



# FEDERAL REGISTER

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# Presidential Documents

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Proclamation 10199 of April 30, 2021

The President

## Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019

By the President of the United States of America

### A Proclamation

The national emergency caused by the coronavirus disease 2019 (COVID-19) outbreak in the United States continues to pose a grave threat to our health and security. As of April 29, 2021, the United States had experienced more than 32 million confirmed COVID-19 cases and more than 570,000 COVID-19 deaths. It is the policy of my Administration to implement science-based public health measures, across all areas of the Federal Government, to act swiftly and aggressively to prevent further spread of the disease.

The Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services, working in close coordination with the Department of Homeland Security, has determined that the Republic of India is experiencing widespread, ongoing person-to-person transmission of SARS-CoV-2, the virus that causes COVID-19. The World Health Organization has reported that the Republic of India has had more than 18,375,000 confirmed cases of COVID-19. The magnitude and scope of the COVID-19 pandemic in the Republic of India is surging; the Republic of India accounts for over one-third of new global cases, and the number of new cases in the Republic of India is accelerating at a rapid rate. There have been more than 300,000 average new daily cases in the Republic of India over the past week. A variant strain of the virus, known as B.1.617, is also circulating in the Republic of India, along with other variant strains, including B.1.1.7, first detected in the United Kingdom, and B.1.351, first detected in the Republic of South Africa. The CDC advises, based on work by public health and scientific experts, that these variants have characteristics of concern, which may make them more easily transmitted and have the potential for reduced protection afforded by some vaccines.

After reviewing the public health situation within the Republic of India, CDC has concluded that proactive measures are required to protect the Nation's public health from travelers entering the United States from that jurisdiction.

Given the determination of CDC, working in close coordination with the Department of Homeland Security, described above, I have determined that it is in the interests of the United States to take action to restrict and suspend the entry into the United States, as nonimmigrants, of noncitizens of the United States ("noncitizens") who were physically present within the Republic of India during the 14-day period preceding their entry or attempted entry into the United States.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that the unrestricted entry into the United States of persons described in section 1 of this proclamation

would, except as provided for in section 2 of this proclamation, be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

**Section 1. *Suspension and Limitation on Entry.*** The entry into the United States, as nonimmigrants, of noncitizens who were physically present within the Republic of India during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation.

**Sec. 2. *Scope of Suspension and Limitation on Entry.***

(a) Section 1 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any noncitizen national of the United States;

(iii) any noncitizen who is the spouse of a U.S. citizen or lawful permanent resident;

(iv) any noncitizen who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;

(v) any noncitizen who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;

(vi) any noncitizen who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;

(vii) any noncitizen traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;

(viii) any noncitizen traveling as a nonimmigrant pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any noncitizen otherwise traveling to the United States as air or sea crew;

(ix) any noncitizen

(A) seeking entry into or transiting the United States pursuant to one of the following visas: A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or

(B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;

(x) any noncitizen who is a member of the U.S. Armed Forces or who is a spouse or child of a member of the U.S. Armed Forces;

(xi) any noncitizen whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee; or

(xii) any noncitizen whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.

(b) Nothing in this proclamation shall be construed to affect any individual's eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.



**Sec. 3. *Implementation and Enforcement.*** (a) The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of noncitizens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(b) The Secretary of State, the Secretary of Transportation, and the Secretary of Homeland Security shall endeavor to ensure that any noncitizen subject to this proclamation does not board an aircraft traveling to the United States, to the extent permitted by law.

(c) The Secretary of Homeland Security may establish standards and procedures to ensure the application of this proclamation at and between all United States ports of entry.

(d) Where a noncitizen circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry, the Secretary of Homeland Security shall consider prioritizing such noncitizen for removal.

**Sec. 4. *Termination.*** This proclamation shall remain in effect until terminated by the President. The Secretary of Health and Human Services shall, as circumstances warrant and no more than 30 days after the date of this proclamation and by the final day of each calendar month thereafter, recommend whether the President should continue, modify, or terminate this proclamation.

**Sec. 5. *Effective Date.*** This proclamation is effective at 12:01 a.m. eastern daylight time on May 4, 2021. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 12:01 a.m. eastern daylight time on May 4, 2021.

**Sec. 6. *Severability.*** It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, public safety, and foreign policy interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

**Sec. 7. *General Provisions.*** (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.

A handwritten signature in black ink, appearing to read "Joe Biden", is written in a cursive style. The signature is positioned to the right of the main text block.

## Presidential Documents

**Proclamation 10200 of May 3, 2021**

**Older Americans Month, 2021**

**By the President of the United States of America**

### **A Proclamation**

During Older Americans Month, we celebrate older Americans and the key role they play in sharing the wisdom and experience that inform today's decisions and actions, and fostering the connection and engagement that build strong, resilient communities. And, we recognize our responsibility to ensure that every American has the opportunity to age with dignity.

The COVID-19 pandemic has imposed tremendous hardships on our Nation's older Americans. Older adults—particularly those from communities of color—have comprised the majority of deaths from COVID-19, with more than 80 percent of all deaths to date occurring in persons 65 and older. Many older Americans have also suffered extreme social isolation from being separated from friends, family, and community resources throughout the pandemic. In spite of this, older Americans have stepped up to support their families, friends, and neighbors. They are among our essential workers, volunteers, and donors, bolstering their communities and inspiring others to do the same. I am committed to ensuring older adults are central in our country's recovery efforts.

My Administration recognizes the value of our older adults and supports the issues most important to them, such as Medicare, Social Security, lowering the price of prescription drugs, and long-term care options—including Medicaid's home and community-based services programs. The American Rescue Plan puts the needs of older Americans at the forefront of our country's path to recovery, starting by mounting a national vaccination program to quickly and efficiently deliver lifesaving vaccines, prioritizing our older citizens.

The American Rescue Plan also provides much needed support to skilled nursing facilities, so they can improve infection control and vaccination rollout capability by partnering with quality improvement organizations. The law allocates funding to support mitigation, clinical care, infection control, and staffing in long-term care facilities during the pandemic. The law also provides significant funding to support older adults who receive home and community-based services through Medicaid to help them remain safe and independent in their own homes and communities throughout the pandemic.

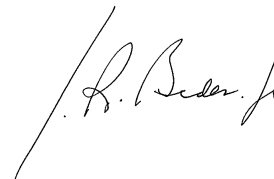
And, the American Rescue Plan adds substantial funding to programs authorized under the Older Americans Act. These programs also connect older adults and their caregivers to food, health care, and other home and community-based services. The American Rescue Plan also calls for the establishment of the National Technical Assistance Center on Grandfamilies and Kinship Families, to give much needed aid to those older Americans who have stepped up to parent the next generation of Americans. Finally, the plan enhances the Elder Justice Act and ensures Adult Protective Services can be used to protect the safety of all adults as they age.

As our country works to put COVID-19 behind us, we know there is more we must do to ensure that older Americans can live and age with dignity. We are committed to ensuring older Americans can easily access appropriate services they need to stay safe and healthy as they age.

In this year of peril and promise, older Americans have suffered greatly, and provided inspirational demonstrations of strength. During Older Americans Month, we honor these citizens and their continued contributions. We commit to learning from them, and we pledge to support their futures.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2021 as Older Americans Month. I call upon Americans of all ages to celebrate older Americans during this month and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this third day of May, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.

A handwritten signature in black ink, appearing to read "Joe Biden", with a long, sweeping flourish extending upwards and to the left.

# Rules and Regulations

Federal Register

Vol. 86, No. 86

Thursday, May 6, 2021

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

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## DEPARTMENT OF LABOR

### Wage and Hour Division

#### 29 CFR Parts 780, 788, and 795

RIN 1235-AA34

#### Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule; withdrawal.

**SUMMARY:** This action finalizes the Department of Labor's proposal to withdraw the rule titled Independent Contractor Status under the Fair Labor Standards Act, which was published in the **Federal Register** on January 7, 2021.

**DATES:** As of May 6, 2021, the final rule published January 7, 2021 at 86 FR 1168, and delayed on March 7, 2021 at 86 FR 12535 is withdrawn.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest Wage and Hour Division ("WHD") district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a

nationwide listing of WHD district and area offices.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

##### A. Statutory and Legal Background

The Fair Labor Standards Act ("FLSA" or "Act") requires all covered employers to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek.<sup>1</sup> In an overtime workweek, for all hours worked in excess of 40 in a workweek, covered employers must pay a nonexempt employee at least one and one-half times the employee's regular rate.<sup>2</sup> The FLSA also requires covered employers to make, keep, and preserve certain records regarding employees.<sup>3</sup>

The FLSA's minimum wage and overtime pay requirements apply only to employees.<sup>4</sup> Section 3(e) generally defines "employee" to mean "any individual employed by an employer."<sup>5</sup> Section 3(d) of the Act defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>6</sup> Section 3(g) defines "employ" to "include[] to suffer or permit to work."<sup>7</sup>

The Supreme Court, in interpreting these definitions, has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'"<sup>8</sup> The Supreme Court has further stated that the "striking breadth" of the FLSA's definition of "employ"—"to suffer or permit to work"—"stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."<sup>9</sup> Thus, the FLSA expressly rejects the common law

standard for determining whether a worker is an employee.<sup>10</sup>

Though the FLSA's definition of employee is broader than the common law definition, the Supreme Court has also recognized that the Act was "not intended to stamp all persons as employees."<sup>11</sup> The Supreme Court has acknowledged that even a broad definition of employee "does not mean that all who render service to an industry are employees."<sup>12</sup> One category of workers that has been recognized as being outside the FLSA's broad definition of "employees" is "independent contractors."<sup>13</sup> Courts have thus recognized a need to delineate between employees, who fall under the protections of the FLSA, and independent contractors, who do not.

The Supreme Court has repeatedly emphasized that the test for whether an individual is an employee under the FLSA is one of "economic reality."<sup>14</sup> Under this test, the "technical concepts" used to label a worker as an employee or independent contractor do not drive the analysis, but rather it is the economic realities of the relationship between the worker and the employer that is determinative.<sup>15</sup>

In *United States v. Silk*, 331 U.S. 704, 712 (1947), an early case applying an economic realities test under the Social Security Act, the Supreme Court acknowledged that "[p]robably it is quite impossible to extract from the statute a rule of thumb" regarding the

<sup>10</sup> See *id.*; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) ("But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." (citation omitted)).

<sup>11</sup> *Portland Terminal*, 330 U.S. at 152; see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (workers may not be employees when their work does not "in its essence . . . follow[] the usual path of an employee").

<sup>12</sup> *United States v. Silk*, 331 U.S. 704, 712 (1947) (analyzing the definition of employee under the Social Security Act).

<sup>13</sup> *Rutherford Food*, 331 U.S. at 729 ("There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees.").

<sup>14</sup> *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)).

<sup>15</sup> *Goldberg*, 366 U.S. at 32-33.

<sup>1</sup> 29 U.S.C. 206(a).

<sup>2</sup> 29 U.S.C. 207(a).

<sup>3</sup> 29 U.S.C. 211(c).

<sup>4</sup> See 29 U.S.C. 206 (minimum wage) and 207 (overtime pay).

<sup>5</sup> 29 U.S.C. 203(e)(1).

<sup>6</sup> 29 U.S.C. 203(d).

<sup>7</sup> 29 U.S.C. 203(g).

<sup>8</sup> *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Black)).

<sup>9</sup> *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).

limits of the employment relationship.<sup>16</sup> The Court suggested that federal agencies and courts “will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision.”<sup>17</sup> The Court cautioned that no single factor is controlling and that the list is not exhaustive.<sup>18</sup> The Court went on to note that the workers in that case were “from one standpoint an integral part of the businesses” of the employer, supporting a conclusion that some of the workers in that case were employees.<sup>19</sup>

The same day that the Supreme Court issued its decision in *Silk*, it also issued *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), in which it affirmed a circuit court decision that analyzed an FLSA employment relationship based on its economic realities.<sup>20</sup> The Court rejected an approach based on “isolated factors” and again considered “the circumstances of the whole activity.”<sup>21</sup> The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse’s production line, ultimately determining that the boners were employees.<sup>22</sup> The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and were best characterized as “part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment.”<sup>23</sup>

Since *Silk* and *Rutherford Food*, federal courts of appeals have applied the economic realities test to distinguish independent contractors from employees who are entitled to the FLSA’s protections. Recognizing that the common law concept of “employee” had been rejected for FLSA purposes, courts of appeals followed the Supreme Court’s instruction that “employees are those who as a matter of economic realities are dependent upon the

business to which they render service.”<sup>24</sup>

All of the courts of appeals have followed the economic realities test, and nearly all of them analyze the economic realities of an employment relationship using the factors identified in *Silk*.<sup>25</sup> No court of appeals considers any factor or combination of factors to universally predominate over the others in every case.<sup>26</sup> For example, the Ninth Circuit has explained that some of the factors “which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA” are: (1) The degree of the employer’s right to control the manner in which the work is to be performed; (2) the worker’s opportunity for profit or loss depending upon his or her managerial skill; (3) the worker’s investment in equipment or materials required for his or her task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer’s business.<sup>27</sup> The Ninth Circuit repeated the Supreme Court’s instruction that no individual factor is conclusive and that the ultimate determination depends upon the circumstances of the whole activity.<sup>28</sup>

Some courts of appeals have applied the factors with some variations. For example, the Fifth Circuit typically does not list the “integral” factor as one of

the considerations that guides the analysis.<sup>29</sup> Nevertheless, the Fifth Circuit—recognizing that the listed factors are not exhaustive—has considered the extent to which a worker’s function is integral to a business as part of its economic realities analysis.<sup>30</sup> The Second Circuit varies in that it treats the employee’s opportunity for profit or loss and the employee’s investment as a single factor, but it still uses the same considerations as the other circuits to inform its economic realities analysis.<sup>31</sup>

In sum, since the 1940s, federal courts have consistently analyzed the question of employee status under the FLSA by examining the economic realities of the employment relationship to determine whether the worker is dependent on the employer for work or is in business for him or herself.<sup>32</sup> In doing so, courts have looked to the six factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.<sup>33</sup>

#### B. Prior Wage and Hour Division Guidance

Since at least 1954, the Wage and Hour Division (WHD) has applied variations of this multifactor analysis when considering whether a worker is an employee under the FLSA or an independent contractor.<sup>34</sup> In a guidance document issued in 1964, WHD stated, “The Supreme Court has made it clear that an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves.”<sup>35</sup> Like the courts, WHD has consistently applied a multifactor economic realities analysis when determining whether a worker is an employee under the FLSA or an independent contractor.<sup>36</sup>

<sup>29</sup> See *Usery*, 527 F.2d at 1311.

<sup>30</sup> See *Hobbs v. Petroplex Pipe and Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).

<sup>31</sup> See, e.g., *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App’x 74, 76 (2d Cir. 2020).

<sup>32</sup> See, e.g., *Franze*, 826 F. App’x at 76; *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142–43 (3d Cir. 2020) (cert. pet. filed Apr. 8, 2021); *Gilbo v. Agment, LLC*, 831 F. App’x 772, 775 (6th Cir. 2020).

<sup>33</sup> See, e.g., *Superior Care*, 840 F.2d at 1054.

<sup>34</sup> See WHD Opinion Letter (Aug. 13, 1954) (applying six factors very similar to the six economic realities factors currently used by courts of appeals).

<sup>35</sup> WHD Opinion Letter FLSA–795 (Sept. 30, 1964).

<sup>36</sup> See, e.g., WHD Opinion Letter, 2002 WL 32406602, at \*2 (Sept. 5, 2002); WHD Opinion Letter, 2000 WL 34444342, at \*3 (Dec. 7, 2000); WHD Opinion Letter, 2000 WL 34444352, at \*1 (Jul. 5, 2000); WHD Opinion Letter, 1999 WL 1788137, at \*1 (Jul. 12, 1999); WHD Opinion Letter, 1995 WL

<sup>16</sup> 331 U.S. at 716. At the time, the Supreme Court noted that “[d]ecisions that define the coverage of the employer-[e]mployee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act.” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723–23 (1947). However, Congress amended the Social Security Act in 1948.

<sup>17</sup> 331 U.S. at 716.

<sup>18</sup> See *id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Rutherford Food*, 331 U.S. at 727.

<sup>21</sup> *Id.* at 730.

<sup>22</sup> See *id.*

<sup>23</sup> *Id.* at 729–30.

<sup>24</sup> *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

<sup>25</sup> See *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382–83 (3d Cir. 1985); *McFeeley v. Jackson Street Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Acosta v. Off Duty Police Services, Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Secretary of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987); *Karlson v. Action Process Service & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013); *Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

<sup>26</sup> See, e.g., *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it “is impossible to assign to each of these factors a specific and invariably applied weight” (citation omitted)); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”); *Scantland*, 721 F.3d at 1312 n.2 (observing that the relative weight of each factor “depends on the facts of the case”).

<sup>27</sup> *Real*, 603 F.2d at 754.

<sup>28</sup> See *id.*

The Department's primary sub-regulatory guidance addressing this topic, WHD Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)," similarly states that, when determining whether an employment relationship exists under the FLSA, the test is the "economic reality" rather than an application of "technical concepts," and that status "is not determined by common law standards relating to master and servant."<sup>37</sup> Instead, "it is the total activity or situation which controls," and "an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves." The fact sheet identifies seven economic realities factors; in addition to factors that are similar to the six factors used by the federal courts of appeals and discussed above, it also identifies the worker's "degree of independent business organization and operation." The fact sheet identifies certain other factors that are immaterial to determining whether a worker is an employee covered under the FLSA or independent contractor, including the place where work is performed, the absence of a formal employment agreement, and whether an alleged independent contractor is licensed by a State or local government.<sup>38</sup>

In 1969 and 1972, WHD promulgated regulations relevant to specific industries after Congress amended the FLSA to change the way it applied to

those industries.<sup>39</sup> Those regulations applied a multifactor analysis under the FLSA for determining whether a worker is an employee or independent contractor in those specific contexts.<sup>40</sup> Further, WHD promulgated a regulation in 1997 applying a multifactor economic realities analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).<sup>41</sup>

On July 15, 2015, WHD issued Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (AI 2015-1).<sup>42</sup> AI 2015-1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified six economic realities factors that followed the six factors used by most federal courts of appeals: (1) The extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015-1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015-1 was withdrawn on June 7, 2017.<sup>43</sup>

In 2019, WHD issued an opinion letter, FLSA2019-6, regarding whether

workers who worked for companies operating self-described "virtual marketplaces" were employees covered under the FLSA or independent contractors.<sup>44</sup> Like WHD's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves.<sup>45</sup> The letter identified six economic realities factors that differed slightly from the factors typically articulated by WHD previously: (1) The nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business.<sup>46</sup> Opinion Letter FLSA2019-6 was withdrawn for further review on February 19, 2021.<sup>47</sup>

### C. The January 2021 Independent Contractor Rule

On January 7, 2021, the Department published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" with an effective date of March 8, 2021 (Independent Contractor Rule or Rule).<sup>48</sup> The Independent Contractor Rule would have introduced into Title 29 of the Code of Federal Regulations a new part (Part 795) titled "Employee or Independent Contractor Classification under the Fair Labor Standards Act" that would have provided a new generally applicable interpretation of employee or independent contractor status under the FLSA.<sup>49</sup> The Rule would also have revised WHD's prior interpretations of independent contractor status in 29 CFR 780.330(b) and 29 CFR 788.16(a), both of which apply in limited contexts.<sup>50</sup>

1032489, at \*1 (June 5, 1995); WHD Opinion Letter, 1995 WL 1032469, at \*1 (Mar. 2, 1995); WHD Opinion Letter, 1986 WL 740454, at \*1 (June 23, 1986); WHD Opinion Letter, 1986 WL 1171083, at \*1 (Jan. 14, 1986); WHD Opinion Letter WH-476, 1978 WL 51437, at \*2 (Oct. 19, 1978); WHD Opinion Letter WH-361, 1975 WL 40984, at \*1 (Oct. 1, 1975); WHD Opinion Letter (Sept. 12, 1969); WHD Opinion Letter (Oct. 12, 1965).

<sup>37</sup> WHD Fact Sheet #13 (July 2008) is available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf> (last visited April 28, 2021).

<sup>38</sup> WHD maintains additional sub-regulatory guidance addressing whether a worker is an employee or independent contractor under the FLSA. For example, WHD's Field Operations Handbook, in its section titled "Test of the employment relationship," cross-references Fact Sheet #13. See section 10b05 of Chapter 10 ("FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits") of WHD's Field Operations Handbook, available at [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch10.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf) (last visited April 28, 2021); see also <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/misclassification-facts.pdf> (last visited April 28, 2021). And the section of WHD's elaws Advisor compliance-assistance materials addressing independent contractors provides guidance very similar to that of Fact Sheet #13. See <https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp> (last visited April 28, 2021).

<sup>39</sup> See 37 FR 12084 (explaining that Part 780 was revised in order to adapt to the changes made by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) and implementing 29 CFR 780.330(b) to apply a six-factor economic realities test to determine whether a sharecropper or tenant is an employee under the Act or an independent contractor); 34 FR 15794 (explaining that Part 788 was revised in order to adapt to the changes made by the 1966 Amendments and implementing 29 CFR 788.16(a) to apply a six-factor economic realities test to determine whether workers in certain forestry and logging operations are employees under the Act or independent contractors).

<sup>40</sup> See *id.*

<sup>41</sup> See 62 FR 11734 (amending 29 CFR 500.20(h)(4)).

<sup>42</sup> AI 2015-1 is available at 2015 WL 4449086.

<sup>43</sup> See News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (Jun. 7, 2017), available at <https://www.dol.gov/newsroom/releases/opa/opa20170607> (last visited April 28, 2021).

<sup>44</sup> See WHD Opinion Letter FLSA2019-6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn February 19, 2021).

<sup>45</sup> See *id.* at \*3.

<sup>46</sup> See *id.* at \*4.

<sup>47</sup> See note at <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited April 28, 2021).

<sup>48</sup> See 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. See 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.

<sup>49</sup> See 86 FR 1168.

<sup>50</sup> See *id.*

The Independent Contractor Rule explained that its purpose was to establish an economic realities test that improved on prior articulations that the Rule viewed as “unclear and unwieldy.”<sup>51</sup> It stated that the existing economic realities test applied by WHD and courts suffered from confusion regarding the meaning of “economic dependence,” a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.<sup>52</sup> The Rule explained that the shortcomings and misconceptions associated with the test were more apparent in the modern economy and that additional regulatory clarity would promote innovation in work arrangements.<sup>53</sup>

The Independent Contractor Rule further explained that under the FLSA, independent contractors are not employees and are therefore not subject to the Act’s minimum wage, overtime pay, or recordkeeping requirements.<sup>54</sup> The Rule would have applied an “economic dependence” test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work and is an independent contractor if that worker is in business for him or herself.<sup>55</sup>

The Rule’s new economic realities test would have identified five economic realities factors to guide the inquiry into a worker’s status as an employee or independent contractor.<sup>56</sup> These factors would not have been exhaustive, and additional factors would have been considered if they “in some way indicate[d] whether the [worker was] in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”<sup>57</sup> Under the Rule’s economic realities test, no one factor would have been dispositive, but two of the identified factors were designated as “core factors” that would have carried greater weight in the analysis. If both of those factors indicated the same classification, as either an employee or an independent contractor, there would have been a “substantial likelihood” that the classification indicated by those factors was the worker’s correct classification.<sup>58</sup> In support of this elevation of two core factors, the Rule noted that the Department had conducted a review of

appellate case law since 1975, and this review indicated that courts of appeals had effectively been affording the control and opportunity factors greater weight.<sup>59</sup>

The first core factor was the nature and degree of control over the work, which would have indicated independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer’s competitors.<sup>60</sup> Under the Rule’s analysis, requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) would not have constituted control.<sup>61</sup>

The second core factor was the worker’s opportunity for profit or loss.<sup>62</sup> This factor would have weighed towards the worker being an independent contractor to the extent the worker has an opportunity to earn profits or incur losses based on either his or her exercise of initiative (such as managerial skill or business acumen or judgment) or his or her management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work.<sup>63</sup> While the effects of the worker’s exercise of initiative and management of investment would both have been considered under this core factor, the worker did not need to have an opportunity for profit or loss based on both initiative and management of investment for this factor to have weighed towards the worker being an independent contractor.<sup>64</sup> This factor would have weighed towards the worker being an employee to the extent the worker is unable to affect his or her earnings or is only able to do so by working more hours or faster.<sup>65</sup>

The Rule would have also identified three other non-core factors: The amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether

the work is part of an integrated unit of production (which is distinct from the concept of the importance or centrality of the worker’s work to the employer’s business).<sup>66</sup> The Rule would have provided that these other factors would be “less probative and, in some cases, [would] not be probative at all” and would be “highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”<sup>67</sup>

The Rule would have further provided that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.<sup>68</sup> The Rule would also have provided five examples illustrating how different factors informed the analysis.<sup>69</sup>

After publication of the Rule, WHD issued Opinion Letters FLSA2021–8 and FLSA2021–9 on January 19, 2021 applying the Rule’s analysis to specific factual scenarios, and then withdrew those opinion letters on January 26, 2021, explaining that the letters were issued prematurely because they were based on a Rule that had yet to take effect.<sup>70</sup>

#### D. Delay of Rule’s Effective Date

On February 5, 2021, the Department published a proposal to delay the Independent Contractor Rule’s effective date until May 7, 2021, 60 days after the original effective date of March 8, 2021.<sup>71</sup> On March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the Independent Contractor Rule as proposed.<sup>72</sup> The Department explained that the delay was consistent with a January 20, 2021 memorandum from the Assistant to the President and Chief of Staff, titled “Regulatory Freeze Pending Review.”<sup>73</sup> The Department further explained that a delay would allow it additional time to consider “significant and complex” issues associated with the Rule, including whether the Rule effectuates the FLSA’s purpose to broadly cover workers as employees as well as the costs and benefits attributed

<sup>51</sup> 86 FR 1172.

<sup>52</sup> 86 FR 1172–75.

<sup>53</sup> See 86 FR 1175.

<sup>54</sup> See 86 FR 1246 (§ 795.105(a)).

<sup>55</sup> See 86 FR 1246 (§ 795.105(b)).

<sup>56</sup> See 86 FR 1246 (§ 795.105(c)).

<sup>57</sup> 86 FR 1246–47 (§§ 795.105(c) & (d)(2)(iv)).

<sup>58</sup> 86 FR 1246 (§ 795.105(c)).

<sup>59</sup> 86 FR 1198.

<sup>60</sup> See 86 FR 1246–47 (§ 795.105(d)(1)(i)).

<sup>61</sup> See *id.*

<sup>62</sup> See 86 FR 1247 (§ 795.105(d)(1)(ii)).

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See 86 FR 1247 (§ 795.105(d)(2)).

<sup>67</sup> 86 FR 1246 (§ 795.105(c)).

<sup>68</sup> See 86 FR 1247 (§ 795.110).

<sup>69</sup> See 86 FR 1247–48 (§ 795.115).

<sup>70</sup> See <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited April 28, 2021), noting the withdrawal of Opinion Letters FLSA2021–8 and FLSA2021–9.

<sup>71</sup> See 86 FR 8326.

<sup>72</sup> 86 FR 12535.

<sup>73</sup> *Id.* (citing January 20, 2021 memo from the Assistant to the President and Chief of Staff, titled “Regulatory Freeze Pending Review,” 86 FR 7424).



to the Rule, including its effect on workers.<sup>74</sup>

### E. Proposal To Withdraw

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the Independent Contractor Rule.<sup>75</sup> The NPRM explained that the Department was considering withdrawing the Independent Contractor Rule for several reasons. First, the Rule's standard has never been used by any court or by WHD, and the Department questioned whether the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test. In particular, the NPRM noted that no court has, as a general and fixed rule, elevated a subset of certain economic realities factors above others, and there is no clear statutory basis for such a predetermined weighting of the factors.<sup>76</sup> Moreover, the NPRM expressed concern that the Rule's emphasis on control and its recasting of other factors typically considered by courts would improperly narrow the facts to be considered in the application of the economic realities test, contrary to the FLSA's more expansive conception of the employment relationship contained in section 3(g) of the Act's definition of "employ" as including "to suffer or permit to work."<sup>77</sup> As a matter of policy, the NPRM expressed concern that the Rule's novel guidance would cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty,<sup>78</sup> and asserted that the Rule failed to fully consider the likely costs, transfers, and benefits that could result from the Rule, particularly for affected workers who might no longer receive the FLSA's wage and hour protections as an independent contractor.<sup>79</sup> Finally, the NPRM stated that withdrawing the Independent Contractor Rule would not be disruptive because the Rule has not yet taken effect.<sup>80</sup>

The Department sought comment on its NPRM to withdraw the Independent Contractor Rule. The period for providing comment expired on April 12, 2021.

<sup>74</sup> *Id.* On March 26, 2021, a lawsuit was filed alleging that the Department's final rule delaying the Independent Contractor Rule's effective date did not comply with the Administrative Procedure Act. See *Coalition for Workforce Innovation v. Sec'y of Labor* (No. 1:21-cv-00130 E.D. Tex.).

<sup>75</sup> See 86 FR 14027.

<sup>76</sup> See 86 FR 14031–32.

<sup>77</sup> See 86 FR 14032–34.

<sup>78</sup> See 86 FR 14034.

<sup>79</sup> See 86 FR 14034–35.

<sup>80</sup> See 86 FR 14035.

## II. Comments and Decision

The Department received 1,010 comments in response to the NPRM.<sup>81</sup> Numerous state officials, members of Congress, labor unions, social justice organizations, worker advocacy groups, and individual commenters wrote in support of the Department's proposal to withdraw the Independent Contractor Rule, including several hundred commenters who submitted comments with similar template language. These commenters expressed opposition to the Independent Contractor Rule predominantly on the basis that, in their view, the Rule would have facilitated the exploitation of workers reclassified or misclassified as independent contractors as a consequence of the Rule. They also raised numerous other legal and policy criticisms of the Rule, discussed in greater detail below.

Numerous companies, trade associations, business advocacy organizations, law firms, and individual commenters submitted comments opposing the Department's proposal to withdraw the Independent Contractor Rule, including several commenters who identified themselves as current or former independent contractors. These commenters generally supported the Independent Contractor Rule for, in their view, providing a clearer and preferable analysis for determining employee or independent contractor status, and they raised numerous other legal and policy arguments in defense of the Rule (or in objection to the proposed withdrawal), discussed in greater detail below.

The Department received a number of comments addressing issues that are beyond the scope of this rulemaking to withdraw the Independent Contractor Rule. For example, several commenters expressed opinions related to the legal analysis for independent contractors under state laws or federal laws other than the FLSA, such as the "ABC" test generally used to evaluate independent contractor status under California state law,<sup>82</sup> or the "PRO Act" bill that would establish a similar standard under

<sup>81</sup> This figure includes a number of duplicate comments (*i.e.*, identical comments submitted by the same requester) which appear to have been submitted by mistake. The Department received approximately 1,000 non-duplicative comments.

<sup>82</sup> See Assembly Bill ("A.B.") 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test for determining independent contractor status articulated in *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018)); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (exempting certain additional professions, occupations, and industries from the ABC test that A.B. 5 had codified).

National Labor Relations Act.<sup>83</sup> As noted in the NPRM, the Department did not propose regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced as Part 795, so commenter feedback addressing or suggesting such a replacement or otherwise requesting that the Department adopt any specific guidance if the Rule was withdrawn was considered outside the scope of this rulemaking.<sup>84</sup> Similarly, the Department received dozens of comments addressing the merits of labor unions; however, this rulemaking addresses whether to withdraw a rule that would have provided a new analysis for determining whether a worker is an employee or independent contractor for purposes of the FLSA, a wage and hour statute that has no direct effect on collective bargaining rights.

Having considered the comments submitted in response to the NPRM, the Department has decided to finalize the withdrawal of the Independent Contractor Rule. The Department believes that the Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent. The Department's response to commenter feedback on specific aspects of the proposed withdrawal is provided below.

### A. The Rule's Standard Has Never Been Used by Any Court or by WHD, and Is Not Supported by the Act's Text or Purpose or Judicial Precedent

Upon further review and consideration of the Rule and having considered the public comments, the Department does not believe that the Independent Contractor Rule is fully aligned with the FLSA's text or purpose, or with decades of case law describing and applying the multifactor economic realities test. The Department fully describes below the rationale for its departure from the views expressed in the prior Rule.<sup>85</sup>

#### 1. The Rule's Elevation of Control and Opportunity for Profit or Loss as the "Most Probative" Core Factors in Determining Employee Status Under the FLSA

For decades, WHD, consistent with case law, has applied a multifactor

<sup>83</sup> See Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021) (introduced by Rep. Bobby Scott) and S. 420, 117th Cong. (2021) (introduced by Sen. Patty Murray).

<sup>84</sup> 86 FR 14035.

<sup>85</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

balancing test to assess whether the worker, as a matter of economic reality, is economically dependent on the employer or is in business for him or herself.<sup>86</sup> Courts universally apply this analysis as well and have explained that “economic reality” rather than “technical concepts” is the test of employment under the FLSA.<sup>87</sup> WHD and the U.S. Courts of Appeals generally consider and balance the following economic realities factors, derived from the Supreme Court’s decisions in *Silk*, 331 U.S. at 716, and *Rutherford Food*, 331 U.S. at 729–30: The nature and degree of the employer’s control over the work; the permanency of the worker’s relationship with the employer; the degree of skill, initiative, and judgment required for the work; the worker’s investment in equipment or materials necessary for the work; the worker’s opportunity for profit or loss; whether the service rendered by the worker is an integral part of the employer’s business; and the degree of independent business organization and operation.<sup>88</sup>

The Rule would have set forth a new articulation of the economic realities test, elevating two factors (control and opportunity for profit or loss) as “core” factors above the other factors, and designating them as having greater probative value.<sup>89</sup> The Rule would have provided that only in “rare” cases would the other factors outweigh the core factors.<sup>90</sup> Notably, the Rule would have further provided that if both core factors point towards the same classification—that the worker is either an employee or an independent contractor—then there would be a “substantial likelihood” that this is the worker’s correct classification.<sup>91</sup> In addition, the preamble to the Rule disagreed with court precedent that, as a general matter, the economic realities test “requires factors to be unweighted or equally weighted.”<sup>92</sup> Although the Rule would have identified three other factors as additional guideposts, it made clear that these “other factors are less

probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”<sup>93</sup> Similarly, the Rule would have provided that unlisted additional factors may be considered, but that they are “unlikely to outweigh either of the core factors.”<sup>94</sup> The Rule noted that “[w]hile all circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.*, factors, must also be given equal weight.”<sup>95</sup> Rather, the Rule would have emphasized the control and opportunity for profit or loss factors as more probative than other factors in determining whether an individual is in business for him or herself, and would have provided that “other factors are less probative and may have little to no probative value in some circumstances.”<sup>96</sup>

In the proposal to withdraw the Rule, the Department expressed concern that no court has taken the Rule’s approach in analyzing whether a worker is an employee or an independent contractor under the FLSA, that the Rule would mark a departure from WHD’s own longstanding approach, and that the Rule was in tension with the Act’s text and purpose.<sup>97</sup> Among other things, the Department noted that the Rule’s elevation of only two factors may be inconsistent with the position, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive and that the totality-of-the-circumstances must be considered.<sup>98</sup>

Multiple commenters who supported withdrawal of the Rule criticized the Rule’s focus on only two factors as departing from the Act’s text and purpose, as well as relevant case law. The AFL–CIO, for example, noted that by focusing on control and opportunity for profit or loss, the Rule “would, in practice, adopt the common law

standard contrary to congressional intent and Supreme Court precedent.” The American Federation of State, County, and Municipal Employees (AFSCME) agreed that there is no reason to elevate the “control” factor above others, and a coalition of State Attorneys General and other officials (“State Officials”) commented that this prioritization of only two factors “jettisoned the definition of employment that flexibly accounts for the full details of a working relationship, as decades of precedent require.” The Northwest Workers Justice Project asserted that the Department’s Rule would administratively amend the FLSA by placing “undue weight on two factors” and that the Rule also narrowed those two factors in a way that would undermine the Act’s statutory intent and that is in tension with judicial precedent; Rep. Grace Napolitano added that the Rule’s weighting of two factors conflicted with congressional intent. The Women’s Law Project concurred that by according greater weight to only two factors instead of allowing the economic realities test to continue to be applied as a balancing test, the Rule was inconsistent with the intent of the Act and judicial and administrative precedent. Finally, the International Brotherhood of Teamsters stated that by giving these two factors “preeminent status” over the other factors, the Rule “would make it more difficult for workers to prove they are employees.”

Commenters opposed to withdrawal of the Rule generally supported giving two core factors greater weight in the analysis. For example, the American Bakers Association noted approvingly the Rule’s determination that the control and opportunity for profit or loss factors should be afforded greater weight because this weighting of the factors would be consistent with the outcomes of prior court decisions applying an economic realities analysis. The Owner-Operator Independent Drivers Association also shared its support of the Rule’s “decision to afford the ‘control’ and ‘opportunity for profit or loss’ factors greater weight in the classification determination.” Relatedly, commenters such as the Coalition to Promote Independent Entrepreneurs stated that the additional weight accorded to these two factors was not intended to alter the economic realities analysis but rather reflected the Department’s review of prior court decisions applying the test, and thus there is no inconsistency between this position and the longstanding Supreme Court tenet that no single factor be dispositive. Other commenters

<sup>93</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>94</sup> *Id.* at 1197.

<sup>95</sup> *Id.* at 1201 (internal quotation marks omitted).

<sup>96</sup> *Id.* at 1202.

<sup>97</sup> See 86 FR 14032–33.

<sup>98</sup> See, e.g., *Silk*, 331 U.S. at 716 (explaining that “[n]o one [factor] is controlling” in the economic realities test, including “degrees of control”); *Parrish*, 917 F.3d at 380 (stating that it “is impossible to assign to each of these factors a specific and invariably applied weight” (citation omitted)); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (“It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.”).

<sup>86</sup> See, e.g., Fact Sheet #13 (July 2008), *supra* note 37.

<sup>87</sup> *Goldberg*, 366 U.S. at 33; see also *Tony & Susan Alamo*, 471 U.S. at 301 (“The test of employment under the Act is one of ‘economic reality.’”) (quoting *Goldberg*, 366 U.S. at 33).

<sup>88</sup> See, e.g., *Razak*, 951 F.3d at 142–43; *Karlson*, 860 F.3d at 1092; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Lauritzen*, 835 F.2d at 1534; *Real*, 603 F.2d at 754; Fact Sheet #13 (July 2008), available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf> (last visited April 28, 2021).

<sup>89</sup> 86 FR 1246–47 (§ 795.105(c) & (d)).

<sup>90</sup> 86 FR 1201.

<sup>91</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>92</sup> *Id.* at 1197.

supported the elevation of two core factors because it would improve clarity. Cambridge Investment Research, for instance, stated that “the enhanced focus on the two core factors elucidates the test review process, reduces inaccurate classifications and decreases associated litigation,” and the Center for Workplace Compliance agreed that the use of two core factors would simplify the analysis. The Texas Policy Foundation similarly commented that “[r]ather than analyzing a non-exhaustive list of six factors, the Independent Contractor Rule allows employers to focus on two core factors regarding how workers should be classified.”

After careful consideration of the comments received, the Department believes that elevating two factors of the multifactor economic realities analysis above all others is in conflict with the Act, congressional intent, and longstanding judicial precedent. The Department and courts recognize, as they have since the Act’s inception, that the cornerstone of the FLSA is the Act’s broad definition of “employ,” which provides that an employee under the Act includes any individual whom an employer suffers, permits, or otherwise employs to work.<sup>99</sup> Rather than being derived from the common law of agency, the FLSA’s definition of “employ” and its “suffer or permit” language originally came from state laws regulating child labor.<sup>100</sup> This standard was intended to expand coverage beyond employers who control the means and manner of performance to include entities who “suffer” or “permit” work.<sup>101</sup> The FLSA’s breadth in defining the employment relationship, as well as its clear remedial purpose, comes from the statutory text itself as well as the legislative history.<sup>102</sup> This standard

“stretches the meaning of ‘employee’ [under the FLSA] to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>103</sup> The FLSA’s overarching inquiry of economic dependence thus establishes a broader scope of employment than that which exists under the common law of agency and evinces Congress’s intent to “protect all covered workers from substandard wages and oppressive working hours.”<sup>104</sup> Altering the focus of this analysis to two “core” factors—particularly the control factor, as discussed below—risks excluding or misclassifying workers whose FLSA employment status is established under other facts that demonstrate that they are economically dependent on an employer and not in business for themselves.

Moreover, upon further review of the case law, the Department is not aware of any court that has, as a general and fixed rule, elevated a subset of the economic realities factors above the other factors in all cases, and there is no clear statutory basis for such a predetermined weighting of the factors. Rather, the Department is cognizant of the voluminous case law that emphasizes that it “‘is impossible to assign to each of these factors a specific and invariably applied weight.’”<sup>105</sup> Undeniably, courts have refused to assign universal and predetermined weights to certain factors; rather, courts stress that the analysis must consider the totality of the circumstances and

broader than the common law, was not changed by the Supreme Court’s decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), which explained that the Act’s statutory exemptions should be interpreted fairly because there is no textual indication that the exemptions should be construed narrowly. *See* 138 S. Ct. at 1142. Here, the Act’s definition of “employ” as including “to suffer or permit to work” gives a clear textual basis for the breadth of employment under the FLSA. 29 U.S.C. 203(g); *see Off Duty Police*, 915 F.3d at 1062 (“[T]hese [economic reality] factors must be balanced in light of the FLSA’s strikingly broad definition of employee.” (quotations and citation omitted)).

<sup>103</sup> *Darden*, 503 U.S. at 326; *see also Portland Terminal*, 330 U.S. at 150 (in determining employee status under the FLSA, “common law employee categories or employer-employee classifications under other statutes are not of controlling significance”).

<sup>104</sup> *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

<sup>105</sup> *Parrish*, 917 F.3d at 380 (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983)); *see also Scantland*, 721 F.3d at 1312 n.2 (observing that the relative weight of each factor “depends on the facts of the case”); *Silk*, 331 U.S. at 716 (rejecting “a rule of thumb to define the limits of the employer-employee relationship” immediately before providing an incomplete list of factors considered “important for decision”).

neither the presence nor absence of any particular factor is dispositive.<sup>106</sup>

Regarding the Department’s review of certain appellate case law in the Rule discussed by some commenters, the Department believes that upon further consideration, this summary of appellate case law is incomplete, oversimplifies the analysis provided by the courts, and makes assumptions about the reasoning behind the courts’ decisions that are not necessarily clear from the decisions themselves.<sup>107</sup> The Rule’s discussion of the review was incomplete because the Department did not provide full documentation or citations for its case law review. In addition, it was not made clear in the Rule what the scope of the review entailed (*e.g.*, whether it included only published circuit court decisions or all cases, whether it included cases that were simply remanded to the district court for any reason, etc.).<sup>108</sup> The review oversimplified the analysis provided by the courts because court decisions regarding classification under the FLSA often emphasize the fact-specific nature of the totality of circumstances analysis and do not parse out each factor like a

<sup>106</sup> *See Razak*, 951 F.3d at 143 (citing *DialAmerica Mktg.*, 757 F.2d at 1382); *see also McFeeley*, 825 F.3d at 241 (“While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.”); *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) (“This ‘economic reality’ standard, however, is not a precise test susceptible to formulaic application. . . . It prescribes a case-by-case approach, whereby the court considers the ‘circumstances of the whole business activity.’”) (quoting *Brandel*, 736 F.2d at 1116); *Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) (“No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence.”); *Superior Care*, 840 F.2d at 1059 (“No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. . . . Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.”); *Lauritzen*, 835 F.2d at 1534 (“Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”); *Hickey*, 699 F.2d at 752 (“It is impossible to assign to each of these factors a specific and invariably applied weight.”); *Usery*, 527 F.2d at 1311–12 (“No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.”).

<sup>107</sup> *See* 86 FR 1196–98.

<sup>108</sup> *See* 86 FR 1198 (stating “[a]mong the appellate decisions since 1975 that the Department reviewed . . .” and thus indicating that the universe may have been limited in some capacity that is not noted in the Rule).

<sup>99</sup> *See* 29 U.S.C. 203(e)(1), (g).

<sup>100</sup> *See Rutherford Food*, 331 U.S. at 728 & n.7.

<sup>101</sup> *See generally People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29–31 (N.Y. 1918).

<sup>102</sup> *See* 29 U.S.C. 202, 203(e)(1), (g); *Rosenwasser*, 323 U.S. at 362, 363 n.3 (quoting statement of Senator Black from 81 Cong. Rec. 7657 that “the term ‘employee’ had been given ‘the broadest definition that has ever been included in any one act’”); *see also, e.g., Parrish*, 917 F.3d at 378 (“Given the remedial purposes of the [FLSA], an expansive definition of ‘employee’ has been adopted by the courts.” (citation omitted)); *Off Duty Police*, 915 F.3d at 1054–55 (noting, directly under the heading “Employment Relationship,” that “[t]he FLSA is ‘a broadly remedial and humanitarian statute . . . designed to correct labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers’” (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (some internal quotation marks omitted)). The FLSA’s broad scope of employment,

checklist.<sup>109</sup> As the Third Circuit, for example, recently reiterated, neither the presence nor absence of any particular factor is dispositive, and courts should examine the circumstances of the whole activity, which is how courts commonly approach this analysis.<sup>110</sup> Mechanically deconstructing court decisions and considering what courts have said about only two factors, even when courts did present their analyses in this manner, ignores the holistic approach that most courts have taken in determining worker classification.

Most significantly, the Rule's assertion about the case law makes assumptions about the courts' decisions that are not part of the courts' reasoning—the Rule did not identify any court opinion that states that control and opportunity for profit or loss should be invariably prioritized over other factors as the Rule would have done, and there is therefore no basis to suggest that the case law endorses this “core factor” analysis. The Rule stated that “[t]he Department's review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so.”<sup>111</sup> The Department should not have replaced the courts' analyses based on the theory that they were actually setting forth an unstated, different analysis, especially when courts expressly stated that they were applying a multifactor, holistic analysis. Ultimately, these cases were decided based on the application of the economic realities test to their facts, and different facts produce different results. As *Saleem*—a case relied upon heavily in the Rule—made clear, courts identify the most probative facts for that particular case and rely on them in reaching an outcome, and the factual differences do not need to be great to

<sup>109</sup> The economic realities factors ultimately assess whether the worker is economically dependent on the employer or in business for him/herself. See, e.g., *Parrish*, 917 F.3d at 380 (“[T]he focus is on an assessment of the economic dependence of the putative employees, the touchstone for this totality of the circumstances test.”) (internal quotation marks and citation omitted); *Keller*, 781 F.3d at 807 (“[W]e address each factor with an eye toward the ultimate question—[the worker's] economic dependence on or independence from [the employer].”); *Scantland*, 721 F.3d at 1312 (the economic realities factors “serve as guides, [and] the overarching focus of the inquiry is economic dependence”).

<sup>110</sup> See *Razak*, 951 F.3d at 143 (citing *DialAmerica Mktg.*, 757 F.2d at 1382).

<sup>111</sup> 86 FR 1198. The Rule further hypothesized that “[i]n those cases where the control factor and opportunity factor aligned, had the courts hypothetically limited their analysis to just those two factors, it appears to the Department that the overall results would have been the same.” *Id.*

produce a different result.<sup>112</sup> The case law reflects that, rather than prioritizing certain factors as the Rule contended, courts have explicitly explained that the determination of the relationship depends on “the circumstances of the whole activity.”<sup>113</sup>

While there are certainly many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit and loss factors, the Rule concedes that there are cases in which the classification suggested by the control factor did not align with the worker's classification as determined by the courts.<sup>114</sup> The Rule also stated in a footnote, regarding the opportunity factor, that “[t]his is not to imply that the opportunity factor necessarily aligns with the ultimate classification, but rather that the Department is not aware of an appellate case in which misalignment occurred.”<sup>115</sup> The Rule did not, however, identify any cases stating that the opportunity for profit or loss factor should be determinative or more probative of a worker's classification than other factors. Additionally, it is necessarily the case that if any two factors of a multifactor balancing test point toward the same outcome, then that outcome becomes increasingly likely to be the ultimate outcome; however, there was no analysis provided in the Rule regarding whether a different combination of factors would yield similar results.

While the Department is always seeking to improve clarity for workers and employers, the Rule's formulaic and mechanical weighting of factors is precisely what courts have cautioned against for decades in applying an economic reality analysis.<sup>116</sup> This is

<sup>112</sup> *Saleem*, 854 F.3d at 149 (“We conclude only that assessing the totality of the circumstances here in light of each *Silk* factor, undisputed evidence makes clear as a matter of law that *these* Plaintiffs were not employees of *these* Defendants. In a different case, and with a different record, an entity that exercised similar control over clients, fees, and rules enforcement in ways analogous to the Defendants here might well constitute an employer within the meaning of the FLSA.”) (emphasis in original).

<sup>113</sup> *Rutherford Food*, 331 U.S. at 730.

<sup>114</sup> 86 FR 1197.

<sup>115</sup> *Id.* at 1197, n.44.

<sup>116</sup> The Supreme Court has been clear that there is no single factor that is determinative, see *Rutherford Food*, 331 U.S. at 730, nor is there any “mathematical formula” to be applied, *Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996). Furthermore, “courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees.” *Antenor*, 88 F.3d at 933 (citations omitted). Courts of appeals have cautioned against any “mechanical application” of the economic

because a true balancing test that properly considers the totality of circumstances by definition does not mechanically elevate certain factors, and doing so would impermissibly narrow the Act's broad definition of “employ.” For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (e.g., the existence of a lengthy and exclusive working relationship under the “permanence” factor, the performance of work at the very heart of the potential employer's business under the “integral” factor, etc.). Courts and the Department may focus on some relevant factors more than others when analyzing a particular set of facts and circumstances, but that does not mean that it is possible or permissible to derive from these fact-driven decisions universal rules regarding which factors deserve more weight than the others when the courts themselves have not set forth any such universal rules despite decades of opportunity.

Further, the Rule's reliance on how courts assessed the control and opportunity for profit or loss factors in the past is inapposite here, because, as discussed below, the Rule would have significantly altered both of these factors, changing what may be considered for each. For example, the Rule would have downplayed the employer's right to control the work and recast the opportunity for profit or loss factor as indicating independent contractor status based on the worker's initiative or investment.<sup>117</sup> In other words, even if courts had generally relied upon control and opportunity for profit or loss in prior cases, the new framing of these factors, as redefined in the Rule, nevertheless sets forth a new analysis without precedent.

Accordingly, the Department agrees with the view expressed by numerous commenters that the Rule's elevation of the control and opportunity for profit or loss factors is in tension with the language and purpose of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of

reality factors. See, e.g., *Saleem*, 854 F.3d at 139. “Rather, each factor is a tool used to gauge the economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind.” *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008).

<sup>117</sup> See 86 FR 1246–47 (§§ 795.105(d)(1)(i)–(ii), 795.110).

whether a worker is an employee or independent contractor.

## 2. The Role of Control in the Rule's Analysis

As explained above, the Independent Contractor Rule would have identified the nature and degree of control over the work as one of the two “core factors” meant to carry “greater weight in the analysis.”<sup>118</sup> According to the Rule, “review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so.”<sup>119</sup> The Rule addressed and rejected comments which opined that focusing the analysis on two core factors—one of which would be control—would narrow the analysis to a common law control test.<sup>120</sup>

In the proposal to withdraw the Independent Contractor Rule, the Department expressed concern that “significant legal and policy implications could result from making control one of only two factors that would be ascribed greater weight” and cited several Supreme Court decisions stating that the FLSA’s definition of “employ” means that the scope of employment under the Act is broader than under a common law control (*i.e.*, agency) analysis.<sup>121</sup> The Department questioned whether, in light of this Supreme Court “directive,” “the outsized—even if not exclusive—role that control would have if the Rule’s analysis were to apply may be contrary to the Act’s text and case law.”<sup>122</sup>

Several commenters who supported the proposed withdrawal of the Rule compared, and even equated, the Rule’s elevation of control as a “core” factor with the adoption of a common law control test, a test which is inconsistent with the FLSA’s “suffer or permit” standard. For example, AFSCME stated that, “by elevating consideration of day-to-day control as near-determinative, rather than one coequal factor among six, the Department has formulated a standard aligned with, and possibly more restrictive than, the common law employment test.” The State Officials asserted that the Independent Contractor Rule “was wrong not only to elevate any one relevant factor over

another in an assessment of a worker’s economic reality, but also to elevate control in particular” because “the FLSA uses an intentionally broad definition of employment, which expands the statute’s protections to a class of workers greater than just those who would satisfy a common law understanding of employment based largely on the degree of control.” They added that the Rule’s “emphasis on control reverts back to the common law standard” and that “this, too, requires withdrawal of the [Rule].” *See also* AFL-CIO (“Despite . . . clear Supreme Court instructions to construe the definition of employee in the FLSA more broadly than under the common law . . . , the [Rule] effectively collapses the FLSA’s definition into the common law definition by giving primacy and controlling weight to the two factors of control and opportunity for profit and loss.”); Representative Scott, *et al.* (“Giving the control factor outsized weight under the Rule’s test is in direct conflict with congressional intent.”).

Many commenters who opposed the proposed withdrawal of the Rule expressed general support for elevating control as a “core” factor along with opportunity for profit or loss. For example, Capital Investment Companies stated that the Rule “properly focuses on the control over the working relationship and the financial aspects of the relationship.” The Intermodal Association of North America commended the Rule’s adoption of a “revised economic reality test, with a focus on the nature and degree of the worker’s control over their work and the worker’s opportunity for profit or loss.” Commenters who opposed the Rule’s proposed withdrawal generally did not express concerns with elevating control as one of two core factors for determining employee or independent contractor status.

As an initial matter and as explained above, it is not legally supportable to elevate in a predetermined and universal manner two factors above the others. Moreover, having considered the issue and the comments received, it is the Department’s position that, in particular, elevating control is contrary to the FLSA’s text and its particular scope of employment. As noted, the FLSA defines “employ” to include “to suffer or permit to work.”<sup>123</sup> The Supreme Court has explained that this FLSA definition was a rejection of the common law control standard for determining who is an employee under

the Act in favor of a broader scope of coverage.<sup>124</sup>

Although the Rule’s test was not the same as the common law control test, the Rule’s mandate that control have such an elevated role in every FLSA employee or independent contractor analysis brought the Rule too close to the common law test that the Act squarely rejects. Accordingly, the outsized role that control would have played in the analysis supports withdrawing the Rule.

## 3. The Rule’s Narrowing of Several Factors

In its proposal to withdraw the Independent Contractor Rule, the Department expressed concern that the ways in which the Rule would have redefined certain factors would improperly narrow the application of the economic realities test.<sup>125</sup> The Department identified four examples of such narrowing: (1) Making the “opportunity for profit or loss” factor indicate independent contractor status based on the worker’s initiative or investment; (2) disregarding the employer’s investments; (3) disregarding the importance or centrality of a worker’s work to the employer’s business; and (4) downplaying the employer’s right or authority to control the worker.<sup>126</sup> In each of these ways, the Rule would have narrowed the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor, eliminating several facts and concepts that have deep roots in both the courts’ and WHD’s application of the analysis.<sup>127</sup> Moreover, the Department expressed concern that, as a policy matter, the Rule’s narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA’s protections, contrary to the Act’s

<sup>124</sup> *See Darden*, 503 U.S. at 326 (“[T]he FLSA . . . defines the verb ‘employ’ expansively” and with “striking breadth” that “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”) (citations omitted); *Portland Terminal*, 330 U.S. at 150–51 (“But in determining who are ‘employees’ under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”) (citations omitted); *see also Rutherford Food*, 331 U.S. at 728 (“The definition of ‘employ’ is broad.”); *Rosenwasser*, 323 U.S. at 362–63 (“A broader or more comprehensive coverage of employees . . . would be difficult to frame.”).

<sup>125</sup> *See* 86 FR 14033–34.

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* at 14034.

<sup>118</sup> *See* 86 FR 1246–47 (§ 795.105(d)(1)). The worker’s opportunity for profit or loss would have been the other core factor.

<sup>119</sup> *Id.* at 1198 (citing 85 FR 60619).

<sup>120</sup> *See id.* at 1200–01.

<sup>121</sup> 86 FR 14033 (citing 29 U.S.C. 203(g); *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 U.S. at 150–51; *Rutherford Food*, 331 U.S. at 728; *Rosenwasser*, 323 U.S. at 362–63).

<sup>122</sup> *Id.*

<sup>123</sup> 29 U.S.C. 203(g).

purpose of broadly covering workers as employees.<sup>128</sup>

A number of commenters who supported withdrawal agreed that the Rule would have impermissibly narrowed how the factors are applied. For example, the National Employment Lawyers Association (NELA) and the Women's Law Project stated that the "words of the FLSA are unrecognizable in [the Rule's] cramped reading of the law and its adoption of entirely irrelevant factors, twisting of the meaning of other factors, and narrowing of the measure of what it means to be an employee." According to AFSCME, the Rule would have "redefine[d]" the factors, "narrowing and confining the depth of each factor's inquiry." The State Officials added that the Rule would have "unreasonably exclude[d] relevant criteria from the determination of whether a worker is covered by the FLSA" and would not have considered "the full details of a working relationship, as decades of precedent require." The National Employment Law Project commented that the Rule "describe[d] a set of narrow 'core' factors taken from a cramped version of the narrowly-scoped common law, which is not the test for employment coverage under the FLSA, assert[ed] new factors never before considered relevant by the courts, and prevent[ed] consideration of factors that the Supreme Court has always deemed critical to determining whether an employment relationship exists."

Of the commenters who opposed the proposed withdrawal of the Rule, the National Association of Home Builders supported the Rule's "adopting a narrower 'economic reality' test to determine a worker's status as an FLSA employee or an independent contractor" and "reject[ed] the contention and justification offered as support for withdrawing the [Rule]." Other commenters disputed the Department's concern that the Rule would narrow the application or the factors and/or that any narrowing is a basis for withdrawing the Rule. For example, the Competitive Enterprise Institute disputed the concern, arguing among other things that "the underlying determining factors would remain the same" and that the Rule did "not prevent courts from weighing all factors," but instead "merely offer[ed] guidance, as a rulemaking should." The U.S. Chamber of Commerce characterized the proposal's concern that the Rule's narrowing of the analysis would result in more workers being classified as independent contractors as

"misguided and presum[ing] conclusions that the [Rule] does not guarantee." Other comments asserted that the Rule's explanation of the factors eliminated confusion and overlap among the factors. *See, e.g.,* Seyfarth Shaw on behalf of Coalition for Workforce Innovation (asserting that the Rule provided "clear guidance regarding . . . which facts fall within the various and sometimes blurred factors," "increas[ing] legal certainty in application of the economic realities test").

Having considered the comments and the issues further, the Department believes that, by removing from the analysis several facts and concepts that have a strong foundation in both the courts' and WHD's application of the analysis, the Rule would have improperly narrowed the scope of facts and considerations comprising the analysis of whether a worker is an employee for purposes of the FLSA or an independent contractor. Narrowing the facts and considerations that comprise the analysis would have been inconsistent with the court-mandated totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.<sup>129</sup> The Department elaborates on this below in its discussion of several examples of how the Rule would have narrowed application of the factors. In addition, upon further consideration, the Rule's narrowing of factors would, in the Department's view, have likely resulted in more workers being reclassified or misclassified as independent contractors not entitled to the FLSA's protections. Not only would such a result have been contrary to the Act's purpose of broadly covering workers as employees,<sup>130</sup> but to the extent that women and people of color are

<sup>129</sup> *See, e.g., Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) ("This 'economic reality' standard, however, is not a precise test susceptible to formulaic application . . . . It prescribes a case-by-case approach, whereby the court considers the 'circumstances of the whole business activity.'") (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) ("No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence."); *Snell*, 875 F.2d at 805 ("It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances."); *Superior Care*, 840 F.2d at 1059 (2d Cir. 1988) ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances . . . . Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.");

<sup>130</sup> *See, e.g., supra* notes 8–10, and accompanying text.

overrepresented in low-wage independent contractor positions where misclassification is more likely (as a number of commenters asserted), this result would have had a disproportionate impact on these workers. Citing a study finding that seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color, the National Women's Law Center, Kentucky Equal Justice Center, Center for Law and Social Policy, Shriver Center on Poverty Law, and other commenters asserted that "it is no coincidence that corporate misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, are overrepresented." These commenters, as well as numerous individual commenters, added that the Rule would have "inflict[ed] the most damage on workers of color who predominate in the low-paying jobs where independent contractor misclassification is common." The Department agrees that if the Rule had resulted in an increase in the use of independent contractors in low-wage industries where independent contracting is common, it could have had a disproportionate effect on women and workers of color.

In sum, the Rule's narrowing of the application of the economic realities factors, as further described below, warrants withdrawal of the Rule.

#### a. Making the Opportunity for Profit or Loss Factor Indicate Independent Contractor Status Based on the Worker's Initiative or Investment

The Independent Contractor Rule would have provided that the opportunity for profit or loss factor indicates independent contractor status if the worker has that opportunity based on either his or her exercise of initiative (such as managerial skill or business judgment) or management of his or her investment in or capital expenditure on helpers or equipment or material to further his or her work.<sup>131</sup> The worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."<sup>132</sup> In other words, the factor would have indicated independent contractor status if the worker either: (1) Made no capital investment but exercised initiative or (2) had a capital investment but exercised no initiative. Most courts currently consider investment as its own factor in the analysis, but the Rule's change

<sup>131</sup> *See* 86 FR 1247 (§ 795.105(d)(1)(ii)).

<sup>132</sup> *Id.*

<sup>128</sup> *See id.*

would have resulted in investment no longer being its own factor. In addition, courts may currently consider initiative as part of the skill factor, but the Rule's change would have resulted in initiative being considered only as part of the opportunity for profit or loss factor. The proposal to withdraw the Rule expressed the concern that, by articulating the factor in this manner, the Rule would completely remove investment or initiative from consideration in certain cases.<sup>133</sup> The proposal suggested that, for example, if the worker exercised initiative, the opportunity for profit or loss factor would indicate independent contractor status even if the worker made no capital investment.<sup>134</sup>

Few commenters addressed the Rule's exact articulation of the opportunity for profit or loss factor. AFSCME commented that although this factor was "initially formulated to determine whether an independent contractor can grow and expand their business through investment," the Rule would have "look[ed] only to whether a worker's success (or failure) in earnings can be attributable to individual initiative or management but need not involve both." The International Brotherhood of Teamsters objected to the Rule's "refram[ing]" of the opportunity for profit or loss factor, arguing that it would "overemphasiz[e] workers' theoretical ability to increase their earnings through minimal investment or personal initiative." Other commenters who supported the proposed withdrawal generally questioned whether the opportunity for profit or loss should be determinative. *See, e.g.,* AFL-CIO; Women's Law Project. On the other hand, commenters who opposed withdrawal of the Rule generally supported the Rule's articulation of the opportunity for profit or loss factor as being based on initiative or investment. *See, e.g.,* SHRM; Seyfarth Shaw on behalf of Coalition for Workforce Innovation; Associated General Contractors of America; *see also* American Society of Travel Advisors.

Having considered the comments and the issue further, the Department believes that the Rule's articulation of the opportunity for profit or loss factor as indicating independent contractor status if the worker either exercises initiative or manages capital investment is not supported. No court articulates the opportunity for profit or loss factor as having these two prongs, only one of which need indicate independent contractor status for the factor as a

whole to indicate independent contractor status. Moreover, this articulation would have erased from the analysis in certain situations the worker's lack of initiative or lack of capital investment—both of which are longstanding and well-settled indicators of employee status. Because the worker's initiative and investment would have been considered under the Rule only as the two prongs comprising the opportunity for profit or loss factor, if either one indicated an opportunity for profit or loss then the factor would have invariably indicated independent contractor status. The other prong need not be considered at all as it could not have reversed or weighed against that finding even if it indicated employee status as a matter of economic reality. In effect, the Rule's subordination of "initiative" and "investment" as alternative considerations within the "opportunity for profit or loss" factor would have favored independent contractor status even when evidence of employee status was present.

#### b. Disregarding the Employer's Investments

The Independent Contractor Rule articulated investment as the worker's "management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work."<sup>135</sup> The Rule's preamble provided that "comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment."<sup>136</sup> Thus, the Rule precluded consideration of the employer's investment. The proposal to withdraw the Rule questioned the basis for the Rule's limited consideration of investment.<sup>137</sup>

Few commenters addressed the issue in response to the proposal. For example, Farmworker Justice commented that the Department was "correct" to identify the Rule's preclusion of consideration of "the worker's investment relative to the putative employer's investment" as "inconsistent with the law." The International Brotherhood of Teamsters opposed both the Rule's rejection of "prior precedent which held that in determining whether or not a worker's investment was significant, courts must compare it to the employer's investment" and the Rule's suggestion that "a minimal investment by a worker might be sufficient to find that a worker is an independent contractor even if the

employer made much more significant investments." Representative Scott, *et al.*, when describing the factors "almost uniformly used in federal courts of appeal as indicators of economic dependence," articulated the investment factor as "the extent of the relative investments of the employer and the worker" and cited AI 2015–1.

Commenters who opposed withdrawal of the Rule generally did not share any concerns with the Rule's limiting of the investment factor to consideration of the worker's investment. The Center for Workplace Compliance, for example, commented that there is "significant overlap between the relative investment factor and the factor examining the opportunity for profit or loss" and that "not separately list[ing] the relative investment factor removes any confusion caused by the overlap yet does not prevent an analysis of relative investment where appropriate." These commenters generally approved of the Rule's articulation of the factors, including investment. *See, e.g.,* Seyfarth Shaw on behalf of Coalition for Workforce Innovation; U.S. Chamber of Commerce.

Having considered the comments and the issue further, the Department believes that the Rule's interpretation against considering the worker's investment as compared to the employer's investment was legally unsound. As support for the interpretation, the Rule cited decisions from the Fifth and Eighth Circuits in which courts gave little weight to the comparison of the employer's investment in its business to the worker's investment in the work in light of the facts presented in those cases.<sup>138</sup> However, the decisions cited did make the comparison of the investments a part of the analysis, but found that the comparison had little relevance or accorded it little weight under those particular facts.<sup>139</sup> Numerous other

<sup>138</sup> *See* 86 FR 14033. The Fifth Circuit decisions cited were *Parrish*, 917 F.3d at 383, and *Hopkins*, 545 F.3d at 344–46. The Eighth Circuit decision cited was *Karlson*, 860 F.3d at 1096.

<sup>139</sup> *See Parrish*, 917 F.3d at 383; *Hopkins*, 545 F.3d at 344–46. The Fifth Circuit recently again articulated the investment factor as "the extent of the relative investments of the worker and the alleged employer." *Hobbs*, 946 F.3d at 829 (quoting *Hopkins*, 545 F.3d at 343). In *Hobbs*, the Fifth Circuit affirmed the district court's finding that the relative investments—the potential employer's "overall investment in the pipe construction projects" as compared to the workers' individual investments—favored employee status. *Id.* at 831–32. The Fifth Circuit agreed with the district court's conclusion to give the factor "little weight in its analysis" in that case given the nature of the industry and work involved. *Id.* at 832 (citing

Continued

<sup>133</sup> *See* 86 FR 14033.

<sup>134</sup> *See id.*

<sup>135</sup> 86 FR 1247 (§ 795.105(d)(1)(ii)).

<sup>136</sup> *Id.* at 1188.

<sup>137</sup> *See* 86 FR 14033.



courts of appeals have considered the worker's investment in the work in comparison to the employer's investment in its business,<sup>140</sup> as does WHD in enforcement actions. As the Fifth and Eighth Circuit decisions demonstrate, courts may give the relative comparison of investments little weight in certain factual circumstances or make nuanced decisions regarding how much evidence of the employer's investment to allow. Accordingly, precluding consideration of the worker's and the employer's relative investments would have very little legal support, would have been contrary to numerous courts of appeals decisions as well as the totality-of-the-circumstances approach applied by courts,<sup>141</sup> and would have been an unfounded limit on factfinders' ability to pursue inquires that best differentiate between a worker's economic dependence and independence based on the particular facts of the case.

#### c. Disregarding the Importance or Centrality of a Worker's Work to the Employer's Business

The Independent Contractor Rule would have recast the factor examining whether the worker's work "is an integral part" of the employer's business as whether the work "is part of an

*Parrish*, 917 F.3d at 383). In sum and contrary to what the Rule would have provided, the Fifth Circuit routinely considers the relative investments of the worker and the potential employer even if the factor may ultimately be accorded little weight depending on the circumstances. And in the Eighth Circuit's decision in *Karlson*, the court affirmed the district court's decision to allow some evidence of the worker's and the employer's relative investments but not allow the worker to introduce evidence of the employer's overall investment (*i.e.*, large dollar figures) that "would create the danger of unfair prejudice." 860 F.3d at 1096.

<sup>140</sup> See, *e.g.*, *McFeeley*, 825 F.3d at 243 (comparing the potential employers' payment of rent, bills, insurance, and advertising expenses to the workers' "limited" investment in their work); *Keller*, 781 F.3d at 810 ("We agree that courts must compare the worker's investment in the equipment to perform his job with the company's total investment, including office rental space, advertising, software, phone systems, or insurance."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) ("In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation."); *Lauritzen*, 835 F.2d at 1537 (disagreeing that "the overall size of the investment by the employer relative to that by the worker is irrelevant" and finding that "that the migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants"); see also *Iontchev v. AAA Cab Service, Inc.*, 685 Fed. Appx. 548, 550 (9th Cir. 2017) (noting that the drivers "invested in equipment or materials and employed helpers to perform their work" but concluding that the investment factor was "neutral" because the cab company "leased taxicabs and credit card machines to most of the [drivers]").

<sup>141</sup> See *supra* note 106.

integrated unit of production."<sup>142</sup> The Rule rejected as irrelevant to this factor whether the work is important or central (*i.e.*, integral) to the employer's business.<sup>143</sup> Instead, the Rule would have provided that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker.<sup>144</sup> The Rule asserted that this recast articulation was supported by *Rutherford Food* (which considered whether the work was "part of the integrated unit of production" of the employer),<sup>145</sup> but acknowledged that WHD and courts typically consider whether the work is important or central.<sup>146</sup> The proposal to withdraw the Rule identified this factor's redefinition to "integrated unit of production" as another example of how the Rule would eliminate from the economic realities analysis facts and concepts that have a strong foundation in the courts' and WHD's application of the analysis and would narrow the scope of the analysis.<sup>147</sup>

A number of commenters who supported the proposed withdrawal objected to the Rule's narrowing of the "integral" factor. For example, Farmworker Justice commented that the Department was "correct" to identify the Rule's "remov[al of] consideration of the work's importance to the business purpose" as "inconsistent with the law." The State Officials stated that, "under well-established circuit court precedent, the relevant inquiry is whether the worker's work is 'an integral part of the business,' which could be satisfied by being part of an integrated unit, or by being integral to the business." Texas RioGrande Legal Aid asserted that, by "removing" consideration of whether "farmworkers perform tasks integral to the businesses of the growers to whom they provide services," the Rule would have "stacked the decks in favor of a narrower definition of farm-based employee." The AFL-CIO added that the Rule would have "narrow[ed] the meaning" of the integral factor and was "contrary to Congress' intent and otherwise unjustified for several reasons," including because it would have been inconsistent with Supreme Court and

<sup>142</sup> See 86 FR at 1193–96, 1247 (§ 795.105(d)(2)(iii)).

<sup>143</sup> See *id.* at 1193–95.

<sup>144</sup> *Id.* at 1195.

<sup>145</sup> See *id.* at 1193–94 (citing *Rutherford Food*, 331 U.S. at 729).

<sup>146</sup> See *id.* at 1193.

<sup>147</sup> See 86 FR 14033–34.

Circuit Court precedent and because it "appears to be intended to provide transportation network companies like Uber and Lyft with a regulatory basis for their argument that their drivers are not their employees." The International Brotherhood of Teamsters objected for similar reasons, arguing that the Rule's "bar[ring] any consideration of whether the work performed is important or otherwise integral to the employer's business [is] in direct contradiction of established precedent" and was undertaken to "facilitat[e] the recognition of gig workers as independent contractors."

Commenters who opposed the proposal to withdraw did not share concerns regarding this factor. The Center for Workplace Compliance stated that "many courts have found the former 'integral part' framing of the factor as overlapping with the ability to control work" and that "the 'integral part' factor can inappropriately be interpreted to focus on the importance of the work instead of integration." It agreed with the Rule that "reframing this factor to look at whether the work is part of an integrated unit of production . . . is much closer to how the factor has been historically interpreted by the Supreme Court." Other commenters who opposed the proposal generally objected to the proposal's assertion that the Rule would have narrowed the factors, *see, e.g.*, U.S. Chamber of Commerce, or generally supported the Rule's articulation of the factors, including the "integrated unit" factor, *see, e.g.*, TechServe Alliance.

Having considered the comments and the issue further, the Department believes that the Rule's narrowing of the "integral part" factor to exclude consideration of whether the work is central or important was not supported. As the Rule acknowledged, WHD and courts have been applying the "integral part" factor for decades,<sup>148</sup> and it is a longstanding factor within the economic realities analysis. This is because a worker who performs work that is integral to the employer's business is more likely to be economically dependent on the employer;<sup>149</sup> whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer. Moreover, as with the other ways in which the Rule would have limited the analysis, the Rule's exclusion of whether the work is important or central to the employer's business is

<sup>148</sup> See 86 FR at 1194 (citing WHD opinion letters and cases).

<sup>149</sup> See *DialAmerica Mktg.*, 757 F.2d at 1382–83.



inconsistent with the court-mandated totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.<sup>150</sup> In addition, the Rule's reliance on *Rutherford Food's* "integrated unit of production" language was overly rigid and incomplete. The Rule did not consider a passage from the Supreme Court's contemporaneous decision in *Silk* finding that "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "an integral part of the businesses of retailing coal or transporting freight." 331 U.S. at 716 (emphasis added). The Rule did not sufficiently credit courts' or WHD's longstanding treatment of *Rutherford Food's* "integrated unit" language as tantamount to analyzing whether the work is an "integral part" of the employer's business.<sup>151</sup> Finally, the Rule stated that the "integral part" factor tended to indicate employee status and had a "higher rate of misalignment" with the ultimate result in certain cases;<sup>152</sup> however, it did not identify any cases where the "integral part" factor led to a result that was contrary to the totality of the evidence. Accordingly, the Rule's narrowing of the "integral" factor is another reason in support of withdrawal.

#### d. Downplaying the Employer's Right or Authority To Control the Worker

The Rule would also have stressed the primacy of the parties' actual practice by providing that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible," and that "a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority."<sup>153</sup> In support, the Rule's preamble asserted that "the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA," and that the FLSA "does not necessarily include every worker considered an employee under the common law."<sup>154</sup> The proposal to withdraw the Rule questioned whether this approach was

consistent with Supreme Court precedent.<sup>155</sup>

Commenters who supported withdrawal objected to how the Rule would treat the employer's right or authority to control the worker. For example, the AFL-CIO commented that "discounting contractual or reserved control is inconsistent with congressional intent to expand the coverage of the FLSA beyond the narrow confines of common law employment and the Department provides a faulty basis for discounting reserved control." The State Officials stated that the Rule "unduly narrowed the existing factors when it emphasized that evaluating whether an employment relationship exists should rely heavily on actual practice." They added that how the Rule would have treated the employer's right or authority to control the worker "is contrary to law" and would have impermissibly "narrowed employment even further than it was understood at common law" (citing *New York v. Scalia*, 490 F. Supp.3d 748, 787–88 (S.D.N.Y. 2020)).

Commenters who opposed withdrawal generally agreed with how the Rule would have treated the employer's right or authority to control the worker. For example, the National Retail Federation commented that the Rule would have "appropriately focus[ed] the test on actual practice rather than contractual or theoretical possibilities." The Center for Workplace Compliance described this provision of the Rule as "consistent with historical interpretation of the economic reality test by federal courts and DOL."

Having considered the comments and the issue further, the Department believes that the actual practice of the employer is not invariably more relevant than the authority that the employer may have reserved for exercise in the future. As several commenters noted, the right to control is part of control at the common law, and the Rule's blanket diminishment of the relevance of the right to control seems inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad and broader than what exists under the common law.<sup>156</sup> Thus, an employer's right or authority to control a worker, for example, can be

strong evidence suggesting the existence of an FLSA employment relationship, just as it is under the common law.<sup>157</sup> In sum, the Rule's simplistic declaration that the parties' actual practices are invariably more relevant is another reason to withdraw the Rule.

#### B. Whether the Rule Would Provide the Intended Clarity

One of the Independent Contractor Rule's primary stated purposes was to "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act."<sup>158</sup> Although the stated intent of the Rule was to provide clarity, it would also (as discussed above) have introduced several concepts to the analysis that neither courts nor WHD have previously applied. As explained in the NPRM, the Department's proposal to withdraw the Rule arose in part from a concern that these changes would cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended.

Numerous commenters asserted that the Independent Contractor Rule would clarify the distinction between independent contractors and FLSA-covered employees, and that withdrawing the Rule would forfeit the benefits of this added clarity. For example, the U.S. Chamber of Commerce stated that "[under] the status quo ante . . . employers are uncertain how to classify a worker under the economic realities test because they can not [sic] know how WHD will evaluate the different factors . . . [which] puts employers at risk of WHD enforcement and private litigation, and can impede businesses from engaging many smaller businesses or sole proprietors." Several commenters specifically identified the Rule's elevation of two "core factors" as a clarifying feature that would reduce uncertainty and inconsistency in application of the economic realities test. *See, e.g.*, American Society of Travel Advisors ("[A]ssigning greater weight to any factor will necessarily reduce, to some degree, the element of subjectivity inherent in the test."); Competitive Enterprise Institute ("Increasing the number of factors that must be given equal weight would lead to more inconsistent outcomes in the courts and elsewhere."). Some commenters, such as Brownstein Hyatt Farber Schreck and the Washington Legal Foundation, praised the

<sup>150</sup> See footnote 106, *supra*.

<sup>151</sup> See, e.g., AI 2015–1, 2015 WL 4449086, at \*5 (relying on *Rutherford Food's* "integrated unit of production" language in its discussion of the "integral" factor).

<sup>152</sup> See 86 FR at 1194.

<sup>153</sup> 86 FR at 1247 (§ 795.110).

<sup>154</sup> *Id.* at 1205.

<sup>155</sup> See 86 FR 14033–34.

<sup>156</sup> See *Rosenwasser*, 323 U.S. at 362 ("A broader or more comprehensive coverage of employees" than that contemplated under the FLSA "would be difficult to frame."); *Darden*, 503 U.S. at 326 (the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

<sup>157</sup> See, e.g., *Razak*, 951 F.3d at 145 ("[A]ctual control of the manner of work is not essential; rather, it is the right to control which is determinative.")

<sup>158</sup> 86 FR 1168.

Independent Contractor Rule's inclusion of illustrative factual examples, while other commenters expressed appreciation for the Rule's guidance on common business practices that would not militate against independent contractor status, such as requiring individuals to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms. *See* American Trucking Association (“Without [such guidance], motor carriers and other companies in other industries will be more reluctant to engage with and require improved safety as a condition of working with them for their independent contractors.”); New Jersey Warehousemen & Movers Association (same). Numerous commenters asserted that these features of the Rule would reduce litigation over the FLSA employment status of alleged independent contractors. *See, e.g.,* Chauvel & Glatt, LLP; Society for Human Resource Management.

Some commenters supportive of the Independent Contractor Rule addressed the concern expressed in the NPRM that the novelty of the Rule's guidance would cause confusion or lead to inconsistent outcomes. The Competitive Enterprise Institute asserted that “[a]ll rule changes are initially unfamiliar and require courts and others to adjust,” and that unfamiliarity “is not a rationale for leaving the rules unchanged when they become outdated.” *See also* Melinda Spencer (“So what if this is a new definition? The country clearly needs a new, clearer definition.”). Associated Builders and Contractors (ABC) and Littler Mendelson, P.C. disputed that the Rule's guidance was new or novel at all, asserting that its features were consistent with the way that most courts have been applying the economic realities test. Asserting differences in the ways that circuit courts describe the economic realities test, the Coalition to Promote Independent Entrepreneurs opined that “the Independent Contractor Rule provides an opportunity to conform all federal circuits to one unified explication of the test.”

By contrast, many other commenters shared the concern expressed in the Department's NPRM that implementation of the Independent Contractor Rule would add confusion rather than clarity due to the Rule's deviation from established guidance and precedent. For example, AFSCME asserted that the Rule would “upset . . . settled understandings and relied-upon judicial precedent upon which millions of American workers and employers

have ordered their relationships.” A number of commenters, including the Center for Law and Social Policy (CLASP), the North Carolina Justice Center, and the Shriver Center on Poverty Law, characterized the Independent Contractor Rule as a “a radical departure from established agency and court interpretations of the FLSA.” Farmworker Justice asserted that the Rule would “still require complex, fact-specific considerations of the unique circumstances of each employer-worker relationship,” but introduce “a whole set of new ambiguities and legal questions,” such as “whether it matters at all that an activity is ‘integral’—or important—to the business . . . how to weigh worker investment without comparing it to the investment made by the employer; what type of control is relevant when deciding the ‘control’ factor; when to weigh the secondary factors and so forth.” The Signatory Wall and Ceiling Contractors Alliance (SWACCA) asserted that, if the Independent Contractor Rule were adopted, subsequent court decisions interpreting the Rule would “necessitate additional, ongoing familiarization costs.” NELA, Pleva Law, and the International Brotherhood of Teamsters opined that implementation of the Rule would be discordant with state laws featuring more expansive worker coverage, increasing the likelihood that some workers might have different employment statuses under state and federal law.

Several commenters asserted that the lack of clarity regarding whether and to what extent courts would defer to the Independent Contractor Rule's guidance would result in uncertainty. *See* AFL-CIO; International Brotherhood of Teamsters; Northwest Workers Justice Project; SWACCA; Texas RioGrande Legal Aid. The United Brotherhood of Carpenters and Joiners of America stated that the Rule would itself be vulnerable to a successful legal challenge, invoking the “fate of the [Department's] equally flawed joint employer rule.”<sup>159</sup> *See also* State Officials (“[F]rom its initial proposal to the present, the States and other commenters have consistently questioned [the Rule's] legality due to its departure from the FLSA and

violation of [Administrative Procedure Act]-required procedures.”).

Upon further reflection, including consideration of relevant comments, the Department does not believe that the Independent Contractor Rule would have achieved the added clarity it intended to provide to the regulated community. To the contrary, given how the Rule failed to account for the FLSA's broad “suffer or permit” language and the numerous ways in which it departed from courts' longstanding precedent, it is not clear whether courts would have deferred to the Rule's guidance. To the extent that some courts would have declined to apply the test set forth in the Independent Contractor Rule, this would have created conflicts among courts and between courts and the Department, resulting in more uncertainty as to the applicable economic realities test. Businesses operating nationwide would have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA across different jurisdictions, continuing “to comply with the most demanding standard if they wish[ed] to make consistent classification determinations.”<sup>160</sup>

In addition to uncertainty resulting from whether courts would defer to the Independent Contractor Rule given its departures from courts' own precedent, the Rule would have introduced several ambiguous terms and concepts into the analysis for determining the FLSA employment status of an alleged independent contractor. For example, courts and regulated parties would have had to grapple with what it would mean in practice for two factors to be “core” factors and entitled to greater weight. In addition, they would have had to determine, in cases where the two “core” factors pointed to the same classification, how “substantial” the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Perhaps most difficult of all, the Rule cautioned that its list of factors was “not exhaustive,”<sup>161</sup> but did not specify whether the “additional factors” referenced in § 795.105(d)(2)(iv) would have had less probative value (or weight) than the three “other factors” listed in § 795.105(d)(2)(i)–(iii) of the Rule.<sup>162</sup> Assuming that they did, the Rule would have essentially transformed the multifactor balancing test that courts and the Department currently apply into a three-tiered

<sup>159</sup> On September 8, 2020, the U.S. District Court for the Southern District of New York vacated most of the FLSA Joint Employer Final Rule issued by the Department and effective in March 2020, on the grounds that it is contrary to law and arbitrary and capricious. *See Scalia*, 490 F. Supp.3d 748. An appeal is currently pending before the Second Circuit Court of Appeals. *See New York v. Walsh*, No. 20–3806 (2d Cir. appeal docketed Nov. 6, 2020).

<sup>160</sup> 86 FR 1241 n. 255.

<sup>161</sup> 86 FR 1246 (§ 795.105(c)).

<sup>162</sup> 86 FR 1247.

multifactor balancing test, with “core” factors given more weight than enumerated “other” factors, and enumerated “other” factors given more weight than unspecified “additional” factors. Rather than weighing all factors against each other in a holistic fashion depending on the facts of a particular work arrangement, courts and the regulated community would have had to evaluate factors within and across groups in a new hierarchical structure, which would have likely caused confusion and inconsistency. Adding to the confusion, the Rule collapses some factors into each other, so that investment and initiative are only considered as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have evaluated those factors.

In other words, the Independent Contractor Rule’s guidance would complicate rather than simplify the analysis for determining whether a worker is an employee or independent contractor under the FLSA. Given the likelihood that many courts would ignore, reject, or not defer to the Rule’s guidance for the reasons explained above, the Department believes that the Rule would have introduced substantial confusion and uncertainty on the topic of independent contractor status, to the detriment of workers and businesses alike.

### *C. Whether the Rule Would Have Benefitted Workers as a Whole*

As part of its analysis of possible costs, transfers, and benefits, the Independent Contractor Rule quantified some possible costs (regulatory familiarization) and some possible cost savings (increased clarity and reduced litigation).<sup>163</sup> The Rule identified and discussed—but did not quantify—numerous other costs, transfers, and benefits possibly resulting from the Rule, including “possible transfers among workers and between workers and businesses.”<sup>164</sup> The Rule “acknowledge[d] that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings,” but determined that these transfers cannot “be quantified with a reasonable degree of certainty for purposes of [the Rule].”<sup>165</sup> The Economic Policy Institute (EPI) had submitted a comment during the rulemaking estimating that the annual transfers from workers to employers as

a result of the Rule would be \$3.3 billion in pay, benefits, and tax payments.<sup>166</sup> The Rule discussed its disagreements with various assumptions underlying EPI’s estimate and explained its reasons for not adopting the estimate.<sup>167</sup> The Rule concluded that “workers as a whole will benefit from [the Rule], both from increased labor force participation as a result of the enhanced certainty provided by [the Rule], and from the substantial other benefits detailed [in the Rule].”<sup>168</sup>

The Department’s view, upon further consideration, of the value of EPI’s analysis is addressed below in section IV, in the analysis of costs and benefits of this withdrawal. As a general matter, the Department notes here that it does not believe the Rule fully considered the likely costs, transfers, and benefits that could result from the Rule. This concern is premised in part on WHD’s role as the agency responsible for enforcing the FLSA and its experience with cases involving the misclassification of employees as independent contractors. The consequence for a worker of being classified as an independent contractor is that the worker is excluded from the protections of the FLSA. Without the protections of the FLSA, workers need not be paid at least the federal minimum wage for all hours worked, and are not entitled to overtime compensation for hours worked over 40 in a workweek. Workers would also lose the FLSA’s protection against retaliation for complaining about a violation of the FLSA. The Department concludes that, to the extent the Rule would result in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers. The Department’s decision to withdraw the Rule is the result in part of its belief that doing so will benefit workers as a whole.

The Washington Legal Foundation commented that the Department should not consider only the distributional effects of withdrawal. It argued that the Rule would still benefit workers even if it benefitted businesses more. As an initial matter, the Department believes that the distributional consequences of withdrawal are appropriate to consider. Moreover, it finds that the Rule would not merely benefit workers less than business owners, but—for the reasons noted above and those explained below—would actually harm workers.

Many commenters expressed concerns that the Rule’s effects would

have harmed workers. For example, a number of individual commenters, including independent contractors, employees, and employers who supported withdrawing the Independent Contractor Rule believed that the Rule would give businesses more power to force workers to accept independent contractor status. As several commenters said in comments that used template language, “[i]n times of high unemployment like today, individual workers have even less market power than usual to demand fair conditions, especially in jobs that historically have been undervalued; they are forced to accept take-it-or-leave-it job conditions.” Other of these commenters worried the Rule would “stack the deck against workers and enable employers to misclassify more and more employees as independent contractors.” The Rule would, according to some, “fuel a race to the bottom.” One commenter who self-identified as “an actual independent contractor” believed that the only effect of the Rule would be “to allow massive companies to deny workers the benefits of employment status and squeeze extra profits for shareholders,” with the result that misclassified workers would “end up on public assistance for basic needs like healthcare, meaning corporations are passing the true cost of business on to taxpayers.” Some commenters were also worried about the effect of the Rule on businesses. The Construction Employers of America commented that the Rule “will make it harder for employers providing middle class careers in our industry to compete and provide good wages, benefits, and the protections that have been part of the employer/employee relationship since the 1930s.” Other commenters also said that the Rule “harms companies that play by the rules and treat workers fairly. Companies that take shortcuts are allowed under the rule to misclassify their employees, undercut responsible employers and drag down the wages and labor standards across essential industries.”

Commenters opposed to the withdrawal saw independent contractor status in a more positive light. In particular, a number of individual commenters expressed a desire to maintain their status as independent contractors, articulating general support for the concept of independent contractor status, especially the concept of flexible work schedules. The Department appreciates these commenters’ perspective, however, these comments do not demonstrate the Rule’s benefit to workers. A worker

<sup>163</sup> See *id.* at 1211.

<sup>164</sup> *Id.* at 1214–16.

<sup>165</sup> *Id.* at 1223.

<sup>166</sup> See *id.* at 1222.

<sup>167</sup> See *id.* at 1222–23.

<sup>168</sup> *Id.* at 1223.

already properly classified as an independent contractor will retain that status because, with this withdrawal, the economic realities test the Department uses to determine who is an employee under the FLSA is not changing. Moreover, flexible work schedules can be made available to employees as well as independent contractors, so any determination of or shift in worker classification need not affect flexibility in scheduling.

Some other commenters stated that the Department “seems to take the position that independent contractors only exist to the extent that they are simply misclassified employees.” They further stated that the proposal “fails to recognize that independent contractors exist separate and apart from employees who are misclassified as independent contractors by some employers.” Similarly, a self-described “freelance writer and editor” commented that the proposal “appears to be part of a larger effort to significantly restrict or even eliminate the ability for employers to classify individuals as independent contractors.” Some of these commenters worried that withdrawal would mean adopting a test similar to the “ABC Test” that generally applies under California state wage laws. These comments do not accurately characterize the proposal or the withdrawal of the Independent Contractor Rule. The Department recognizes, and has always recognized, that there are bona fide independent contractors that do not fall under the FLSA. In fact, soon after the FLSA was enacted, the Supreme Court stated that the Act was “not intended to stamp all persons as employees”<sup>169</sup> and recognized that independent contractors are not employees within the Act’s broad scope of coverage.<sup>170</sup> The Department is withdrawing the Rule for the reasons described throughout this final rule, and is not creating a new test, but is instead leaving in place the current economic realities test which allows for determinations that some workers are independent contractors.

Commenters also assert that many independent contractors would prefer independent contracting arrangements. Fundamentally, however, “the purposes of the [FLSA] require that it be applied even to those who would decline its protections,” as allowing workers who otherwise qualify as FLSA-covered employees to waive their rights “would affect many more people than those workers directly at issue . . . and would be likely to exert a general downward

pressure on wages in competing businesses.”<sup>171</sup> The Department also believes that this preference does not hold for a significant proportion of independent contractors. A survey cited by CWI found that in May 2020, 45 percent of workers preferred being an independent contractor to being fully employed. This is by no means a majority—the same survey finds that 53 percent of workers prefer being a full-time employee with benefits.<sup>172</sup> This survey—which was limited to users and potential users of one jobs platform—found a significant increase in workers who preferred being an independent contractor compared to the prior year, and also found that a lack of childcare was workers’ largest obstacle to full-time employment.<sup>173</sup> These findings suggest that even this minority of workers who prefer being an independent contractor to full-time employment are motivated in part by temporary pressures created by the COVID-19 pandemic. The survey did not ask whether workers would prefer a flexible schedule combined with employee status. As this rule notes elsewhere, flexibility and FLSA employment are not mutually exclusive.

Other commenters suggested that the Independent Contractor Rule would harm workers in ways beyond the effects of a worker’s classification on their individual compensation. The AFL-CIO commented that all workers benefit from the FLSA’s minimum wage requirements, even if those requirements do not apply to them directly, because the FLSA establishes a wage floor that prevents wages in general from being dragged downward. The NWLC commented that the FLSA’s definition of “employ” governs other worker protections, including the provision of lactation breaks and spaces for breastfeeding mothers as well as anti-discrimination protections. The Department agrees that the Independent Contractor Rule failed to consider these issues.

#### *D. Whether Withdrawing the Independent Contractor Rule Is Disruptive*

The Department explained in the NPRM that, because the Independent Contractor Rule had yet to take effect,

<sup>171</sup> *Tony & Susan Alamo Found.*, 471 U.S. at 302.

<sup>172</sup> Wonolo, “COVID-19 economic fallout weighs heavily on blue collar gig workers,” 2020. <https://go.wonolo.com/rs/052-CZJ-953/images/Data-report-The-rise-of-blue-collar-gig-workers.pdf>.

<sup>173</sup> *Id.* (finding that workers preferred full-time employment to independent contractor status by a ratio of 71-to-29 percent in 2019, and that workers concerned about a lack of childcare increased from 12 percent to 23 percent).

withdrawing it would not be disruptive. The NPRM pointed out that, as remains the case, courts have not applied the Rule in deciding cases, and WHD has not implemented the Rule. For example, WHD’s Fact Sheet #13, titled “Employment Relationship Under the Fair Labor Standards Act (FLSA)” and dated July 2008, does not contain the Rule’s analysis for determining whether a worker is an employee or independent contractor.<sup>174</sup> WHD’s Field Operations Handbook addresses independent contractor status by simply cross-referencing Fact Sheet #13 and likewise does not contain the Rule’s new economic realities test.<sup>175</sup> WHD’s elaws Advisor compliance-assistance information regarding independent contractors likewise does not contain the Rule’s analysis.<sup>176</sup> On January 26, 2021, WHD withdrew two opinion letters issued on January 19, 2021 applying the Rule’s analysis to several factual scenarios.<sup>177</sup> WHD explained that the letters were “issued prematurely because they are based on [a Rule] that ha[s] not gone into effect.”<sup>178</sup> Accordingly, the NPRM asserted that the regulated community has been functioning under the current state of the law and the Department does not believe that it would be negatively affected by continuing to do so were the Rule to be withdrawn.

Several commenters agreed that withdrawing the Rule would not be disruptive. The State Officials agreed that, because the Rule has not taken effect, it “has not required the substantial expenditure of compliance resources from the regulated community” and “has not engendered substantial reliance interests.” The State Officials explained that, to the contrary, failing to withdraw the Rule would be disruptive, as they believed the Rule “would have led employers to reclassify many employees as independent contractors overnight.” The State Officials argued that such reclassification and misclassification would have disruptive consequences for workers and states who are already

<sup>174</sup> Fact Sheet #13 (July 2008), *supra* note 37.

<sup>175</sup> Chapter 10 of Wage and Hour’s Field Operations Handbook, “FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits,” is available at [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH\\_Ch10.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf) (last visited April 28, 2021). The relevant provision, section 10b05 (“Test of the employment relationship”), is on page 6.

<sup>176</sup> See <https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp> (last visited April 28, 2021).

<sup>177</sup> See <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited April 28, 2021), noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9.

<sup>178</sup> *Id.*

<sup>169</sup> *Portland Terminal*, 330 U.S. at 152.

<sup>170</sup> See *Rutherford Food*, 331 U.S. at 729.

dealing with disruptions caused by the ongoing COVID-19 pandemic and resulting unemployment. The Department agrees that it is inappropriate to issue a rule during the pandemic that could increase the classification of workers as independent contractors, and therefore reduce the number of workers protected by the FLSA. Farmworker Justice likewise agreed that any disruption caused by withdrawal would be “minimal,” because “no adjustments would need to be made by workers, employers, or courts. Instead, the regulated community would be free to continue applying the decades of case law built up around the FLSA.” Texas RioGrande Legal Aid suggested that withdrawing the Rule before it went into effect would be far less disruptive than withdrawing it after it went into effect, because employers could simply refrain from reclassifying employees, whereas workers who were reclassified as a result of the Rule going into effect would be less likely to know if the Rule were later withdrawn and therefore less likely to insist on being reclassified again.

Some commenters disagreed with the Department, asserting that withdrawal of the Rule would be disruptive. Multiple commenters argued that “DOL did not consider the costs of compliance preparation many individuals and businesses have already undertaken in anticipation of the Final Rule becoming effective as scheduled.” However, none of these commenters presented evidence of such costs or even described what kind of costs they incurred, so the Department cannot assess the validity or significance of these claims, or quantify these possible costs. Moreover, the Department would expect any such costs to be minimal given that to the extent businesses had reason to incur costs in preparation for the Rule’s becoming effective—even though the Rule imposed no new requirements on businesses—the Department announced on February 5, 2021 that it was proposing to delay the effective date of the Rule in order to reconsider the Rule,<sup>179</sup> putting businesses on notice that it was far from certain when the Rule would go into effect, or in what form. In addition, any costs of complying with the Independent Contractor Rule were created by the Rule and would not be increased by its withdrawal. The Rule’s withdrawal does not impose new compliance costs on the regulated community, because it imposes no new requirements. Employers must continue to comply

with the currently governing interpretations of the FLSA.

Some commenters confused the one-time costs of coming into compliance with the withdrawal of the Rule with the ongoing costs of complying with the FLSA, which may be higher under the current interpretation of the FLSA than under the interpretation contained in the Independent Contractor Rule. For example, Capital Investment Companies stated that the Department “should not be able to simply withdraw a rule that was developed after public notice and comment” because the regulated community “cannot be expected to be able to shift gears every two months.” It argued that “DOL did not consider the costs to the current properly-classified independent contractors who may face a loss of business opportunities in the face of the uncertainties resulting from the DOL’s actions.” The Mercatus Center likewise argued that the Department’s belief that withdrawal would not be disruptive was inaccurate, because “[a]ny valid analysis of the final rule’s withdrawal must be measured in reference to the anticipated cost and benefits of the previous rule.”

These comments incorrectly assert that the Department is ignoring the costs and benefits of not implementing the Independent Contractor Rule. The Department has considered comments from the public, following the same procedures used to promulgate the Rule in the first instance. In doing so, the Department has measured the costs and benefits of retaining the current interpretation of the FLSA by withdrawing the Rule against the costs and benefits of enacting the Rule. The Department’s determination that the Rule’s withdrawal will not be disruptive does not mean that there will not be costs imposed on some employers. By its nature, the FLSA imposes costs on employers in the form of minimum wage and overtime pay requirements. However, the costs to come into compliance with the Department’s decision to withdraw the Rule are minimal, because employers and businesses who engage independent contractors will only need to comply with the statutory interpretations that already apply. They will not need to “shift gears” or change anything about their business practices, so long as they are currently complying with the FLSA.

The Coalition to Promote Independent Entrepreneurs (CPIE) argued that the Rule’s withdrawal will cause confusion in future enforcement actions brought by the Department, because a company accused of misclassifying workers as independent contractors “could respond by relying on DOL’s own research

findings that are published in the **Federal Register.**” In other words, though the Independent Contractor Rule would not be in effect, the company could rely on the Department’s reasoning behind the Rule. CPIE asked rhetorically, “If this were to occur, would DOL dispute its own published research findings?” Contrary to the implications of this comment, there should be no confusion about the Department’s position. The Department is withdrawing the Rule because, as explained throughout this final rule, it believes that the Rule’s justifications were insufficient to support such a departure from courts’ well-established analysis and the Department’s previous guidance. Accordingly, the Independent Contractor Rule does not reflect the Department’s interpretation.

Finally, a few commenters argued that withdrawal would be disruptive if it occurred before the resolution of the pending lawsuit challenging the Department’s delay of the Independent Contractor Rule’s original March 8, 2021 effective date.<sup>180</sup> The Coalition for Workforce Innovation (CWI), which brought that lawsuit, argued that the Department should avoid confusion by allowing that litigation to determine whether the delay of the Rule’s effective date was lawful. CWI argued that the Department’s “assumption” that the Independent Contractor Rule is not currently in effect is “faulty.” Littler Mendelson argued that “insofar as the Department’s arguments in support of withdrawal of the Rule rests [sic] on its status as not yet in effect, they are at best premature, and at worst, incorrect as a matter of fact and law.”

The Department does not agree with these comments. The Independent Contractor Rule is not currently in effect and is not currently applied by the Department, courts, or others. The Department maintains that its delay of the Rule’s original effective date was proper for the reasons explained in the final rule effectuating that delay,<sup>181</sup> but declines to comment on the ongoing litigation. Regardless of the outcome of the lawsuit, the result of this withdrawal of the Rule is that longstanding prior guidance, such as Fact Sheet #13, remains in effect. Even if the Department’s delay of the Rule’s effective date were vacated such that the Rule is deemed to have been in effect since March 8, 2021, any disruption caused by the short period in which the Rule was in effect would be outweighed by the reasons described in this final

<sup>180</sup> See *Coalition for Workforce Innovation v. Sec’y of Labor* (No. 1:21-cv-00130 E.D. Tex.).

<sup>181</sup> See 86 FR 12535.

<sup>179</sup> See 86 FR 8326.

rule to withdraw the Independent Contractor Rule. In other words, the Department would withdraw the Independent Contractor Rule even if it were currently in effect. Therefore, businesses can, as of publication of this withdrawal of the Rule, continue to rely upon the prior, familiar guidance even if the delay is later vacated and the Rule is retroactively deemed to have been in effect from March 8 until the issuance of this final rule. The disruption caused by the withdrawal would accordingly remain limited.

After carefully considering commenter feedback, the Department maintains its belief that withdrawing the Independent Contractor Rule will not result in significant disruption to the regulated community. In particular, any businesses currently engaging workers properly classified as independent contractors or individuals who now correctly consider themselves to be independent contractors will be able to continue to operate without any effect brought about by the absence of new regulations. Businesses that had taken steps in preparation for the Rule taking effect will not be precluded from adjusting their relationships with workers or paying for new services from workers, and can rely on past court decisions and WHD guidance to determine whether those workers are employees under the FLSA or independent contractors.

#### *E. Timing and Effect of Withdrawal*

##### 1. Effective Date of Final Rule

Section 553(d) of the Administrative Procedure Act provides that substantive rules should take effect not less than 30 days after the date they are published in the **Federal Register** unless “otherwise provided by the agency for good cause found.” 5 U.S.C. 553(d)(3). The Department finds that it has good cause to make this rule effective immediately upon publication. Allowing for a 30-day delay between publication and the effective date of this rulemaking would result in the Independent Contractor Rule taking effect for a short period before its withdrawal, which would cause confusion for regulated entities. The “Regulatory Freeze Pending Review” Memorandum described in section I(D) above, which directed the review that led the Department to propose withdrawing the Independent Contractor Rule, was issued on January 20, 2021. Even after delaying the Rule’s original effective date of March 8, 2021 to May 7, 2021, the Department had less than 4 months to consider the significant and complex issues raised by the Independent Contractor Rule as

directed by the Memorandum and subsequent guidance from the Office of Management and Budget<sup>182</sup> and to conduct notice-and-comment rulemaking based on that consideration as well as input from commenters.

Withdrawing the Rule immediately ends employers’ and workers’ uncertainty about whether the Rule would go into effect at all following the Memorandum and the delay of the Rule’s effective date. At least since the Memorandum, businesses have been unsure whether to expect to apply the Rule’s analysis to their employment practices. Ending this uncertainty immediately benefits employers and workers alike. To delay the withdrawal by 30 days would mean that the Rule would be in effect from May 7, 2021, until the effective date approximately one month later. To require businesses to apply the Rule’s analysis only to have them reassess the analysis when the Rule is withdrawn would impose unnecessary costs with no benefits. And, as pointed out by Texas RioGrande Legal Aid, it could have negative effects on workers—in particular, low-wage workers—whose employment status could be changed upon the Rule’s taking effect, and would be unlikely to know that they were again entitled to FLSA protections. Because withdrawing the Rule will merely retain the status quo rather than impose any new requirements, immediate withdrawal will not require any reassessments of employment status. The regulated community does not require time to adjust to new requirements, because there are none imposed by withdrawal of the Rule. Because a delay of this rule’s effective date would be impracticable and unnecessary, the Department finds it has good cause to make this withdrawal effective immediately upon publication.

##### 2. Effect of Withdrawal

For the reasons described above, the Department has decided to withdraw the Independent Contractor Rule, effective immediately. Accordingly, the guidance that the Rule would have introduced as part 795 of Title 29 of the Code of Federal Regulations will not be introduced and the revisions that the Rule would have made to 29 CFR 780.330(b) and 29 CFR 788.16(a) will not occur and their text will remain unchanged. The Department did not propose and is not now issuing regulatory guidance to replace the

guidance that the Independent Contractor Rule would have introduced as part 795.

### III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations require an agency to consider its need for any information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. This final rule does not contain a collection of information subject to Office of Management and Budget approval under the PRA.

### IV. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

#### *A. Introduction*

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>183</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. This final rule is economically significant under section 3(f) of Executive Order 12866 because it is withdrawing an economically significant rule.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society,

<sup>182</sup> Memorandum M–21–14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, <https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf> (last visited April 28, 2021).

<sup>183</sup> See 58 FR 51735 (Sept. 30, 1993).

consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.<sup>184</sup> Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from the Rule's withdrawal and was prepared pursuant to the above-mentioned executive orders.

### B. Background

On January 7, 2021, WHD published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (Independent Contractor Rule or Rule).<sup>185</sup> In this final rule, the Department is withdrawing the Independent Contractor Rule, which has not taken effect. Aside from minimal rule familiarization costs, the Department also provides below a qualitative discussion of the transfers that may be avoided by withdrawing the Rule.

### C. Costs

#### 1. Rule Familiarization Costs

Withdrawing the Independent Contractor Rule will impose direct costs on businesses that will need to review the withdrawal. To estimate these regulatory familiarization costs, the Department determined: (1) The number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the withdrawal, and (3) the amount of time required to review the withdrawal. It is uncertain whether these entities would incur regulatory familiarization costs at the firm or the establishment level.<sup>186</sup> For example, in smaller businesses there might be just one specialist reviewing the withdrawal, while larger businesses might review it at corporate headquarters and determine policy for all establishments owned by the business. To avoid underestimating the

costs of the withdrawal, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the withdrawal, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.<sup>187</sup> Because the Department is unable to determine how many of these businesses are interested in using independent contractors, this analysis assumes all businesses will undertake review.

The Department believes ten minutes per entity, on average, to be an appropriate review time here. This rulemaking would withdraw the Independent Contractor Rule and would not set forth any new regulations in its place. Additionally, the Department believes that many entities do not use independent contractors and thus would not spend any time reviewing the withdrawal. Therefore, the ten-minute review time represents an average of no time for the entities that do not use independent contractors, and potentially more than ten minutes for review by some entities that might use independent contractors.

The Department's analysis assumes that the withdrawal would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The median hourly wage for these workers was \$31.04 per hour in 2019, the most recent year of data available.<sup>188</sup> The Department also assumes that benefits are paid at a rate of 46 percent<sup>189</sup> and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of \$50.60.

The Department estimates that the lower bound of regulatory familiarization cost range would be \$50,675,004 (5,996,900 firms  $\times$  \$50.60  $\times$  0.167 hours), and the upper bound, \$66,424,267 (7,860,674 establishments  $\times$

\$50.60  $\times$  0.167 hours). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this proposed withdrawal over 10 years. Over 10 years, it would have an average annual cost of \$6.7 million to \$8.8 million, calculated at a 7 percent discount rate (\$5.8 million to \$7.6 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

In their comment, the Financial Services Institute (FSI) asserted that the rule familiarization costs are understated because "they fail to consider the costs that will be imposed on stakeholders by repeating their activities of the very recent notice/comment period." However, they also acknowledged that there has been no change in law since the Independent Contractor Rule was announced. The Department notes that estimates of rule familiarization costs do not usually include the time it takes stakeholders to comment on the rule, and instead only include the time it takes to read and become familiar with the final rule.

#### 2. Other Impacts

In the Independent Contractor Rule, the Department estimated cost savings associated with increased clarity, as well as cost savings associated with reduced litigation. The Department does not anticipate that this withdrawal will increase costs in these areas, or result in greater costs as compared to the Rule. Although the intent of the Independent Contractor Rule was to provide clarity, it would also have introduced several concepts to the FLSA economic realities analysis that neither courts nor WHD have previously applied. Because the Rule would have been unfamiliar and could have led to inconsistent approaches and/or outcomes, and because withdrawal maintains the status quo, the Department does not believe that withdrawal of the Independent Contractor Rule will result in decreased clarity for stakeholders. As discussed above in section II(B), numerous commenters agreed that the Rule would not have increased clarity, and that there would have instead been increased litigation following the Rule due to uncertainty over whether and to what extent courts would adopt the Rule's complicated guidance.

Some commenters asserted that there would be significant costs associated with withdrawing the Independent Contractor Rule. For example, the National Retail Federation (NRF) and Littler Mendelson's Workplace Policy

<sup>184</sup> See 76 FR 3821 (Jan. 21, 2011).

<sup>185</sup> See 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. See 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.

<sup>186</sup> An establishment is a single physical location where one predominant activity occurs. A firm is an establishment or a combination of establishments.

<sup>187</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

<sup>188</sup> Occupational Employment and Wages, May 2019, <https://www.bls.gov/oes/current/oes131141.htm>.

<sup>189</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.



Institute (WPI) claimed that employers had already begun to implement the Rule, even though it had not yet gone into effect. WPI claimed that, in the withdrawal NPRM, the Department ignored the costs of compliance preparation that many businesses have already undertaken in anticipation of the rule becoming effective. The commenters did not provide information on the types of activities that businesses have taken to implement the Rule, or how much time they spent. The Department also did not receive any data on the number of businesses that have incurred implementation costs, or the magnitude of these costs, so the Department has not quantified them here. Any costs that were incurred by businesses in response to the publication of the Independent Contractor Rule are sunk costs, and would not be affected by the withdrawal. Commenters did not provide any information on what changes businesses would have to undo following the withdrawal.

In discussing the effects of the Independent Contractor Rule, many commenters referenced the analysis that the Economic Policy Institute (EPI) provided in their comment to the 2020 Independent Contractor NPRM. EPI itself commented to again explain the results of its study, which estimated that the Independent Contractor Rule would have cost workers more than \$3.7 billion annually. This figure represents \$400 million in new annual paperwork costs and a transfer to employers of at least \$3.3 billion in the form of reduced compensation for employees who are converted to independent contractors. EPI also estimated a loss of \$750 million in employer contributions to social insurance funds such as Social Security, Medicare, Unemployment Insurance, and Workers' Compensation. The Department believes that although the magnitude of this estimate may be overstated, for reasons discussed in response to the comment on the Independent Contractor Rule, the discussion of impacts to workers is valid. EPI did not directly address the Department's criticisms of its estimates in the Independent Contractor Rule, but it agreed with the Department's statement in the NPRM that EPI's analysis may be useful in understanding the types of impacts the Rule would have had on workers.

Michael D. Farren and Liya Palagashvili of the Mercatus Center provided a detailed comment evaluating the Department's economic analysis. In their comment, they estimated the costs associated with withdrawing the Independent Contractor Rule, stating

that the annual cost of withdrawing the Rule is approximately \$1.85 billion. After thoroughly reviewing this analysis, the Department concludes that this cost estimate is not accurate, for the reasons described below.

Farren and Palagashvili note that their analysis is based on the framework provided by EPI, in order to allow their estimate to be comparable. They begin by estimating the own-wage elasticity of employment costs from a meta-analysis of literature, finding that "the average own-wage elasticity with respect to changes in employment costs is  $-0.66$ ." They conclude that this suggests that workers capture 66 percent of the decrease in employer costs associated with reclassifying employees as independent contractors. The Department believes that this is not an accurate application of the findings of the meta-analysis. The studies indicate that on average, the impact of a 1.0% increase in taxes is a 0.66% decrease in wages for employees. It may be inappropriate to assume that this estimate for employees also applies to independent contractors. Additionally, it is unclear whether non-tax labor costs would have the same elasticity as taxes. The Department also notes that the studies referenced in their meta-analysis come from many different countries, some of which may reflect a different economic situation than that of the United States, and may not be applicable to an analysis of worker classification in the United States. Although the Department recognizes that regulatory impacts are often experienced across both workers and employers (and, more generally, labor market outcomes are the result of tradeoffs made by both workers and employers), the Department's analysis on earnings does not find that independent contractors capture a large portion of the decrease in employer costs. As discussed in section IV(D)(4), when controlling for observable characteristics related to earnings, the data fail to show that independent contractors have an earnings premium over employees sufficient to cover the increased tax liability.

The Mercatus Center commenters also estimate the average willingness to pay for flexible work, by stating that a National Bureau of Economic Research (NBER) working paper finds that the average worker is willing to accept a salary that is 10.4 percent lower for a flexible job. Although the Department could not find this figure in the three papers that were cited in the comment, two of the three papers have a range of results that include approximately 10

percent.<sup>190</sup> The Department does not believe that the first paper cited is appropriate for applying to the analysis, because that study was a field experiment using a Chinese job board, and only looked at college-educated workers with 5–10 years of experience, all applying for professional/executive positions. The tradeoff between wages and flexibility for this population might not be comparable to that of the total population of workers in the United States. The authors of the paper also note that they "look at a narrow set of jobs (and at one employer), so the results may not generalize to different types of jobs and the workers searching for them."

The Mercatus Center assumed that workers would receive increased flexibility if they are reclassified as independent contractors, but this is not necessarily true. Many employees already enjoy flexible work schedules<sup>191</sup>—and the share of employees with such flexible work arrangements is likely to increase as a result of the COVID-19 pandemic.<sup>192</sup> If an employee with a flexible work arrangement is converted to an independent contractor, that worker might or might not experience an increase in flexibility. Though the Mercatus Center stated that it would be illegal for an employer to convert an employee to an independent contractor without increasing their flexibility, this

<sup>190</sup> The three papers cited were Haoran He, David Neumark, and Qian Weng, "Do Workers Value Flexible Jobs? A Field Experiment" (NBER Working Paper No. 25423, National Bureau of Economic Research, Cambridge, MA, July 2020), 26; Nicole Maestas et al., "The Value of Working Conditions in the United States and Implications for the Structure of Wages" (NBER Working Paper No. 25204, National Bureau of Economic Research, Cambridge, MA, October 2018). M. Keith Chen et al., "The Value of Flexible Work: Evidence from Uber Drivers," *Journal of Political Economy* 127, no. 6 (December 2019): 2735–94.

<sup>191</sup> Flexible work schedules do not prevent courts from finding workers to be employees. *See, e.g., Silk*, 331 U.S. at 706 (finding that coal unloaders were employees despite their ability to show up to work "when they wish and work for others at will"); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 230 (3d Cir. 2019) (finding that dancers were employees and not independent contractors despite fact that they could select their own shifts and work for competitors); *DialAmerica Mktg.*, 757 F.2d at 1380 (finding that home researchers were employees even though they were "free to choose the weeks and hours they wanted to work").

<sup>192</sup> *See* Society for Human Resources Management, "Managing Flexible Work Arrangements," <https://www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/managingflexibleworkarrangements.aspx> (last visited April 28, 2021) ("Now that many employers have experienced how successful telecommuting can be for their organization or how work hours that differ from the normal 9-to-5 can be adopted without injury to productivity, offering flexible work arrangements may become even more commonplace.").



does not accurately reflect the Independent Contractor Rule or WHD's prior interpretations, because control over one's schedule is only one part of one factor in the analysis. The assumption that all workers converted to independent contractors would benefit from increased flexibility may be inaccurate.

These commenters then use these estimates to calculate the benefits to workers when employees are reclassified as independent contractors. The commenters first calculate the value of each worker's lost supplemental income, lost employment fringe benefits (paid leave, health insurance, and retirement benefits), and net change in FICA (Federal Insurance Contributions Act) tax liability.<sup>193</sup> They then calculate the amount that workers would capture of these employer cost savings using the average own-wage elasticity of 0.66.<sup>194</sup> From that amount, they subtract the amount that they claim workers are willing to forgo for greater flexibility. Comparing the net gains to the net losses, Farren and Palagashvili say that workers will receive a net benefit of \$414. The Department believes that the commenters misapplied the estimate of elasticity when calculating this benefit, because they multiplied 0.66 by total reduced costs. The Department believes it is more appropriate to find the percent reduction in cost, and apply that percentage to total wages. When adjusting for this change in the analysis, it would result in a net loss to workers.<sup>195</sup> Moreover, the short-hand term "total reduced costs" lumps together several types of impacts, some of which should not be used as inputs into the type of comparative statics analysis suggested by the commenters; for example, although legal tax liability shifts depending on whether workers are employees or independent contractors, the size of the tax wedge is unchanged.

Additionally, the Mercatus Center noted that its estimates excluded one cost from EPI's analysis: The cost of additional paperwork that independent contractors must do. EPI estimated this cost would average \$777, which

<sup>193</sup> The commenters calculate a sum of \$6,185 using data in EPI's comment: Heidi Shierholz, EPI Comments on Independent Contractor Status, 5–6.

<sup>194</sup>  $\$6,186 \times 0.66 = \$4,082$ .

<sup>195</sup> Assuming the bare minimum employer costs of wages plus cost savings listed (\$30,387), the Department calculates that of the cost savings, \$3,251 would be passed along to employees. Even with the assumption that this amount would be paid to the independent contractor, and incorporating the flexibility benefits that the commenters claim independent contractors experience, it results in a net loss of \$417 per worker.

included an IRS estimate of an additional 13 hours of tax preparation, an average of half an hour a week of other, non-tax paperwork, and the cost of accounting and tax preparation software that independent contractors use. The Mercatus Center explained that it excluded these costs because "[t]hese costs are required only for business expense deductibility purposes, and workers would not engage in such paperwork if their expected return were not positive." However, workers would not know if their return would be positive until after they spent this time calculating their deductible expenses. The IRS estimate of additional time independent contractors spend on tax preparation is an average, so any independent contractors who do not spend extra time on taxes are already accounted for in that average. Moreover, only 13 of the 39 hours of additional paperwork estimated by EPI were tax-related, and the Mercatus Center analysis did not account for the time spent on non-tax paperwork. The \$777 in paperwork expenses that the Mercatus Center excluded from its analysis would outweigh its conclusion of \$414 in average net benefits to employees converted to independent contractors. Even a somewhat smaller paperwork burden would result in a net loss to workers.

In sum, the Department believes that the Mercatus Center's criticisms of EPI's study overestimate the benefits to employees converted to independent contractors in the form of higher wages and greater flexibility, while underestimating the costs imposed on such workers. Though it remains difficult to quantify the costs and benefits of the Rule precisely, and the Department believes that the magnitude of the costs in EPI's analysis may be overstated, the Department nonetheless believes that the EPI estimate correctly concluded that workers affected by the Independent Contractor Rule would suffer a net loss.

One of the main benefits discussed in the Rule was the increased flexibility associated with independent contractor status. The Department acknowledges that although many independent contractors report that they value the flexibility in hours and work, employment and flexibility are not mutually exclusive. Many employees similarly value and enjoy such flexibility.

Commenters such as the Mercatus Center and the Coalition for Workforce Innovation (CWI) also claim that DOL's analysis does not include the value of workplace flexibility, and that evidence does not show that employees also have

flexibility. The Department believes that employment and flexibility are not mutually exclusive, and many employees do have flexibility. For example, a 2016 study found that 81 percent of U.S. employers allow employees some flexibility in schedule.<sup>196</sup> A 2019 USA Today article cites results from surveys indicating that a large percentage of companies offer flexibility and a large percentage of employees say that they have flexibility in their jobs.<sup>197</sup>

Some commenters assert that the Department's analysis ignores the component of the workforce that like being independent contractors. For example, the Financial Services Institute (FSI) says that DOL "utterly ignores the possibility that true independent contractors exist" and that independent financial advisors are proud to be their "own boss."

Throughout their comment, CWI cites many surveys, some with questionable survey sampling procedures, showing that independent contractors like the flexibility of their work. For example, in opposition to the Department's withdrawal, CWI references a study on freelancing, which concludes that the freelance workforce contributes over a trillion dollars to the U.S. economy, freelance workers are highly skilled, and that freelancing increases earnings potential.<sup>198</sup> The Department appreciates the importance of freelance work, but believes that comments such as these lack evidence to show that these opportunities were restricted before the Independent Contractor Rule. Therefore, the withdrawal will not create further restrictions on independent contractor work beyond those imposed by existing guidance. Existing freelancers who are properly classified as independent contractors will not be affected by this withdrawal. Additionally, the data cited by CWI showing that freelancing increases earning potential is limited to freelancers who voluntarily left their employer to become freelancers. This population could be different from workers who would have been reclassified as independent contractors because of the Independent Contractor Rule.

<sup>196</sup> Kenneth Matos, Ellen Galinsky and James T. Bond. 2016 National Study of Employers, 2017, <https://www.familiesandwork.org/research/workplace-research-national-study-of-employers>.

<sup>197</sup> Paul Davidson, "More employers offer flexible hours, but many grapple with how to make it succeed.," October 20, 2019. <https://www.usatoday.com/story/money/2019/10/20/flexible-hours-jobs-more-firms-offer-variable-schedules/4020990002/>.

<sup>198</sup> <https://www.upwork.com/i/freelance-forward>.

#### D. Transfers

The Department believes that it is important to provide a qualitative discussion of the transfers that would have occurred under the Independent Contractor Rule. In the economic analysis originally accompanying the Rule, the Department assumed that the Rule would lead to an increase in the number of independent contractor arrangements, and acknowledged that some of this increase could be due to businesses reclassifying employees as independent contractors.<sup>199</sup> As discussed in the Rule and again below, an increase in independent contracting could have resulted in transfers associated with employer-provided fringe benefits, tax liabilities, and minimum wage and overtime pay.<sup>200</sup> By withdrawing the Rule, these transfers from employees (and, in some cases, from state or local governments and the recipients of government-operated unemployment insurance of worker's compensation programs) to employers are avoided.

#### 1. Employer Provided Fringe Benefits

The reclassification of employees as independent contractors, or the use of independent contracting relationships as opposed to employment, decreases access to employer-provided fringe benefits such as health care or retirement benefits. According to the BLS Current Population Survey (CPS) Contingent Worker Supplement (CWS), 75.4 percent of independent contractors have health insurance, compared to 84 percent of employees.<sup>201</sup> This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than \$15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).<sup>202</sup>

<sup>199</sup> See 86 FR 1225–27.

<sup>200</sup> See 86 FR 1216–18, 1223–24.

<sup>201</sup> Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements—May 2017,” USDL–18–0942 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

<sup>202</sup> To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS.

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that employers pay 5.3 percent of employees' total compensation in retirement benefits on average (\$1.96/\$37.03). If a worker is reclassified from employee to independent contractor status, that worker would likely no longer receive employer-provided retirement benefits.

#### 2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, as discussed in the Rule, if workers' classifications change from employees to independent contractors, there may be a transfer in federal tax liabilities from employers to workers.<sup>203</sup> Although the Rule only addressed whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.<sup>204</sup> These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.<sup>205</sup> In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some or all of this increased tax liability may ultimately be paid for by a business if it increases pay to compensate independent contractors for this tax

At a 0.05 significance level, the proportion of Hispanic independent contractors with any health insurance is lower than the proportion for all independent contractors.

<sup>203</sup> See 86 FR 1218.

<sup>204</sup> Courts have noted that the FLSA has the broadest conception of employment under federal law. See, e.g., *Darden*, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding federal standard, a rulemaking addressing the standard for determining whether a worker is an FLSA employee or an independent contractor may affect the businesses' classification decisions for purposes of benefits and legal requirements under other federal laws.

<sup>205</sup> Internal Revenue Service, “Publication 15, (Circular E), Employer's Tax Guide” (Dec. 23, 2019), <https://www.irs.gov/pub/irs-pdf/p15.pdf>. The social security tax has a wage base limit of \$137,700 in 2020. An additional Medicare Tax of 0.9 percent applies to wages paid in excess of \$200,000 in a calendar year for individual filers.

liability, and changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

In addition to affecting tax liabilities for workers, some commenters claimed that the Rule would have an impact on state tax revenue and budgets. SWACCA noted that taxpayer costs would have increased following the Rule. They state that an increase in independent contractor arrangements leads to reduced tax revenues and increased costs to Federal, State, and local governments for programs like unemployment insurance and workers compensation. A comment from the State Officials also claimed that reclassification following the Independent Contractor Rule would disrupt States' efforts to administer their unemployment insurance programs, especially at a time when they have been processing record numbers of unemployment claims.

Because independent contractors do not receive benefits like health insurance, workers compensation, and retirement plans from an employer, the State Officials suggested that a rule that increases the prevalence of independent contracting could shift this burden to State and Federal governments.

#### 3. FLSA Protections

When workers are classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of \$7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees).<sup>206</sup> Research on drivers who are classified as independent contractors and work for online transportation companies in California and New York also finds that many drivers receive significantly less than the applicable state minimum wages.<sup>207</sup> Commenters asserted that

<sup>206</sup> In their comment, CWI noted that the CWS data that was cited by the Department does not include this data. These calculations cannot be found in the tables published by BLS, but are from the Department's own calculations of the CWS microdata.

<sup>207</sup> M. Reich, “Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers.” University of California, Berkeley (October 5, 2020), <https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf>; L. Moe, et al. “The Magnitude of Low-Paid Gig and Independent Contract Work in New York State,” The New School Center for New York City Affairs (February

because of the COVID–19 pandemic and the resulting economic fallout, there is an even greater need to ensure workers have access to FLSA protections. The Center for Law and Social Policy (CLASP) cited a study showing that minimum wage violations increased dramatically as unemployment rose during the Great Recession, disproportionately impacting Latinx, Black, and female workers.<sup>208</sup> They anticipate that the recent period of high unemployment could lead to similar violations.

Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime (more than 40 hours in a workweek) at their main job (29 percent for self-employed independent contractors and 17 percent for employees).<sup>209</sup>

Commenters referenced other FLSA protections that employees would lose if they were reclassified as independent contractors following the Rule. The National Women’s Law Center points out that the FLSA also contains provisions that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

#### 4. Hourly Wages, Bonuses, and Related Compensation

Some commenters asserted that independent contractors are compensated better than employees, citing discussions of earnings from the Independent Contractor Rule. The Department is concerned that its

2020), [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020\\_GigReport.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf).

<sup>208</sup> Fine et al., Maintaining effective U.S. labor standards enforcement through the coronavirus recession, Washington Center for Equitable Growth, Sept. 3, 2020, available at <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/>.

<sup>209</sup> The Department based this calculation on the percentage of workers in the CWS data who respond to the PEHRUSL1 variable (“How many hours per week do you usually work at your main job?”) with hours greater than 40. Workers who answer that hours vary were excluded from the calculation. The Department also applied the exclusion criteria used by Katz and Krueger (exclude workers reporting weekly earnings less than \$50 and workers whose calculated hourly rate (weekly earnings divided by usual hours worked per week) is either less than \$1 or more than \$1,000).

discussion of data on the differences in earnings between employees and independent contractors in the Independent Contractor Rule was confusing and potentially inaccurate, so the findings and methodology are discussed again here. Independent contractors are often expected to earn a wage premium to compensate for reduced fringe benefits, increased tax liability and associated paperwork costs. However, due to asymmetric information, differences in bargaining power, or a willingness to trade earnings for increased flexibility, this may not hold. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an employee to an independent contractor.

The Department used an approach similar to Katz and Krueger (2018).<sup>210</sup> Both regressed hourly wages on independent contractor status<sup>211</sup> and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.<sup>212</sup>

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees do (e.g., \$27.29 per hour for all independent contractors versus \$24.07 per hour for employees using the 2017 CWS). However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors’ and employees’ hourly wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees do, they recommended caution in interpreting these results due to the

<sup>210</sup> L. Katz and A. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,” (2018).

<sup>211</sup> On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of “traditional” employees.

<sup>212</sup> In both Katz and Krueger’s regression results and the Department’s calculations, the following outlying values were removed: Workers reporting earning less than \$50 per week, less than \$1 per hour, or more than \$1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018), *supra* note 210.

imprecision of the estimates.<sup>213</sup> The Department found no statistically significant difference between independent contractors’ and employees’ hourly wages in the 2017 CWS data.

Based on these inconclusive results, the Department believes it is inappropriate to conclude independent contractors generally earn a higher hourly wage than employees do. Therefore, the Department does not assert that wages would be impacted due to the Rule or its withdrawal. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results did not find a statistically significant difference in earnings for these groups.<sup>214</sup>

The Mercatus Center commenters also claim that independent contractors earn supplemental compensation, which the Department believes is unsupported by widespread evidence for most independent contractors. They say that “[t]he analysis assumes that independent contractors do not receive supplemental compensation, despite widespread evidence to the contrary in the platform economy, such as signing and performance bonuses.” The commenters cite one Wall Street Journal article to support their assertion, and this article also discusses the difficulty finding and retaining workers, including statements like, “turnover is driven by gig workers’ unhappiness with their take-home pay,” “a 2015 analysis found 45% of Uber’s workforce left in their first year,” and, “in any given month, an estimated 1 in six participants in the gig economy is new, and more than half of such workers exit within a year.”<sup>215</sup>

#### V. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires federal agencies engaged in rulemaking

<sup>213</sup> See top of page 20, “Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP].”

<sup>214</sup> The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

<sup>215</sup> Kelsey Gee, “In a Job Market This Good, Who Needs to Work in the Gig Economy?,” *Wall Street Journal*, August 8, 2017.

to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this withdrawal to determine whether it will have a significant economic impact on a substantial number of small entities.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.<sup>216</sup> Of these, 5,976,761 firms and 6,512,802 establishments have fewer than 500 employees. The per-entity cost for small business employers is the regulatory familiarization cost of \$8.43, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist (\$50.60) multiplied by  $\frac{1}{6}$  hour (ten minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least \$100,000 per year for the smallest businesses, the Department certifies that this withdrawal will not have a significant economic impact on a substantial number of small entities.

## VI. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)<sup>217</sup> requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$165 million (\$100 million in 1995 dollars adjusted for inflation) or more in at least one year.<sup>218</sup> This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or

<sup>216</sup> Statistics of U.S. Businesses 2017, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>, 2016 SUSB Annual Data Tables by Establishment Industry.

<sup>217</sup> See 2 U.S.C. 1501.

<sup>218</sup> Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This withdrawal is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of \$165 million or more in any one year.

## VII. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed withdrawal in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The Independent Contractor Rule's withdrawal will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

## VIII. Executive Order 13175, Indian Tribal Governments

This withdrawal will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Signed this 30th day of April, 2021.

**Jessica Looman,**

*Principal Deputy Administrator, Wage and Hour Division.*

[FR Doc. 2021-09518 Filed 5-5-21; 8:45 am]

**BILLING CODE 4510-27-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket Number USCG-2021-0103]

RIN 1625-AA08

#### Special Local Regulation; Choptank River, Between Trappe and Cambridge, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing special local regulations for certain waters of the Choptank River. This action is necessary to provide for the safety of life on these navigable waters located between Trappe, Talbot County, MD, and Cambridge, Dorchester County, MD, during a swim event on May 16, 2021. This regulation prohibits persons and vessels from being in the regulated area unless authorized by the

Captain of the Port Maryland-National Capital Region or Coast Guard Patrol Commander.

**DATES:** This rule is effective from 6 a.m. through 10:30 a.m. on May 16, 2021.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2021-0103 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email MST2 Shaun Landante, U.S. Coast Guard Sector Maryland-National Capital Region; telephone 410-576-2570, email [D05-DG-SectorMD-NCR-MarineEvents@uscg.mil](mailto:D05-DG-SectorMD-NCR-MarineEvents@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
PATCOM Patrol Commander  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

On February 15, 2021, the TCR Event Management of St. Michaels, MD, notified the Coast Guard that it will be conducting the Maryland Freedom Swim from 7 a.m. to 9:30 a.m. on May 16, 2021. The open water swim consists of approximately 200 participants competing on a designated 1.75-mile linear course. The course starts at the beach of Bill Burton Fishing Pier State Park at Trappe, MD, proceeds across the Choptank River along and between the fishing piers and the Senator Frederick C. Malkus, Jr. Memorial (US-50) Bridge, and finishes at the beach of the Dorchester County Visitors Center at Cambridge, MD. In response, on March 18, 2021, the Coast Guard published a notice of proposed rulemaking (NPRM) titled "Special Local Regulation; Choptank River, Between Trappe and Cambridge, MD" (86 FR 14714). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this swim event. During the comment period that ended April 19, 2021, we received no comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the date of the event, it would be impracticable to make the

regulation effective 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with the “Maryland Freedom Swim” event.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port Maryland-National Capital Region (COTP) has determined that potential hazards associated with the swim event will be a safety concern for anyone intending to operate in or near the swim area. The purpose of this rule is to protect event participants, non-participants, and transiting vessels before, during, and after the scheduled event.

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

As noted above, we received no comments on our NPRM published March 18, 2021. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a special local regulation to be enforced from 6 a.m. to 10:30 a.m. on May 16, 2021. The regulated area will cover all navigable waters of the Choptank River, from shoreline to shoreline, within an area bounded on the east by a line drawn from latitude 38°35'14.2" N, longitude 076°02'33.0" W, thence south to latitude 38°34'08.3" N, longitude 076°03'36.2" W, and bounded on the west by a line drawn from latitude 38°35'32.7" N, longitude 076°02'58.3" W, thence south to latitude 38°34'24.7" N, longitude 076°04'01.3" W, located at Cambridge, MD. The duration of the special local regulations and size of the regulated area are intended to ensure the safety of life on these navigable waters before, during, and after the open water swim event, scheduled from 7 a.m. until 9:30 a.m. on May 16, 2021.

Except for participants and vessels already at berth, a vessel or person will be required to get permission from the COTP or Event PATCOM before entering the regulated area. Vessel operators can request permission to enter and transit through the regulated area by contacting the Event PATCOM on VHF-FM channel 16. Vessel traffic will be able to safely transit the regulated area once the Event PATCOM deems it safe to do so. A person or vessel not registered with the event sponsor as a participant or assigned as official patrols will be considered a non-participant. Official Patrols are any

vessel assigned or approved by the Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

If permission is granted by the COTP or Event PATCOM, a person or vessel will be allowed to enter the regulated area or pass directly through the regulated area as instructed. Vessels will be required to operate at a safe speed that minimizes wake while within the regulated area. Official patrol vessels will direct non-participants while within the regulated area.

### V. Regulatory Analyses

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

#### A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, duration and location of the regulated area. Vessel traffic will be able to safely transit around this regulated area, which would impact a small designated area of the Choptank River for 4½ hours. The Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the status of the regulated area. Moreover, the rule will allow vessels to seek permission to enter the regulated area, and vessel traffic will be able to safely transit the regulated area once the Event PATCOM deems it safe to do so.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration

on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

#### C. Collection of Information

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

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### E. Unfunded Mandates Reform Act

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

#### F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States. The temporary regulated area will be in effect for eight hours. It is categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Memorandum for the Record supporting this determination is available in the docket where indicated under **ADDRESSES**.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 46 U. S. C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.T599–0103 to read as follows:

#### § 100.T599–0103 Maryland Freedom Swim, Choptank River, Between Trappe and Cambridge, MD.

(a) *Regulated area.* The regulations in this section apply to the following area: All navigable waters of the Choptank River, from shoreline to shoreline, within an area bounded on the east by a line drawn from latitude 38°35′14.2″ N, longitude 076°02′33.0″ W, thence south to latitude 38°34′08.3″ N, longitude 076°03′36.2″ W, and bounded on the west by a line drawn from latitude 38°35′32.7″ N, longitude 076°02′58.3″ W, thence south to latitude 38°34′24.7″ N, longitude 076°04′01.3″ W, located at Cambridge, MD. These coordinates are based on datum NAD 1983.

(b) *Definitions.* As used in this section—

*Captain of the Port (COTP) Maryland-National Capital Region* means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region or any Coast Guard commissioned, warrant or petty officer who has been authorized by the COTP to act on his behalf.

*Coast Guard Patrol Commander (PATCOM)* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Maryland-National Capital Region.

*Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

*Participant* means all persons and vessels registered with the event sponsor as participating in the Maryland Freedom Swim or otherwise designated by the event sponsor as having a function tied to the event.

(c) *Regulations.* (1) Except for vessels already at berth, all non-participants are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area described in paragraph (a) of this section unless authorized by the COTP Maryland-National Capital Region or PATCOM.

(2) To seek permission to enter, contact the COTP Maryland-National Capital Region at telephone number 410–576–2693 or on Marine Band Radio, VHF–FM channel 16 (156.8

MHz) or the PATCOM on Marine Band Radio, VHF–FM channel 16 (156.8 MHz). Those in the regulated area must comply with all lawful orders or directions given to them by the COTP Maryland-National Capital Region or PATCOM.

(3) The COTP Maryland-National Capital Region will provide notice of the regulated area through advanced notice via Fifth Coast Guard District Local Notice to Mariners, broadcast notice to mariners, and on-scene official patrols.

(d) *Enforcement officials.* The Coast Guard may be assisted with marine event patrol and enforcement of the regulated area by other Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 6 a.m. to 10:30 a.m. on May 16, 2021.

Dated: April 29, 2021.

**Joseph B. Loring,**

*Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.*

[FR Doc. 2021–09564 Filed 5–5–21; 8:45 am]

**BILLING CODE 9110–04–P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 9, 721, and 725

[EPA–HQ–OPPT–2018–0777; FRL–10023–11]

RIN 2070–AB27

#### Significant New Use Rules on Certain Chemical Substances (19–1.F)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is issuing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances which were the subject of premanufacture notices (PMNs) and a microorganism that was the subject of a Microbial Commercial Activity Notice (MCAN). This action requires persons to notify EPA at least 90 days before commencing manufacture (defined by statute to include import) or processing of any of these chemical substances for an activity that is designated as a significant new use by this rule. This action further requires that persons not commence manufacture or processing for the significant new use until they have submitted a Significant New Use Notice (SNUN), and EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken any risk management

actions as are required as a result of that determination.

**DATES:** This rule is effective on July 6, 2021. For purposes of judicial review, this rule shall be promulgated at 1 p.m. (e.s.t.) on May 20, 2021.

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* William Wysong, New Chemicals Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-4163; email address: [wysong.william@epa.gov](mailto:wysong.william@epa.gov).

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this action apply to me?*

You may be potentially affected by this action if you manufacture, process, or use the chemical substances contained in this rule. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturers or processors of one or more subject chemical substances (NAICS codes 325 and 324110), e.g., chemical manufacturing and petroleum refineries.

This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA. Chemical importers are subject to the TSCA section 13 (15 U.S.C. 2612) import provisions. This action may also affect certain entities through pre-existing import certification and export notification rules under TSCA, which would include the SNUR requirements. The EPA policy in support of import certification appears at 40 CFR part 707, subpart B. In addition, pursuant to 40 CFR 721.20 (or 40 CFR 725.920 for the MCAN substance), any persons who export or intend to export a chemical substance that is the subject of this rule are subject to the export notification provisions of TSCA section 12(b) (15 U.S.C. 2611(b)), and must comply with the export notification requirements in 40 CFR part 707, subpart D.

*B. How can I access the docket?*

The docket includes information considered by the Agency in developing

the proposed and final rules. The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2018-0777, is available at <https://www.regulations.gov> and at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

Due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

**II. Background**

*A. What action is the Agency taking?*

EPA is finalizing SNURs under TSCA section 5(a)(2) for chemical substances which were the subject of PMNs P-17-382, P-18-41, P-18-70, P-18-100, P-18-102, P-18-116, P-18-136, P-18-137, P-18-219, P-18-224, P-18-225, P-18-233, P-18-279, and of MCAN J-18-41. These SNURs require persons who intend to manufacture or process any of these chemical substances for an activity that is designated as a significant new use to notify EPA at least 90 days before commencing that activity.

Previously, in the **Federal Register** of July 31, 2019 (84 FR 37199) (FRL-9994-62), EPA proposed SNURs for these chemical substances. EPA will address the other proposed SNURs in a subsequent **Federal Register** document. More information on the specific chemical substances subject to this final rule can be found in the **Federal Register** document proposing the SNURs. The docket includes information considered by the Agency in developing the proposed and final rules, including the public comments received on the proposed rules that are described in Unit IV.

*B. What is the Agency's authority for taking this action?*

TSCA section 5(a)(2) (15 U.S.C. 2604(a)(2)) authorizes EPA to determine

that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including the four TSCA section 5(a)(2) factors listed in Unit III.A.

*C. Do the SNUR general provisions apply?*

General provisions for SNURs appear in 40 CFR part 721, subpart A. These provisions describe persons subject to the rule, recordkeeping requirements, exemptions to reporting requirements, and applicability of the rule to uses occurring before the effective date of the rule. Provisions relating to user fees appear at 40 CFR part 700. Pursuant to 40 CFR 721.1(c), persons subject to these SNURs must comply with the same SNUN requirements and EPA regulatory procedures as submitters of PMNs under TSCA section 5(a)(1)(A). In particular, these requirements include the information submission requirements of TSCA sections 5(b) and 5(d)(1), the exemptions authorized by TSCA sections 5(h)(1), 5(h)(2), 5(h)(3), and 5(h)(5) and the regulations at 40 CFR part 720. Once EPA receives a SNUN, EPA must either determine that the significant new use is not likely to present an unreasonable risk of injury or take such regulatory action as is associated with an alternative determination before manufacture or processing for the significant new use can commence. If EPA determines that the significant new use is not likely to present an unreasonable risk, EPA is required under TSCA section 5(g) to make public, and submit for publication in the **Federal Register**, a statement of EPA's findings.

**III. Significant New Use Determination**

*A. Determination Factors*

TSCA section 5(a)(2) states that EPA's determination that a use of a chemical substance is a significant new use must be made after consideration of all relevant factors, including:

- The projected volume of manufacturing and processing of a chemical substance.
  - The extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance.
  - The extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance.
  - The reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.
- In determining what would constitute a significant new use for the chemical



substances that are the subject of these SNURs, EPA considered relevant information about the toxicity of the chemical substances and potential human exposures and environmental releases that may be associated with the substances, in the context of the four bulleted TSCA section 5(a)(2) factors listed in this unit.

During its review of the chemical substances that are the subjects of these SNURs and as further discussed in Unit VI., EPA identified potential risk concerns associated with other circumstances of use that, while not intended or reasonably foreseen, may occur in the future. EPA is designating those other circumstances of use as significant new uses.

#### B. Procedures for Significant New Uses Claimed as Confidential Business Information (CBI)

By this rule, EPA is establishing certain significant new uses which have been claimed as CBI subject to Agency confidentiality regulations at 40 CFR part 2 and 40 CFR part 720, subpart E. Absent a final determination or other disposition of the confidentiality claim under 40 CFR part 2 procedures, EPA is required to keep this information confidential. EPA promulgated a procedure to deal with the situation where a specific significant new use is CBI, at 40 CFR 721.1725(b)(1) and has referenced it to apply to other SNURs.

Under these procedures a manufacturer or processor may request EPA to determine whether a specific use would be a significant new use under the rule. The manufacturer or processor must show that it has a *bona fide* intent to manufacture or process the chemical substance and must identify the specific use for which it intends to manufacture or process the chemical substance. If EPA concludes that the person has shown a *bona fide* intent to manufacture or process the chemical substance, EPA will tell the person whether the use identified in the *bona fide* submission would be a significant new use under the rule. Since most of the chemical identities of the chemical substances subject to these SNURs are also CBI, manufacturers and processors can combine the *bona fide* submission under the procedure in 40 CFR 721.1725(b)(1) with that under 40 CFR 721.11 into a single step.

If EPA determines that the use identified in the *bona fide* submission would not be a significant new use, *i.e.*, the use does not meet the criteria specified in the rule for a significant new use, that person can manufacture or process the chemical substance so long as the significant new use trigger is not

met. In the case of a production volume trigger, this means that the aggregate annual production volume does not exceed that identified in the *bona fide* submission to EPA. Because of confidentiality concerns, EPA does not typically disclose the actual production volume that constitutes the use trigger. Thus, if the person later intends to exceed that volume, a new *bona fide* submission would be necessary to determine whether that higher volume would be a significant new use.

#### IV. Public Comments

EPA received public comments from two identifying entities on the proposed rule. The Agency's responses are presented in the Response to Public Comments document that is available in the docket for this rule. EPA did not make changes to any of the proposed rules as a result of these comments. Separately, EPA made changes to the SNUR proposed at 40 CFR 725.1079 for the microorganism which was the subject of MCAN J-18-41. This SNUR, as proposed, included references to 40 CFR part 721. These have been changed to refer instead to the equivalent provisions in 40 CFR part 725, concerning reporting requirements and review processes for microorganisms. The effect of the SNUR has not been altered by these changes.

#### V. Substances Subject to This Rule

EPA is establishing significant new use and recordkeeping requirements for chemical substances in 40 CFR part 721, subpart E, for several chemicals that were the subject of PMNs, and in 40 CFR part 725 for one chemical substance that is a microorganism (MCAN J-18-41). In Unit IV. of the proposed SNUR, EPA provided the following information for each chemical substance:

- PMN or MCAN number.
- Chemical name (generic name, if the specific name is claimed as CBI).
- Chemical Abstracts Service (CAS) Registry number (if assigned for non-confidential chemical identities).
- Basis for the SNUR.
- Potentially useful information.
- CFR citation proposed to be assigned in the regulatory text section. This final rule makes the final assignment to set the CFR citation for the chemical.

The regulatory text section of these rules specifies the activities designated as significant new uses. Certain new uses, including production volume limits and other uses designated in the rules, may be claimed as CBI.

#### VI. Rationale and Objectives of the Rule

##### A. Rationale

The chemical substances that are the subjects of these SNURs received "not likely to present an unreasonable risk" determinations under TSCA section 5(a)(3)(C) based on EPA's review of the intended, known, and reasonably foreseen conditions of use. However, EPA has identified other circumstances that, should they occur in the future, even if not reasonably foreseen, may present risk concerns. Specifically, EPA has determined that deviations from the protective measures identified in the PMN submissions could result in changes in the type or form of exposure to the chemical substances, increased exposures to the chemical substances, and/or changes in the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of the chemical substances. These SNURs identify as a significant new use manufacturing, processing, use, distribution in commerce, or disposal that does not conform to the protective measures identified in the submissions. As a result, those significant new uses cannot occur without first going through a separate, subsequent EPA review and determination process associated with a SNUN.

##### B. Objectives

EPA is issuing these SNURs because the Agency wants:

- To have an opportunity to review and evaluate data submitted in a SNUN before the notice submitter begins manufacturing or processing a listed chemical substance for the described significant new use.
- To be obligated to make a determination under TSCA section 5(a)(3) regarding the use described in the SNUN, under the conditions of use. The Agency will either determine under TSCA section 5(a)(3)(C) that the significant new use is not likely to present an unreasonable risk, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator under the conditions of use, or make a determination under TSCA section 5(a)(3)(A) or (B) and take the required regulatory action associated with the determination, before manufacture or processing for the significant new use of the chemical substance can occur.

Issuance of a SNUR for a chemical substance does not signify that the chemical substance is listed on the TSCA Inventory. Guidance on how to determine if a chemical substance is on



the TSCA Inventory is available on the internet at <https://www.epa.gov/tscainventory>.

### VII. Applicability of the Rules to Uses Occurring Before the Effective Date of the Final Rule

To establish a significant new use, EPA must determine that the use is not ongoing. The chemical substances subject to this rule have undergone premanufacture review. In cases where EPA has not received a notice of commencement (NOC) and the chemical substance has not been added to the TSCA Inventory, no person may commence such activities without first submitting a PMN. Therefore, for chemical substances for which an NOC has not been submitted, EPA concludes that the designated significant new uses are not ongoing.

When the chemical substances identified in this rule are added to the TSCA Inventory, EPA recognizes that, before the rule is effective, other persons might engage in a use that has been identified as a significant new use. However, the identities of many of the chemical substances subject to this rule have been claimed as confidential (per 40 CFR 720.85). Based on this, the Agency believes that it is highly unlikely that any of the significant new uses described in the regulatory text of this rule are ongoing.

EPA designated July 31, 2019 (the date of FR publication of the proposed rule) as the cutoff date for determining whether the new use is ongoing. The objective of EPA's approach is to ensure that a person cannot defeat a SNUR by initiating a significant new use before the effective date of the final rule.

Persons who began commercial manufacture or processing of the chemical substances for a significant new use identified on or after that date will have to cease any such activity upon the effective date of the final rule. To resume their activities, these persons would have to first comply with all applicable SNUR notification requirements and EPA would have to take action under section 5 allowing manufacture or processing to proceed.

### VIII. Development and Submission of Information

EPA recognizes that TSCA section 5 does not require development of any particular new information (*e.g.*, generating test data) before submission of a SNUN. There is an exception: If a person is required to submit information for a chemical substance pursuant to a rule, Order or consent agreement under TSCA section 4, then TSCA section 5(b)(1)(A) requires such information to

be submitted to EPA at the time of submission of the SNUN.

In the absence of a rule, Order, or consent agreement under TSCA section 4 covering the chemical substance, persons are required only to submit information in their possession or control and to describe any other information known to or reasonably ascertainable by them (see 40 CFR 720.50). However, upon review of PMNs and SNUNs, the Agency has the authority to require appropriate testing. Unit IV. of the proposed rule lists potentially useful information for all SNURs listed here. Descriptions are provided for informational purposes. The potentially useful information identified in Unit IV. of the proposed rule will be useful to EPA's evaluation in the event that someone submits a SNUN for the significant new use. Companies who are considering submitting a SNUN are encouraged, but not required, to develop the information on the substance, which may assist with EPA's analysis of the SNUN.

EPA strongly encourages persons, before performing any testing, to consult with the Agency pertaining to protocol election. Furthermore, pursuant to TSCA section 4(h), which pertains to reduction of testing in vertebrate animals, EPA encourages consultation with the Agency on the use of alternative test methods and strategies (also called New Approach Methodologies, or NAMs), if available, to generate the recommended test data. EPA encourages dialog with Agency representatives to help determine how best the submitter can meet both the data needs and the objective of TSCA section 4(h). For more information on alternative test methods and strategies to reduce vertebrate animal testing, visit <https://www.epa.gov/assessing-and-managing-chemicals-under-tsc/a/alternative-test-methods-and-strategies-reduce>.

The potentially useful information described in Unit IV. of the proposed rule may not be the only means of providing information to evaluate the chemical substance associated with the significant new uses. However, submitting a SNUN without any test data may increase the likelihood that EPA will take action under TSCA sections 5(e) or 5(f). EPA recommends that potential SNUN submitters contact EPA early enough so that they will be able to conduct the appropriate tests.

SNUN submitters should be aware that EPA will be better able to evaluate SNUNs which provide detailed information on the following:

- Human exposure and environmental release that may result

from the significant new use of the chemical substances.

### IX. SNUN Submissions

According to 40 CFR 721.1(c), persons submitting a SNUN must comply with the same notification requirements and EPA regulatory procedures as persons submitting a PMN, including submission of test data on health and environmental effects as described in 40 CFR 720.50. SNUNs must be submitted on EPA Form No. 7710-25, generated using e-PMN software, and submitted to the Agency in accordance with the procedures set forth in 40 CFR 720.40. According to 40 CFR 725.900, persons submitting an MCAN for a significant new use of a microorganism must comply with the same notification requirements and EPA regulatory procedures as persons submitting an MCAN for a new microorganism, including submission of test data on health and environmental effects as described in 40 CFR 725.160. E-PMN software is available electronically at <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsc>.

### X. Economic Analysis

EPA has evaluated the potential costs of establishing SNUN requirements for potential manufacturers and processors of the chemical substances subject to this rule. EPA's complete economic analysis is available in the docket for this rulemaking.

### XI. Statutory and Executive Order Reviews

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

#### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action establishes SNURs for new chemical substances that were the subject of PMNs. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

#### B. Paperwork Reduction Act (PRA)

According to the PRA, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires OMB approval under PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control

numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements related to this action have already been approved by OMB pursuant to PRA under OMB control number 2070-0012 (EPA ICR No. 574). This action does not impose any burden requiring additional OMB approval. If an entity were to submit a SNUN to the Agency, the annual burden is estimated to average between 30 and 170 hours per response. This burden estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete, review, and submit the required SNUN.

The listing of the OMB control numbers of the collection instruments and their subsequent codification in the table in 40 CFR 9.1 satisfies the display requirements of the PRA and OMB's implementing regulations at 5 CFR part 1320. Since this ICR was previously subject to public notice and comment prior to OMB approval, and given the technical nature of the table in 40 CFR part 9, EPA finds that further notice and comment to amend it is unnecessary. As a result, EPA finds that there is "good cause" under section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) to amend this table in 40 CFR 9.1 without further notice and comment.

#### C. Regulatory Flexibility Act (RFA)

Pursuant to the RFA section 605(b), 5 U.S.C. 601 *et seq.*, I hereby certify that promulgation of this SNUR does not have a significant adverse economic impact on a substantial number of small entities. The requirement to submit a SNUN applies to any person (including small or large entities) who intends to engage in any activity described in the final rule as a "significant new use". Because these uses are "new," based on all information currently available to EPA, it appears that no small or large entities presently engage in such activities. A SNUR requires that any person who intends to engage in such activity in the future must first notify EPA by submitting a SNUN. Although some small entities may decide to pursue a significant new use in the future, EPA cannot presently determine how many, if any, there may be. However, EPA's experience to date is that, in response to the promulgation of SNURs covering over 1,000 chemicals, the Agency receives only a small number of notices per year. For

example, the number of SNUNs received was seven in Federal fiscal year (FY) 2013, 13 in FY2014, six in FY2015, 12 in FY2016, 13 in FY2017, and 11 in FY2018. Only a fraction of these were from small businesses. In addition, the Agency currently offers relief to qualifying small businesses by reducing the SNUN submission fee from \$16,000 to \$2,800. This lower fee reduces the total reporting and recordkeeping of cost of submitting a SNUN to about \$10,116 for qualifying small firms. Therefore, the potential economic impacts of complying with this SNUR are not expected to be significant or adversely impact a substantial number of small entities. In a SNUR that published in the **Federal Register** of June 2, 1997 (62 FR 29684) (FRL-5597-1), the Agency presented its general determination that final SNURs are not expected to have a significant economic impact on a substantial number of small entities, which was provided to the Chief Counsel for Advocacy of the Small Business Administration.

#### D. Unfunded Mandates Reform Act (UMRA)

Based on EPA's experience with proposing and finalizing SNURs, State, local, and Tribal governments have not been impacted by these rulemakings, and EPA does not have any reasons to believe that any State, local, or Tribal government will be impacted by this action. As such, EPA has determined that this action does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of UMRA sections 202, 203, 204, or 205 (2 U.S.C. 1501 *et seq.*).

#### E. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have a substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999).

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

This action will not have Tribal implications because it is not expected to have substantial direct effects on Indian Tribes, significantly or uniquely affect the communities of Indian Tribal governments, and does not involve or impose any requirements that affect Indian Tribes. Accordingly, the

requirements of Executive Order 13175 (65 FR 67249, November 9, 2000), do not apply to this action.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined by Executive Order 12866, and this action does not address environmental health or safety risks disproportionately affecting children.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because this action is not a significant regulatory action under Executive Order 12866.

#### I. National Technology Transfer and Advancement Act (NTTAA)

Since this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

#### J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action does not entail special considerations of environmental justice related issues as delineated by Executive Order 12898 (59 FR 7629, February 16, 1994).

#### K. Congressional Review Act (CRA)

This action is subject to the CRA (5 U.S.C. 801 *et seq.*), and EPA will submit a rule report containing this rule and other required information to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects

##### 40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

##### 40 CFR Parts 721 and 725

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: April 22, 2021.

**Tala Henry,**

*Deputy Director, Office of Pollution Prevention and Toxics.*

Therefore, for the reasons stated in the preamble, 40 CFR chapter I is amended as follows:

**PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT**

■ 1. The authority citation for part 9 continues to read as follows:

**Authority:** 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, amend the table by adding entries for §§ 721.11278, 721.11282, 721.11283, 721.11285 through 721.11287, 721.11289 through 721.11294, and 721.11603 in numerical order under the undesignated center heading “Significant New Uses of Chemical Substances” to read as follows:

**§ 9.1 OMB approvals under the Paperwork Reduction Act.**

* * * * *	40 CFR citation	OMB control No.
* * * * *	Significant New Uses of Chemical Substances.	* * * * *
* * * * *	721.11278 .....	2070–0012
* * * * *	721.11282 .....	2070–0012
* * * * *	721.11283 .....	2070–0012
* * * * *	721.11285 .....	2070–0012
* * * * *	721.11286 .....	2070–0012
* * * * *	721.11287 .....	2070–0012
* * * * *	721.11289 .....	2070–0012
* * * * *	721.11290 .....	2070–0012
* * * * *	721.11291 .....	2070–0012
* * * * *	721.11292 .....	2070–0012
* * * * *	721.11293 .....	2070–0012
* * * * *	721.11294 .....	2070–0012
* * * * *	721.11603 .....	2070–0012
* * * * *	721.11603 .....	2070–0012
* * * * *	721.11603 .....	2070–0012

**PART 721—SIGNIFICANT NEW USES OF CHEMICAL SUBSTANCES**

■ 3. The authority citation for part 721 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, and 2625(c).

■ 4. Add §§ 721.11278, 721.11282, 721.11283, 721.11285 through 721.11287, 721.11289 through 721.11294, and 721.11603 to subpart E to read as follows:

**Subpart E—Significant New Uses for Specific Chemical Substances**

\* \* \* \* \*

Sec.

- 721.11278 Amides, tallow, N,N-bis(2-hydroxypropyl).
- 721.11282 2,5-Furandione, polymer with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 3a,4,5,6,7,7a-hexahydro-4,7-methano-1H-inden-5(or 6)-yl ester, ester with 2,3-dihydroxypropyl neodecanoate.
- 721.11283 Waste plastics, polyester, depolymd. with glycols, polymers with dicarboxylic acids (generic).
- 721.11285 Substituted alkanolic acid, polymer with alkylcarbonate, alkanediols and isocyanate substituted carbomonocycles, sodium salt, alkenoic acid substituted polyol reaction products-blocked (generic).
- 721.11286 Alkenoic acid, ester with [oxybis(alkylene)]bis[alkyl-substituted alkanediol], polymer with alkylcarbonate, alkanediols, substituted alkenoic acid and isocyanate and alkyl substituted carbomonocycle, sodium salt (generic).
- 721.11287 Castor oil, reaction products with soybean oil.
- 721.11289 1-Butanaminium,N,N,N-tributyl-,2(or 5)-[[benzoyldihydrodioxo [(sulfophenyl) amino]heteropolycycle]oxy]-5(or 2)-(1,1-dimethylpropyl)benzenesulfonate (2:1) (generic).
- 721.11290 Alkylsilsequioxane, ethoxy-terminated (generic).
- 721.11291 Polythioether, short chain diol polymer terminated with aliphatic diisocyanate (generic).
- 721.11292 Alkenoic acid, polymer with alkenylcarbomonocycle, [alkanedylbis (substituted alkylene)] bis[heteromonocycle] and (alkylalkenyl) aromatic, salt (generic).
- 721.11293 Alkenoic acid, polymer with substituted alkyloxirane, alkenylcarbomonocycle, alkyl substituted alkyl alkanediol and (alkylalkenyl) aromatic, salt (generic).
- 721.11294 Alkyl alkenoic acid, alkyl ester, telomer with alkylthiol, substituted carbomonocycle, substituted alkyl alkyl alkenoate and hydroxyalkyl alkenoate, tertbutyl alkyl peroxyate-initiated (generic).
- \* \* \* \* \*
- 721.11603 Substituted heteromonocycle, polymer with substituted alkanediol and diisocyanate substituted carbomonocycle, alkylene glycol acrylate-blocked (generic).

**§ 721.11278 Amides, tallow, N,N-bis(2-hydroxypropyl).**

(a) *Chemical substance and significant new uses subject to reporting.* (1) The chemical substance identified as amides, tallow, N,N-bis(2-hydroxypropyl) (PMN P–17–382; CAS No. 1454803–04–3) is subject to reporting under this section for the

significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposures. It is a significant new use to process the substance resulting in an end use product containing greater than 3% by weight of the substance.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=11.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11282 2,5-Furandione, polymer with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 3a,4,5,6,7,7a-hexahydro-4,7-methano-1H-inden-5(or 6)-yl ester, ester with 2,3-dihydroxypropyl neodecanoate.**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as 2,5-Furandione, polymer with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol, 3a,4,5,6,7,7a-hexahydro-4,7-methano-1H-inden-5(or 6)-yl ester, ester with 2,3-dihydroxypropyl neodecanoate (PMN P–18–41) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(g). It is a significant new use to manufacture (including import) the substance with the number average molecular weight of less than 1000 daltons.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11283 Waste plastics, polyester, depolymd. with glycols, polymers with dicarboxylic acids (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as waste plastics, polyester, depolymd. with glycols, polymers with dicarboxylic acids (PMN P-18-70) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(j).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

**§ 721.11285 Substituted alkanolic acid, polymer with alkylcarbonate, alkanediols and isocyanate substituted carbomonocycles, sodium salt, alkenolic acid substituted polyol reaction products-blocked (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as substituted alkanolic acid, polymer with alkylcarbonate, alkanediols and isocyanate substituted carbomonocycles, sodium salt, alkenolic acid substituted polyol reaction products-blocked (PMN P-18-100) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (j), and (o).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The

provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

**§ 721.11286 Alkenolic acid, ester with [oxybis(alkylene)]bis[alkyl-substituted alkanediol], polymer with alkylcarbonate, alkanediols, substituted alkenolic acid and isocyanate and alkyl substituted carbomonocycle, sodium salt (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkenolic acid, ester with [oxybis(alkylene)]bis[alkyl-substituted alkanediol], polymer with alkylcarbonate, alkanediols, substituted alkenolic acid and isocyanate and alkyl substituted carbomonocycle, sodium salt (PMN P-18-102) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f), (j), and (o).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

**§ 721.11287 Castor oil, reaction products with soybean oil.**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified as castor oil, reaction products with soybean oil (PMN P-18-116) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(f) and (j). It is a significant new use to process or use the substance in any manner that generates an aerosol or mist. It is a significant new use to exceed the confidential annual production volume stated in the PMN.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

(3) *Determining whether a specific use is subject to this section.* The provisions of § 721.1725(b)(1) apply to paragraph (a)(2)(i) of this section.

**§ 721.11289 1-Butanaminium,N,N,N-tributyl-,2(or 5)- [[benzoyldihydrodioxo [(sulfophenyl) amino]heteropolycycle]oxy]-5(or 2)-(1,1-dimethylpropyl)benzenesulfonate (2:1) (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as 1-butanaminium,N,N,N-tributyl-,2(or 5)- [[benzoyldihydrodioxo [(sulfophenyl) amino]heteropolycycle]oxy]-5(or 2)-(1,1-dimethylpropyl)benzenesulfonate (2:1) (PMN P-18-136) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=19.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11290 Alkylsilsesquioxane, ethoxy-terminated (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkylsilsesquioxane, ethoxy-terminated (PMN P-18-137) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure.

(ii) *Release to water.* Requirements as specified in § 721.90(a)(4), (b)(4), and (c)(4), where N=58.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c), (i), and (k) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11291 Polythioether, short chain diol polymer terminated with aliphatic diisocyanate (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as polythioether, short chain diol polymer terminated with aliphatic diisocyanate (PMN P-18-219) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture the PMN substance with molecular weight greater than 10,000 daltons. It is a significant new use to manufacture the PMN substance with free isocyanate residuals greater than 0.01% by weight.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11292 Alkenoic acid, polymer with alkenylcarbomonocycle, [alkanediylbis (substituted alkylene)] bis[heteromonocycle] and (alkylalkenyl) aromatic, salt (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkenoic acid, polymer with alkenylcarbomonocycle, [alkanediylbis (substituted alkylene)] bis[heteromonocycle] and (alkylalkenyl)

aromatic, salt (PMN P-18-224) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure. It is a significant new use to manufacture the substance to contain an acid content greater than 20% by weight.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11293 Alkenoic acid, polymer with substituted alkyloxirane, alkenylcarbomonocycle, alkyl substituted alkyl alkanediol and (alkylalkenyl) aromatic, salt (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkenoic acid, polymer with substituted alkyloxirane, alkenylcarbomonocycle, alkyl substituted alkyl alkanediol and (alkylalkenyl) aromatic, salt (PMN P-18-225) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* It is a significant new use to manufacture, process, or use the substance in any manner that results in inhalation exposure. It is a significant new use to manufacture the substance to contain an acid content greater than 20% by weight.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

**§ 721.11294 Alkyl alkenoic acid, alkyl ester, telomer with alkylthiol, substituted carbomonocycle, substituted alkyl alkyl alkenoate and hydroxyalkyl alkenoate, tertbutyl alkyl peroxyate-initiated (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance identified generically as alkyl alkenoic acid, alkyl ester, telomer with alkylthiol, substituted carbomonocycle, substituted alkyl alkyl alkenoate and hydroxyalkyl alkenoate, tertbutyl alkyl peroxyate-initiated (PMN P-18-233) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Industrial, commercial, and consumer activities.* Requirements as specified in § 721.80(w)(2).

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) through (c) and (i) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

\* \* \* \* \*

**§ 721.11603 Substituted heteromonocycle, polymer with substituted alkanediol and diisocyanate substituted carbomonocycle, alkylene glycol acrylate-blocked (generic).**

(a) *Chemical substance and significant new uses subject to reporting.*

(1) The chemical substance generically identified as substituted heteromonocycle, polymer with substituted alkanediol and diisocyanate substituted carbomonocycle, alkylene glycol acrylate-blocked (PMN P-18-279) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) *Protection in the workplace.* Requirements as specified in § 721.63(a)(1), (4), and (5). For purposes of § 721.63(a)(4), only persons subject to inhalation exposure from spray application of the chemical substance are subject to these requirements. When determining which persons are reasonably likely to be exposed as required for § 721.63(a)(4), engineering control measures (e.g., enclosure or confinement of the operation, general, and local ventilation) or administrative control measures (e.g., workplace policies and procedures) shall be considered and implemented to prevent

exposure, where feasible. For purposes of § 721.63(a)(5) respirators must provide a National Institute for Occupational Safety and Health assigned protection factor of at least 1000.

(ii) [Reserved]

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 721.125(a) though (d) are applicable to manufacturers and processors of this substance.

(2) *Limitation or revocation of certain notification requirements.* The provisions of § 721.185 apply to this section.

## PART 725—REPORTING REQUIREMENTS AND REVIEW PROCESSES FOR MICROORGANISMS

■ 5. The authority citation for part 725 continues to read as follows:

**Authority:** 15 U.S.C. 2604, 2607, 2613, and 2625.

■ 6. Add § 725.1079 to read as follows:

### § 725.1079 Arsenic detecting strain of *E. coli* with extra-chromosomal elements, including an intergeneric screening marker (generic).

(a) *Microorganism and significant new uses subject to reporting.* (1) The genetically-modified microorganism identified generically as arsenic detecting strain of *E. coli* with extra-chromosomal elements, including an intergeneric screening marker (MCAN J-18-41) is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section.

(2) The significant new uses are:

(i) It is a significant new use to manufacture (excluding import) the microorganism in the United States for any use.

(ii) It is a significant new use to use the microorganism other than to detect arsenic in small water samples.

(b) *Specific requirements.* The provisions of subpart L of this part apply to this section except as modified by this paragraph (b).

(1) *Recordkeeping.* Recordkeeping requirements as specified in § 725.950(b)(2) through (4) are applicable to manufacturers and processors of this microorganism.

(2) *Modification or revocation of certain notification requirements.* The provisions of § 725.984 apply to this section.

[FR Doc. 2021-08840 Filed 5-5-21; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 42 CFR Part 37

[Docket No. CDC-2019-0088; NIOSH-330]

RIN 0920-AA68

### Coal Workers' Health Surveillance Program: Autopsy Payment

**AGENCY:** Centers for Disease Control and Prevention, HHS.

**ACTION:** Final rule.

**SUMMARY:** With this final rule, HHS amends existing regulatory text to allow compensation for pathologists who perform autopsies on coal miners at a market rate, on a discretionary basis as needed for public health purposes. HHS has determined that the agency needs additional time to consider the public comments received on the addition of procedures for suspending or revoking B Reader certification, as proposed in the notice of proposed rulemaking preceding this final rule; those procedures will be finalized at a later date.

**DATES:** This rule is effective on July 6, 2021. Comments on the information collection approval request sought under the Paperwork Reduction Act must be received by June 7, 2021.

**ADDRESSES:** Submit comments on the Paperwork Reduction Act information collection to CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806.

**FOR FURTHER INFORMATION CONTACT:** Rachel Weiss, Program Analyst; 1090 Tusculum Ave., MS: C-48, Cincinnati, OH 45226; telephone (855) 818-1629 (this is a toll-free number); email [NIOSHregs@cdc.gov](mailto:NIOSHregs@cdc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Public Participation

HHS invited interested parties to participate in a proposed rulemaking published on February 14, 2020 (85 FR 8521) by submitting written views, opinions, recommendations, and data. HHS received 12 submissions from 11 commenters, including unaffiliated individuals, professional societies, trade associations, a labor union, and a law firm. No submissions were received regarding the proposed Paperwork Reduction Act information collection.

Within the February 14, 2020 rulemaking, HHS published a "Proposed Data Collection Submitted for Public Comment and Recommendations" to obtain comments from the public and affected agencies.

HHS did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, email [omb@cdc.gov](mailto:omb@cdc.gov). Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

##### II. Statutory Authority

The Federal Mine Safety and Health Act of 1977 (Pub. L. 91-173, 30 U.S.C. 801 *et seq.*) (Mine Act), authorizes the HHS Secretary (Secretary) to work with coal mine operators to make available to coal miners the opportunity to have regular and routine chest radiographs (X-rays) in order to detect coal workers' pneumoconiosis (*i.e.*, black lung) and prevent its progression in individual miners. The Mine Act grants the Secretary general authority to issue regulations as is deemed appropriate to carry out provisions of the Act and authorizes the Coal Workers' Health Surveillance Program (Program), within the NIOSH Respiratory Health Division, to detect pneumoconiosis and prevent its progression in individual miners and to provide information to NIOSH for the evaluation of temporal and geographic trends in pneumoconiosis. The Mine Act also authorizes the Secretary to establish specifications for the reading of radiographs and to pay for autopsies submitted to the Program.

##### III. Background and Need for Rulemaking

The NIOSH Respiratory Health Division uses coal miner autopsies to study important issues affecting coal miners, such as evaluating the cause of rapidly progressive and severe pneumoconiosis by assessing its pathology and determining the lung content of mineral particles relative to what was seen in the past. Also, autopsies are sometimes requested after mine disasters. With this final rule, regulatory language promulgated over 45 years ago is updated to reflect the

contemporary costs associated with autopsies. HHS anticipates that increasing the compensation rate will make it economically feasible for pathologists to conduct autopsies of coal miners, thereby allowing the NIOSH Respiratory Health Division to better study pneumoconiosis in contemporary coal miners and to perform public health investigations more thoroughly, especially in the aftermath of mine disasters.

#### IV. Summary of Final Rule

Of the 12 submissions to the docket for this activity, only one addressed the autopsy payment provisions. The commenter agreed that the proposed increase in payment for pathologists who provide autopsies to the NIOSH Coal Workers' Health Surveillance Program is "essential to assure that autopsies can and will be conducted when indicated," and should be incorporated.

To promote administrative efficiency and ensure program integrity, HHS amends 42 CFR part 37 by updating existing regulatory text in §§ 37.202 through 37.204 to allow NIOSH, on a discretionary basis as needed for public health purposes, to better compensate pathologists who perform autopsies on coal miners. Existing text in § 37.202(a) is revised to clarify that pathologists must secure prior authorization for payment from NIOSH and provide proof that legal consent to conduct an autopsy on a coal miner was either obtained or not required, as in the case of a forensic autopsy. New language in § 37.202(a)(2)(i) and (ii) clarifies the types of chest radiographic images accepted by the Program.

New language in § 37.202(b) specifies that pathologists will be compensated in accordance with their ordinary, usual, or customary fees or at amounts agreed upon through negotiation with NIOSH. NIOSH may survey other board-certified pathologists who provide the same services in the same geographic area to inform payment amounts. Existing language in paragraph (b) is revised to clarify that NIOSH will provide additional payment for the submission of chest radiographs of the autopsy subject made within 5 years of the miner's death. Compensation for chest radiographs is offered to the pathologist because NIOSH has found that asking families or estates to provide radiographs is often cumbersome, difficult, and emotionally painful.

Language in § 37.202(c) states that NIOSH will not pay a pathologist for their services if that pathologist has already received payment from another party. The text is revised to clarify that

the prohibition on double payment is extended to the pathologist's employer, the organization in which the pathologist practices, or another entity receiving payment on behalf of or for services provided by the pathologist.

Section 37.203 is revised to update the reference for standard autopsy procedures. Although no public comments addressed § 37.203, NIOSH has added language to paragraph (b)(7) to clarify that the three microscopic slides required for each autopsy must be accompanied by three blocks of tissue that correspond to those slides. The slides and tissue blocks must correspond so that NIOSH can make additional slides if needed.

Finally, new language in § 37.204(a) details the new requirement that the pathologist obtain written authorization from the NIOSH Respiratory Health Division prior to completion of the autopsy. Language specifying how claims for payment should be submitted to NIOSH is reorganized. New language is added to § 37.204(b)(1) to clarify that the claim for payment must include a statement that the pathologist or the pathologist's employer, the organization in which the pathologist practices, or another entity receiving payment on behalf of or for services provided by the pathologist has not been paid for performing the specific autopsy by another party.

In § 37.201(b), the definition of *Miner* is revised to remove the word "underground," to clarify that the autopsy provisions pertain to all coal miners. Section 37.201(d) is also revised to update the definition of *NIOSH*, clarifying that the name of the NIOSH division responsible for administering the Coal Workers' Health Surveillance Program is now the Respiratory Health Division.

#### V. Regulatory Assessment Requirements

*A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined not to be a "significant regulatory action" under section 3(f) of E.O. 12866. The revisions finalized in this notice allow NIOSH to compensate pathologists at a contemporary rate for autopsies submitted to the Coal Workers' Health Surveillance Program.

The revisions to Part 37 do not impose significant costs on the public and will benefit coal miners and coal mine operators. Allowing the NIOSH Respiratory Health Division to better compensate pathologists for autopsies submitted to the Program would also enhance NIOSH's ability to study pneumoconiosis in coal miners.

The costs to the Federal government of administering these revisions would be minor and infrequent. In addition to the administrative costs, NIOSH estimates that over a 5-year period, it might fund up to 20 autopsies, costing NIOSH approximately \$60,000.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires each agency to consider the potential impact of its regulations on small entities including small businesses, small governmental units, and small not-for-profit organizations. HHS certifies that this final rule has "no significant economic impact upon a substantial number of small entities" within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### C. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, requires an agency to invite public comment on, and to obtain Office of Management and Budget (OMB) approval of, any regulation that requires 10 or more people to report information to the agency or to keep certain records. In accordance with section 3507(d) of the PRA, HHS has determined that the PRA does apply to information collection and recordkeeping requirements included in this rule. OMB has already approved the information collection and recordkeeping requirements under OMB Control Number 0920-0020, *National Coal Workers' Health Surveillance Program (CWHSP)* (expiration date 9/30/2021). HHS has determined that the amendments in this final rulemaking will not impact the existing collection of data but would add one new item to the approval: The pathologist prior authorization request. To request more information or to obtain a copy of the data collection plan and instrument send an email to [omb@cdc.gov](mailto:omb@cdc.gov).

Comments are invited on the following: (a) Whether the proposed



collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information

on respondents; and (e) information collection costs. Written comments must be received within 30 days of the publication of this notice. The addition of additional paperwork requirements resulting from this final rule will increase the burden associated with the following provision:

*Section 37.204 Procedure for obtaining payment.* This section establishes that a pathologist who wants

to submit an autopsy to the Coal Workers' Health Surveillance Program must first obtain written authorization from the NIOSH Respiratory Health Division. HHS expects an average of about four requests for prior authorization annually. HHS estimates that each request for prior authorization will take no more than 15 minutes to complete, averaging about one hour annually over a period of years.

Section	Title	Number of respondents	Responses per respondent	Average burden per response (min)	Total burden (hr)
37.204 .....	Authorization for Payment of Autopsy .....	4	1	15/60	1

*D. Small Business Regulatory Enforcement Fairness Act*

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), HHS will report the promulgation of this rule to Congress prior to its effective date.

*E. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector "other than to the extent that such regulations incorporate requirements specifically set forth in law." For purposes of the Unfunded Mandates Reform Act, this final rule does not include any Federal mandate that may result in increased annual expenditures in excess of \$100 million by State, local, or Tribal governments in the aggregate, or by the private sector.

*F. Executive Order 12988 (Civil Justice Reform)*

This final rule has been drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. This rule has been reviewed carefully to eliminate drafting errors and ambiguities.

*G. Executive Order 13132 (Federalism)*

HHS has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have "federalism implications." The rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

*H. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)*

In accordance with Executive Order 13045, HHS has evaluated the environmental health and safety effects of this final rule on children. HHS has determined that the rule will have no environmental health and safety effect on children.

*I. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)*

In accordance with Executive Order 13211, HHS has evaluated the effects of this final rule on energy supply, distribution, or use, and has determined that the rule will not have a significant adverse effect.

*J. Plain Writing Act of 2010*

Under Public Law 111-274 (October 13, 2010), executive Departments and Agencies are required to use plain language in documents that explain to the public how to comply with a requirement the Federal government administers or enforces. HHS has attempted to use plain language in promulgating the final rule consistent with the Federal Plain Writing Act guidelines.

**List of Subjects in 42 CFR Part 37**

Autopsy, Chronic Obstructive Pulmonary Disease, Coal Workers' Pneumoconiosis, Incorporation by reference, Lung diseases, Mine safety and health, Occupational safety and health, Part 90 miner, Part 90 transfer rights, Pneumoconiosis, Respiratory and pulmonary diseases, Silicosis, Spirometry, Surface coal mining, Underground coal mining, X-rays.

**Final Rule**

For the reasons discussed in the preamble, the Department of Health and Human Services amends 42 CFR part 37 as follows:

**PART 37—SPECIFICATIONS FOR MEDICAL EXAMINATIONS OF COAL MINERS**

■ 1. The authority citation for part 37 continues to read as follows:

**Authority:** Sec. 203, 83 Stat. 763, 30 U.S.C. 843, unless otherwise noted.

■ 2. Revise § 37.201 to read as follows:

**§ 37.201 Definitions.**

As used in this subpart:

(a) *Secretary* means the Secretary of Health and Human Services.

(b) *Miner* means any individual who during their life was employed in any coal mine.

(c) *Pathologist* means:

(1) A physician certified in anatomic pathology or pathology by the American Board of Pathology or the American Osteopathic Board of Pathology,

(2) A physician who possesses qualifications which are considered board-eligible by the American Board of Pathology or American Osteopathic Board of Pathology, or

(3) An intern, resident, or other physician in a training program in pathology who performs the autopsy under the supervision of a pathologist as defined in paragraph (c) (1) or (2) of this section.

(d) *NIOSH* means the National Institute for Occupational Safety and Health, located within the Centers for Disease Control and Prevention (CDC). Within NIOSH, the Respiratory Health Division (formerly called the Division of Respiratory Disease Studies and the Appalachian Laboratory for Occupational Safety and Health) is the organizational unit that has



programmatic responsibility for the medical examination and surveillance program.

■ 3. Revise § 37.202 to read as follows:

**§ 37.202 Payment for autopsy.**

(a) NIOSH may, at its discretion, pay any pathologist who has received prior authorization for payment from NIOSH pursuant to § 37.204(a). Payment will only be provided with proof that legal consent for an autopsy as required by applicable law from the next of kin or other authorized person has been obtained, or that consent is not required, such as for a forensic autopsy. Payment may be provided to a pathologist who:

(1) Performs an autopsy on a miner in accordance with this subpart; and  
(2) Submits the findings and other materials to NIOSH in accordance with this subpart within 180 calendar days after having performed the autopsy.

(i) Types of chest radiographic images accepted for submission include a digital chest image (posteroanterior view) provided in an electronic format consistent with the DICOM standards described in § 37.42(c)(5), a chest computed tomography provided in an electronic format consistent with DICOM standards, or a good-quality copy or original of a film chest radiograph (posteroanterior view).

(ii) More than one type of chest radiographic image may be submitted.

(b) If payments are available, pathologists will be compensated in accordance with their ordinary, usual, or customary fees or at amounts determined through negotiation with NIOSH. To inform payment amounts, NIOSH may collect information about the fees charged by other pathologists with the same board certifications for the same services, in the same geographic area. NIOSH will additionally compensate a pathologist for the submission of chest radiographic images made of the subject of the autopsy within 5 years prior to their death together with copies of any interpretations made.

(c) A pathologist (or the pathologist's employer, the organization in which the pathologist practices, or another entity receiving payment on behalf of or for services provided by the pathologist) who receives any other specific payment, fee, or reimbursement in connection with the autopsy from the miner's surviving spouse, family, estate, or any other Federal agency will not receive payment from NIOSH.

■ 4. Revise § 37.203 to read as follows:

**§ 37.203 Autopsy specifications.**

(a) Each autopsy for which a claim for payment is submitted pursuant to this

subpart must be performed in a manner consistent with standard autopsy procedures such as those, for example, set forth in *Autopsy Performance & Reporting, third edition* (Kim A. Collins, ed., College of American Pathologists, 2017). Copies of this document may be borrowed from NIOSH.

(b) Each autopsy must include:

(1) Gross and microscopic examination of the lungs, pulmonary pleura, and tracheobronchial lymph nodes;

(2) Weights of the heart and each lung (these and all other measurements required under this subparagraph must be in the metric system);

(3) Circumference of each cardiac valve when opened;

(4) Thickness of right and left ventricles; these measurements must be made perpendicular to the ventricular surface and must not include trabeculations or pericardial fat. The right ventricle must be measured at a point midway between the tricuspid valve and the apex, and the left ventricle must be measured directly above the insertion of the anterior papillary muscle;

(5) Size, number, consistency, location, description and other relevant details of all lesions of the lungs;

(6) Level of the diaphragm;

(7) From each type of suspected pneumoconiotic lesion, representative microscopic slides stained with hematoxylin eosin or other appropriate stain, and one formalin fixed, paraffin-impregnated block of tissue; a minimum of three stained slides and three blocks of tissue corresponding to the three stained slides must be submitted. When no such lesion is recognized, similar material must be submitted from three separate areas of the lungs selected at random; a minimum of three stained slides and three formalin fixed, paraffin-impregnated blocks of tissue corresponding to the three stained slides must be submitted.

(c) Needle biopsy techniques will not be accepted.

■ 5. Revise § 37.204 to read as follows:

**§ 37.204 Procedure for obtaining payment.**

(a) Prior to performing an autopsy, the pathologist must obtain written authorization from NIOSH and agreement regarding payment amount for services specified in § 37.202(a) by submitting an Authorization for Payment of Autopsy (form CDC 2.19).

(1) NIOSH will maintain up-to-date information about the availability of payments on its website.

(2) After receiving a completed authorization request form, NIOSH will

reply in writing with an authorization determination within 3 working days.

(b) After performance of an autopsy, each claim for payment under this subpart must be submitted to NIOSH and must include:

(1) An invoice (in duplicate) on the pathologist's letterhead or billhead indicating the date of autopsy, the amount of the claim, and a signed statement that the pathologist (or the pathologist's employer, the organization in which the pathologist practices, or another entity receiving compensation on behalf of or for services provided by the pathologist) is not receiving any other specific compensation for the autopsy from the miner's surviving spouse or next-of-kin, the estate of the miner, or any other source.

(2) Completed Consent, Release and History Form for Autopsy (CDC/NIOSH (M)2.6). This form may be completed with the assistance of the pathologist, attending physician, family physician, or any other responsible person who can provide reliable information.

(3) Report of autopsy:

(i) The information, slides, and blocks of tissue required by this subpart.

(ii) Clinical abstract of terminal illness and other data that the pathologist determines is relevant.

(iii) Final summary, including final anatomical diagnoses, indicating presence or absence of simple and complicated pneumoconiosis, and correlation with clinical history if indicated.

**Xavier Becerra,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2021-09499 Filed 5-5-21; 8:45 am]

**BILLING CODE 4163-18-P**

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[MB Docket No. 21-61; RM-11885; DA 21-477; FR ID 24752]

**Television Broadcasting Services  
Lubbock, Texas**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** On February 22, 2021, the Media Bureau, Video Division (Bureau) issued a *Notice of Proposed Rulemaking* in response to a petition for rulemaking filed by Gray Television Licensee, LLC (Gray), the licensee of KCBD, channel 11 (NBC), Lubbock, Texas, requesting the substitution of channel 36 for channel

11 at Lubbock in the DTV Table of Allotments. For the reasons set forth in the Report and Order referenced below, the Bureau amends FCC regulations to substitute channel 36 for channel 11 at Lubbock.

**DATES:** Effective May 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Joyce Bernstein, Media Bureau, at (202) 418-1647 or [Joyce.Bernstein@fcc.gov](mailto:Joyce.Bernstein@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 21-61; RM-11885; DA 21-477, adopted April 26, 2021, and released April 26, 2021. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proposed rule was published at 86 FR 12163 on March 2, 2021. Gray filed comments in support of the petition reaffirming its commitment to applying for channel 36. No other comments were received. In support, Gray states that the Commission has recognized that VHF channels have certain propagation characteristics which may cause reception issues for some viewers, and that many of its viewers experience significant difficulty receiving KCBT's signal. Gray also demonstrated that while there is a small terrain limited predicted loss area when comparing the licensed channel 11 and the proposed channel 36 facilities, all but 350 of the persons currently served by KCBT will continue to be well served by at least five other stations, a number which the Commission has recognized as *de minimis*. The Bureau believes the public interest would be served by the channel substitution because it will result in improved service.

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, do not apply to this proceeding.

The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Part 73**

Television.

Federal Communications Commission.

**Thomas Horan,**

Chief of Staff, Media Bureau.

**Final Rule**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

**PART 73—RADIO BROADCAST SERVICE**

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.622(i), amend the Post-Transition Table of DTV Allotments, under Texas, by revising the entry for Lubbock to read as follows:

**§ 73.622 Digital television table of allotments.**

\* \* \* \* \*

(i) \* \* \*

	Community	Channel No.
	* * * * *	
<b>TEXAS</b>		
Lubbock .....	* * * * *	16, 27, 35, 36, * 39, 40
	* * * * *	

[FR Doc. 2021-09537 Filed 5-5-21; 8:45 am]

**BILLING CODE 6712-01-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 218**

[Docket No. 210421-0084]

**RIN 0648-BJ90**

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon request of the U.S. Navy (Navy), hereby issues

regulations to govern the unintentional taking of marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station Norfolk (NAVSTA Norfolk) over the course of five years (2021-2026). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective from June 7, 2021 to June 7, 2026.

**ADDRESSES:** A copy of the Navy's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-norfolk-norfolk-virginia>. In case of problems accessing these documents, please call the contact listed below.

**FOR FURTHER INFORMATION CONTACT:** Leah Davis, Office of Protected Resources, NMFS, (301) 427-8401.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Regulatory Action**

We received an application from the Navy requesting five-year regulations and authorization to take multiple species of marine mammals. This rule establishes a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take by Level B harassment of marine mammals incidental to the Navy's construction activities, including impact and vibratory pile driving. Please see Background below for definitions of harassment.

**Legal Authority for the Action**

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of

effecting the “least practicable adverse impact” on the affected species or stocks and their habitat (see the discussion below in the Mitigation Measures section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this final rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

### Summary of Major Provisions Within the Final Rule

Following is a summary of the major provisions of this final rule regarding Navy construction activities. These measures include:

- Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities;
- Shutdown of construction activities under certain circumstances to avoid injury of marine mammals; and
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

### Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

### Summary of Request

In February 2020, NMFS received a request from the Navy for an LOA to take marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at NAVSTA Norfolk. NMFS reviewed the Navy’s application, and the Navy provided an updated version addressing NMFS’ questions and comments on May 22, 2020. The application was deemed adequate and complete and published for public review and comment on June 9, 2020 (85 FR 35267). We did not receive substantive comments on the notice of the receipt of the Navy’s application. We subsequently published a proposed rule in the **Federal Register** on December 21, 2020 (85 FR 83001). Comments received during the public comment period on the proposed regulations are addressed in the Comments and Responses section of this final rule.

The Navy plans to conduct construction activities at NAVSTA Norfolk and nearby facilities off the lower Chesapeake Bay. Among other activities, the planned project will include both vibratory pile driving and removal, and impact pile driving. The use of both vibratory and impact pile driving is expected to produce underwater sound at levels that have the potential to result in harassment of marine mammals. The Navy requested authorization to take a small number of five species of marine mammals by Level B harassment only. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity. The regulations are valid for five years (2021–2026).

### Description of the Specified Activity

The Navy is proposing to conduct construction activities at NAVSTA Norfolk on the Naval Station, and at nearby facilities off the lower Chesapeake Bay. The Navy’s planned activities include pile replacement at the Morale, Welfare and Recreation Marina, and installation of two new floating docks at the V-area. Both areas are located on the Naval Station. The Navy also proposes to conduct maintenance/repair activities at the Naval Station and neighboring Defense Fuel Supply Point Craney Island and Lambert’s Point Deperming Station (see Figure 1 of the proposed rule; 85 FR 83001; December 21, 2020). The Navy has indicated specific projects where

existing needs have been identified, as well as estimates for expected emergent or emergency repairs. The planned project will include both vibratory pile driving and removal, and impact pile driving (hereafter, collectively referred to as “pile driving”) over approximately 574 days over five years (2021–2026), with the greatest amount of work occurring during Year 1 (approximately 208 days). The Navy plans to conduct all work during daylight hours.

A detailed description of the planned construction project is provided in the proposed rule (85 FR 83001; December 21, 2020). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to the proposed rule for the description of the specific activity.

### Comments and Responses

We published a proposed rule in the **Federal Register** on December 21, 2020 (85 FR 83001). During the 30-day comment period, we received a letter from the Marine Mammal Commission (Commission), and a comment from the general public. Summaries of all substantive comments, and our responses to these comments, are provided here. Please see the comment letter, available online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-norfolk-virginia>, for full detail regarding the comments received.

*Comment 1:* The Commission recommended that NMFS re-estimate the numbers of Level B harassment takes of harbor seals based on up to 21 rather than 14 seals potentially being taken on the various days of proposed activities.

*Response:* In the proposed rule, NMFS calculated takes based on haulout data from the CBBT (14 Level B harassment takes per day. See the Estimated Take section of the proposed rule; 85 FR 83001; December 21, 2020). The CBBT is approximately 19 km (kilometers; 12 miles (mi)) from the project site, and the ES haulout is approximately 48 km (30 mi) from the project site. While some seals tagged at ES haulouts entered the Chesapeake Bay (Ampela *et al.* 2019), even if a seal enters the Chesapeake Bay, it does not necessarily enter the project area. The Level B harassment zones are <50 m for all impact pile driving, and given the shoreline, Level B harassment zones during vibratory pile driving would be truncated in many directions. Additionally, some seals move between the CBBT and ES haulout sites (Jones *et al.* 2018); therefore, including seals from

both haulouts could result in double counting of the same animals. Further, the nearby HRBT project began pile installation in September, and no seals have been sighted during five months of construction under the project's Marine Mammal Monitoring and Mitigation Program. Therefore, the best available information indicates that the take estimate included in the proposed rule is already conservative, and it is not appropriate to increase the take estimate as suggested by the Commission. Therefore, NMFS does not concur with the Commission's recommendation and does not adopt it.

*Comment 2:* The Commission recommended that NMFS require the Navy to (1) conduct sound source and sound propagation measurements of vibratory and impact installation of at least 10 high-density polyethylene (HDPE), 10 hollow-core fiberglass, and 3 concrete piles using near-field and far-field hydrophones placed mid-water column and (2) include certain specific elements in its hydroacoustic monitoring report.

The Commission also recommended that NMFS require the Navy to increase the sizes of the shut-down zones and Level B harassment zones if the measured data indicate that the model-estimated zones were underestimated.

*Response:* Since publication of the proposed rule, the Navy has determined that sound source verification (SSV) may not be feasible given budget constraints associated with the individual, small-scale projects planned. Therefore, NMFS did not adopt the Commission's recommendation to require sound source and sound propagation measurements for the number of piles it indicated, and NMFS has removed the SSV requirement from this final rule. However, subject to funding availability, the Navy may conduct a SSV study for pile types other than timber piles (prioritizing composite pile types). As noted in the proposed rule, composite piles may be either HDPE or hollow-core fiberglass; the Navy will not necessarily install both types.

If funding is available for a SSV study, the Navy will develop an acoustic monitoring plan. The acoustic monitoring plan would follow accepted methodologies regarding source level measurements and propagation measurements. NMFS generally agrees with the elements that the Commission has suggested that the Navy report, though the exact reporting requirements would be outlined in an acoustic monitoring plan, which would be available at a later date, and would be

reviewed and approved by NMFS prior to implementation.

If the Navy conducts hydroacoustic monitoring, and the results suggest that the Level A or Level B harassment zones were underestimated in this final rule, NMFS will work with the Navy to update the Level A and Level B harassment zone sizes and the associated shutdown zones, as appropriate.

*Comment 3:* The Commission recommends generally that NMFS require the use of shutdown zones that encompass the extent of the associated Level A harassment zone. Specifically, the Commission recommends that NMFS require the Navy to implement a shutdown zone of 55 m rather than 50 m for low-frequency (LF) cetaceans during impact installation of 24-inch (in) concrete piles.

*Response:* NMFS does not agree with the Commission's rationale for this recommendation. Generally speaking, given the duration component associated with actual occurrence of Level A harassment take, it is not necessary to require a shutdown zone equivalent to the estimated Level A harassment zone to avoid permanent threshold shift (PTS), *i.e.*, Level A harassment take. Regardless, in this case, the proposed 50 m shutdown zone is essentially equivalent to the estimated 52 m Level A harassment zone. Nevertheless, the Navy has agreed to implement the 55 m shutdown zone recommended by the Commission.

*Comment 4:* The Commission recommended that NMFS require the Navy to use at least three PSOs to monitor for marine mammals during vibratory pile installation and removal at Pier 3, Pier 12, and Craney Island and four PSOs for Lambert's Point positioned sufficiently in the far field to monitor the largest extents of the respective Level B harassment zones.

*Response:* NMFS concurs with the Commission's recommendation and has adopted it. This final rule requires the Navy to employ at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point, though the exact locations are not stipulated. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020).

*Comment 5:* The Commission recommended that NMFS make available to the public for review and comment all monitoring plans, hydroacoustic and marine mammal-related, contemporaneously with any proposed rule or proposed incidental

harassment authorization that NMFS publishes in the **Federal Register**.

*Response:* NMFS agrees that it is important to ensure adequate review of monitoring plans, including hydroacoustic and marine mammal-related monitoring plans, before they are implemented by applicants. NMFS will review the Navy's proposed marine mammal monitoring plan prior to the start of construction, and therefore prior to the implementation of the plan. If funding is available for a SSV study, the Navy will develop an acoustic monitoring plan, and NMFS will review and approve the plan prior to its implementation. It is important to provide the objectives of proposed monitoring for review by the public. However, as is the case here, methodological details follow widely accepted practices and, therefore, it is unnecessary to provide these plans for public review. To do so would necessitate development of standalone plans at an earlier stage than is ideal or, in some cases, possible.

While the Navy initially expected to submit a standalone marine mammal monitoring and mitigation plan in association with the application, it has since indicated that it is unable to do so given restrictions on funding allocation between NEPA and associated analyses/consultations such as this MMPA authorization and separate construction project funding. The construction project funding must be used for further development of site/project-specific monitoring plans at a later stage of project development. All monitoring requirements in the Navy's LOA application, this final rule, and any subsequent LOA(s) will be incorporated into the construction contractor's monitoring plan.

*Comment 6:* The Commission recommended that NMFS include the requirement, which it deems standard, that the Navy conduct pile driving and removal activities during daylight hours only either in section 218.5 of the final rule or in any LOA issued under the final rule.

*Response:* We do not concur with the Commission's recommendations, or with their underlying justification, and did not adopt them. While the Navy has no intention of conducting pile driving activities at night, it is unnecessary to preclude such activity should the need arise (*e.g.*, on an emergency basis or to complete driving of a pile begun during daylight hours, should the construction operator deem it necessary to do so). Further, while acknowledging that prescribed mitigation measures for any specific action (and an associated determination that the prescribed

measures are sufficient to achieve the least practicable adverse impact on the affected species or stocks and their habitat) are subject to review by the Commission and the public, any determination of what measures constitute “standard” mitigation requirements is NMFS’ alone to make. Even in the context of measures that NMFS considers to be “standard” we reserve the flexibility to deviate from such measures, depending on the circumstances of the action. We disagree with the statement that a prohibition on pile driving activity outside of daylight hours would help to ensure that the Navy is effecting the least practicable adverse impact on the affected species, and the Commission does not justify this assertion.

The final rule includes a measure stating that “should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (e.g., fog, heavy rain, night), pile driving and removal must be delayed until observers are confident marine mammals within the shutdown zone could be detected,” though this need not preclude pile driving at night with sufficient illumination.

*Comment 7:* The Commission recommends that NMFS revise section 218.6(g)(9) in the final rule to require the Navy to report the number of individuals of each species detected within the Level A and B harassment zones, and estimates of the number of marine mammals taken by Level A and B harassment, by species.

In a related comment, the Commission recommended that, for the final rule, NMFS include requirements in section 218.6(g) that the Navy include in its monitoring report (1) the estimated percentages of the Level B harassment zones that were not visible, (2) an extrapolation of the estimated takes by Level B harassment based on the number of observed exposures within the Level B harassment zones and the percentages of the Level B harassment zones that were not visible (i.e., extrapolated takes), and (3) the total number of Level B harassment takes based on both the observed and extrapolated takes for each species.

*Response:* We do not fully concur with the Commission’s recommendation and do not adopt it as stated. NMFS agrees with the recommendation to require the Navy to report the number of individuals of each species detected within the Level A and Level B harassment zones. Section 218.6(g)(9) in the proposed rule stated that the Navy must report the “number of marine mammals detected within the

harassment zones, by species,” which is effectively the same measure as the Commission’s recommended “number of individuals of each species detected within the Level A and B harassment zones.” Therefore, NMFS did not modify that measure. NMFS does not agree with the recommendation to require the Navy to report estimates of the numbers of marine mammals taken by Level A and Level B harassment. The Commission does not explain why it believes this requirement is necessary, nor does it provide recommendations for methods of generating such estimates in a manner that would lead to credible results. NMFS does not agree that the basic method described in footnote 22 of the Commission’s November 19, 2020 letter should be expected to yield estimates of total take such that readers of the Navy’s report should have confidence that the estimates are reasonable representations of what may have actually occurred.

NMFS does agree that the Navy should report the estimated percentage(s) of the Level B harassment zones that were not visible, and has included this requirement in this final rule (See section 218.6(g)(12)). These pieces of information—numbers of individuals of each species detected within the harassment zones and the estimated percentage(s) of the harassment zones that were not visible—may be used to glean an approximate understanding of whether the Navy may have exceeded the amount of take authorized. Although the Commission does not explain its reasoning for offering these recommendations, NMFS recognizes the basic need to understand whether an IHA-holder may have exceeded its authorized take. The need to accomplish this basic function of reporting does not require that NMFS require applicants to use methods we do not have confidence in to generate estimates of “total take” that cannot be considered reliable.

*Comment 8:* The Commission recommended that NMFS *reinforce* that the Navy must keep a running tally of the total Level B harassment takes, both observed and extrapolated, for each species consistent with section 218.5(a)(10) of the final rule.

*Response:* The LOA will indicate the number of takes authorized for each species. We agree that the Navy must ensure they do not exceed authorized takes, but do not concur with the Commission’s repeated recommendations regarding the need for NMFS to dictate how an applicant does so, including by requiring an applicant to maintain a “running tally” of takes. Regardless of the Commission’s

substitution of the word “reinforce” for the word “ensure,” as compared with its prior recommendations for other actions, compliance with the terms of an issued LOA remains the responsibility of the LOA-holder.

### Changes From Proposed to Final Regulations

As noted by the Commission in its informal comments on the proposed rule, Table 13 in the proposed rule mistakenly indicated an estimate of 20 Level B harassment takes of harbor porpoise over the five-year duration of this rule. NMFS corrected this take estimate to reflect 24 takes over the five-year period, as described in the Estimated Take section of this final rule. NMFS has also adjusted the harbor seal take estimate in this final rule to reflect estimated take of 13.6 harbor seals per day, rather than 14 harbor seals per day included in the proposed rule, also described further in the Estimated Take section.

Regarding mitigation, this final rule requires the Navy to establish a 55 m shutdown zone for LF cetaceans during impact driving of 24-in concrete piles, rather than 50 m included in the proposed rule.

Regarding monitoring, the proposed rule stated that the Navy would conduct SSV for composite piles; however, this final rule does not include a requirement for the Navy to conduct SSV. Please see the *Acoustic Monitoring* section for additional information. This final rule requires the Navy to employ at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert’s Point, though the exact locations have not been determined. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020). This change is reflected in the Monitoring and Reporting section of this final rule and in section 218.6(b).

Regarding reporting, this final rule requires the Navy to report the estimated percentage of the Level B harassment zone that was not visible.

### Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the Navy’s application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS’s SARs (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/>)

marine-mammal-stock-assessments) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS’s website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species or stocks for which take is expected and may be authorized, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may

be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS’s SARs). While no mortality is anticipated, nor will mortality be authorized, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS’s stock abundance estimates for most species

represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS’s U.S. Atlantic and Gulf of Mexico SARs (e.g., Hayes *et al.* 2020). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2019 SARs (Hayes *et al.* 2020) or the 2020 draft SARS, available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>.

TABLE 1—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) <sup>1</sup>	Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>2</sup>	PBR	Annual M/SI <sup>3</sup>
<b>Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)</b>						
Family Balaenopteridae (rorquals): Humpback whale .....	<i>Megaptera novaeangliae</i> .....	Gulf of Maine .....	-; N	1,396 (0; 1,380; see SAR).	22	12.15
<b>Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>						
Family Delphinidae: Bottlenose dolphin .....	<i>Tursiops truncatus</i> .....	Western North Atlantic (WNA) Coastal, Northern Migratory. WNA Coastal, Southern Migratory. Northern North Carolina Estuarine System (NNCES).	-; Y -; Y -; Y	6,639 (0.41; 4,759; 2016). 3,751 (0.06; 2,353; 2011). 823 (0.06; 782; 2017) ...	48 23 7.8	12.2–21.5 0–18.3 7.2–30
Family Phocoenidae (porpoises): Harbor porpoise .....	<i>Phocoena phocoena</i> .....	Gulf of Maine/Bay of Fundy ...	-; -; N	95,543 (0.31; 74,034; 2016).	851	217
<b>Order Carnivora—Superfamily Pinnipedia</b>						
Family Phocidae (earless seals): Harbor seal .....	<i>Phoca vitulina</i> .....	WNA .....	-; N	75,834 (0.15; 66,884, 2012).	2,006	350
Gray seal .....	<i>Halichoerus grypus</i> .....	WNA .....	-; N	27,131 (0.19, 23,158, 2016).	1,359	4,729

<sup>1</sup> Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

<sup>2</sup> NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>. CV is coefficient of variation; N<sub>min</sub> is the minimum estimate of stock abundance. In some cases, CV is not applicable.

<sup>3</sup> These values, found in NMFS’s SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all five species (with seven managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we may authorize take. While North Atlantic right whales (*Eubalaena glacialis*), minke whales (*Balaenoptera acutorostrata acutorostrata*), and fin whales (*Balaenoptera physalus*) have been documented in the area, the temporal and/or spatial occurrence of these whales is such that take is not expected to occur, and they are not

discussed further beyond the explanation provided here.

Based on sighting data and passive acoustic studies, the North Atlantic right whale could occur off Virginia year-round (DoN 2009; Salisbury *et al.* 2016). They have also been reported seasonally off Virginia during migrations in the spring, fall, and winter (CeTAP 1981, 1982; Niemeyer *et al.* 2008; Kahn *et al.* 2009; McLellan 2011b, 2013; Mallette *et al.* 2016a, 2016b, 2017, 2018a; Palka *et al.* 2017; Cotter 2019). Right whales are known to frequent the

coastal waters of the mouth of the Chesapeake Bay (Knowlton *et al.* 2002) and the area is a seasonal management area (November 1–April 30) mandating reduced ship speeds out to approximately 20 nautical miles (37 km) for the species; however, the project area is further inside the Bay.

North Atlantic right whales have stranded in Virginia, one each in 2001, 2002, 2004, 2005: Three during winter (February and March) and one in summer (September) (Costidis *et al.* 2017, 2019). In January 2018, a dead,

entangled North Atlantic right whale was observed floating over 60 miles (96.6 km) offshore of Virginia Beach (Costidis *et al.* 2019). All North Atlantic right whale strandings in Virginia waters have occurred on ocean-facing beaches along Virginia Beach and the barrier islands seaward of the lower Delmarva Peninsula (Costidis *et al.* 2017). Due to the low occurrence of North Atlantic right whales in the project area, NMFS is not authorizing take of this species.

Fin whales have been sighted off Virginia (Cetacean and Turtle Assessment Program (CeTAP) 1981, 1982; Swingle *et al.* 1993; DoN 2009; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; Aschettino *et al.* 2018; Engelhaupt *et al.* 2017, 2018; Cotter 2019), and in the Chesapeake Bay (Bailey 1948; CeTAP 1981, 1982; Morgan *et al.* 2002; Barco 2013; Aschettino *et al.* 2018); however, they are not likely to occur in the project area. Sightings have been documented around the Chesapeake Bay Bridge Tunnel (CBBT) during the winter months (CeTAP 1981, 1982; Barco 2013; Aschettino *et al.* 2018).

Eleven fin whale strandings have occurred off Virginia from 1988 to 2016 mostly during the winter months of February and March, followed by a few in the spring and summer months (Costidis *et al.* 2017). Six of the strandings occurred in the Chesapeake Bay (three on eastern shore; three on western shore) with the remaining five occurring on the Atlantic coast (Costidis *et al.* 2017). Documented strandings near the project area have occurred: February 2012, a dead fin whale washed ashore on Oceanview Beach in Norfolk (Swingle *et al.* 2013); December 2017, a live fin whale stranded on a shoal in Newport News and died at the site (Swingle *et al.* 2018); February 2014, a dead fin whale stranded on a sand bar

in Pocomoke Sound near Great Fox Island, Accomack (Swingle *et al.* 2015); and, March 2007, a dead fin whale near Craney Island, in the Elizabeth River, in Norfolk (Barco 2013). Only stranded fin whales have been documented in the project area; no free-swimming fin whales have been observed. Due to the low occurrence of fin whales in the project area, NMFS is not authorizing take of this species.

Minke whales have been sighted off Virginia (CeTAP 1981, 1982; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; McLellan 2017; Engelhaupt *et al.* 2017, 2018; Cotter 2019), near the CBBT (Aschettino *et al.* 2018), but sightings in the project area are from strandings (Jensen and Silber 2004; Barco 2013; DoN 2009). In August 1994, a ship strike incident involved a minke whale in Hampton Roads (Jensen and Silber 2004; Barco 2013). It was reported that the animal was struck offshore and was carried inshore on the bow of a ship (DoN 2009). Twelve strandings of minke whales have occurred in Virginia waters from 1988 to 2016 (Costidis *et al.* 2017). There have been six minke whale stranding from 2017 through 2020 in Virginia waters. Because all known minke whale occurrences in the project area are due to strandings, NMFS is not authorizing take of this species.

A detailed description of the species likely to be affected by the Navy's project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the proposed rule (85 FR 83001; December 21, 2020); since that time, we are not aware of any changes in the status of these species and stocks, except that the Gulf of Maine humpback whale stock has been designated as strategic in the 2020 draft SARs; therefore, detailed descriptions

are not provided here. Please refer to the proposed rule for these descriptions (85 FR 83001; December 21, 2020). Please also refer to NMFS' website (<https://www.fisheries.noaa.gov/find-species>) for generalized species accounts.

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, LF cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for LF cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS [NMFS, 2018]

Hearing group	Generalized hearing range*
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i> ).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

\* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating

that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids,

especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt, 2013).



For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (three cetacean and two phocid pinniped species) have the reasonable potential to co-occur with the planned construction activities. Please refer to Table 1. Of the cetacean species that may be present, one is classified as a LF cetacean (*i.e.*, humpback whale) one is classified as a mid-frequency cetacean (*i.e.*, bottlenose dolphin), and one is classified as a high-frequency cetacean (*i.e.*, harbor porpoise).

#### Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Navy's activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The proposed rule (85 FR 83001; December 21, 2020) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the Navy's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final rule and is not repeated here; please refer to the proposed rule (85 FR 83001; December 21, 2020).

The Estimated Take section in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Mitigation Measures section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. We also provided additional description of sound sources in our proposed rule (85 FR 83001; December 21, 2020).

#### Estimated Take

This section provides an estimate of the number of incidental takes that may be authorized, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities

not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns and potential TTS for individual marine mammals resulting from exposure to pile driving and removal. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.*, shutdown zones) discussed in detail below in the Mitigation Measures section, Level A harassment is neither anticipated nor will be authorized.

As described previously, mortality is neither anticipated nor will be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.*, previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

#### Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment for non-explosive sources*—Though significantly driven by

received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.*, frequency, predictability, duty cycle), the environment (*e.g.*, bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.* 2007, Ellison *et al.* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1  $\mu$ Pa (rms) (microPascal, root mean square) for continuous (*e.g.*, vibratory pile-driving, drilling) and above 160 dB re 1  $\mu$ Pa (rms) for non-explosive impulsive (*e.g.*, seismic airguns) or intermittent (*e.g.*, scientific sonar) sources.

The Navy's construction includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1  $\mu$ Pa (rms) are applicable.

*Level A harassment for non-explosive sources*—NMFS' *Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing* (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's planned construction includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>.



TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds* (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans .....	Cell 1: $L_{pk,flat}$ : 219 dB; $L_{E,LF,24h}$ : 183 dB .....	Cell 2: $L_{E,LF,24h}$ : 199 dB.
Mid-Frequency (MF) Cetaceans .....	Cell 3: $L_{pk,flat}$ : 230 dB; $L_{E,MF,24h}$ : 185 dB .....	Cell 4: $L_{E,MF,24h}$ : 198 dB.
High-Frequency (HF) Cetaceans .....	Cell 5: $L_{pk,flat}$ : 202 dB; $L_{E,HF,24h}$ : 155 dB .....	Cell 6: $L_{E,HF,24h}$ : 173 dB.
Phocid Pinnipeds (PW) (Underwater) .....	Cell 7: $L_{pk,flat}$ : 218 dB; $L_{E,PW,24h}$ : 185 dB .....	Cell 8: $L_{E,PW,24h}$ : 201 dB.
Otariid Pinnipeds (OW) (Underwater) .....	Cell 9: $L_{pk,flat}$ : 232 dB; $L_{E,OW,24h}$ : 203 dB .....	Cell 10: $L_{E,OW,24h}$ : 219 dB.

\* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ( $L_{pk}$ ) has a reference value of 1  $\mu$ Pa, and cumulative sound exposure level ( $L_E$ ) has a reference value of 1  $\mu$ Pa<sup>2</sup>s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels.

The sound field in the project area is the existing background noise plus additional construction noise from the planned project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.*, impact pile driving and vibratory pile driving). The largest

calculated Level B harassment zone extends 7.2 km (4.5 mi) from the source (though truncated by land in some directions), with an area of 4.7 km<sup>2</sup> (1.8 mi<sup>2</sup>), as calculated using geographic information system (GIS) data as determined by the transmission loss modeling.

TABLE 4—PROJECT SOUND SOURCE LEVELS

Pile size and type	Installation method	RMS SPL	Peak SPL	SEL	Source
24-in Square Concrete .....	Impact .....	176	189	163	Illingworth and Rodkin, 2017.
16-in Composite .....	Impact .....	165	177	157	Caltrans, 2015. <sup>1</sup>
12-in Timber .....	Vibratory .....	158	.....	.....	Illingworth and Rodkin, 2017.
	Vibratory .....	<sup>2</sup> 158	.....	.....	Illingworth and Rodkin, 2017.

<sup>1</sup> These source levels are from a 12-in timber pile (Table 2–2, page 2–16).

<sup>2</sup> NMFS typically recommends a proxy source level of 152dB RMS SPL for installation and removal of 12-in timber piles; however, the Navy’s application included specialized modeling (described below) using 158dB RMS SPL. Given that modeling and that 158dB RMS SPL is a more conservative source level, NMFS concurred with the use of 158dB RMS SPL as the proxy source level for 12-in timber piles.

The Navy contracted the University of Washington, Applied Physics Laboratory (APL) to conduct site-specific acoustic transmission loss

modeling for the project. The APL’s full report is included in Appendix B of the Navy’s application. NMFS independently reviewed and concurred

with the modeling in the report, and has adopted the resulting isopleths for the project, as included in Table 5.

TABLE 5—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS

Site	Pile size and type	Level A harassment isopleth (m)				Level B harassment isopleth (m) <sup>1</sup>
		LF cetacean	MF cetacean	HF cetacean	Phocid	
<b>Impact Pile Driving</b>						
Pier 3 .....	16-in Composite .....	18	<10m		27	
Pier 12 .....	16-in Composite .....	18			24	
MWR Marina .....	24-in Concrete .....	52			59	
	16-in Composite .....	11			18	
V-Area .....	24-in Concrete .....	42			47	
	16-in Composite .....	11			17	
Craney Island .....	16-in Composite .....	16			21	
Lambert’s Point .....	16-in Composite .....	19			28	
<b>Vibratory Pile Driving</b>						
Pier 3 .....	16-in Composite/12-in Timber .....	<10m			5,615	
Pier 12 .....					4,159	
MWR Marina .....					469	
V-Area .....					382	

TABLE 5—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS—Continued

Site	Pile size and type	Level A harassment isopleth (m)				Level B harassment isopleth (m) <sup>1</sup>
		LF cetacean	MF cetacean	HF cetacean	Phocid	
Craney Island .....	16-in Composite/12-in Timber	<10m				3,001
Lambert's Point .....						7,161

<sup>1</sup> Please refer to Tables 6–5 and 6–6 in the Navy's application for the areas of the Level B harassment zones.

*Marine Mammal Occurrence and Take Calculation and Estimation*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. We describe how the information provided above is brought together to produce a quantitative take estimate.

**Humpback Whale**

Humpback whales occur in the mouth of the Chesapeake Bay and nearshore waters of Virginia during winter and spring months. Most detections during shipboard surveys were of one or two juveniles per sighting. Although two individuals were detected in the vicinity of MPU project activities, there is no evidence that they linger for multiple days. Because no density estimates are available for the species in this area, the Navy estimated one take for every 60 days of pile driving. However, given the potential group size of two, as indicated by the sightings referenced above, NMFS has estimated that two humpback whales may be taken by Level B harassment for every 60 days of pile driving. Therefore, given the number of project days expected in

each year (Table 4), NMFS may authorize a total of 24 takes by Level B harassment of humpback whale over the five-year authorization, with no more than eight takes by Level B harassment in one year.

The largest Level A harassment zone for low-frequency cetaceans extends approximately 52 m from the source during impact pile driving of 24-in concrete piles at the MWR Marina (Table 5). For most activities, the Level A harassment zone is less than 20 m. The Navy is planning to implement a 55-m shutdown zone for humpback whales during impact pile driving of 24-in concrete piles, and shutdown zones that include the entire Level A harassment isopleth for all activities, as indicated in Table 11. Therefore, the Navy did not request, and NMFS will not authorize Level A harassment take of humpback whale.

**Bottlenose Dolphin**

The expected number of bottlenose dolphins in the project area was estimated using inshore seasonal densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent

areas near Virginia Beach, Virginia, from August 2012 through August 2015 (Engelhaupt *et al.* 2016). To calculate Level B harassment takes of bottlenose dolphin, NMFS used the Chesapeake Bay density of 1.38 dolphins/km<sup>2</sup> (Engelhaupt *et al.* 2016). This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and is the most representative density for the project area. NMFS conservatively multiplied the density of 1.38 dolphins/km<sup>2</sup> by the largest Level B harassment zone for each project location (Table 7) and then by the proportional number of estimated pile driving days at each location for each year (Table 6). For example, to calculate Level B harassment takes associated with work at Pier 3 in 2021, NMFS multiplied the density (1.38 dolphins/km<sup>2</sup>) by largest Level B harassment zone for Pier 3 (10.3 km<sup>2</sup>) by the proportional number of pile driving days at Pier 3 in 2021 (24.6) for a total of 350 Level B harassment takes at Pier 3 in 2021. Therefore, NMFS may authorize 7,566 takes by Level B harassment of bottlenose dolphin across all five years, with no more than 2,742 in one year.

TABLE 6—ESTIMATED NUMBER OF PILE DRIVING DAYS AT EACH PROJECT LOCATION

Location <sup>1</sup>	Estimated number of pile driving days (all seasons)	Proportional number of pile driving days <sup>3</sup>				
		2021	2022	2023	2024	2025
Pier 3 .....	68	24.6	10.0	2.1	9.0	22.3
Pier 12 .....	352	127.6	51.5	11.0	46.6	115.3
MWR Marina .....	52	18.8	7.6	1.6	6.9	17.0
V-Area .....	44	15.9	6.4	1.4	5.8	14.4
Craney Island .....	52	18.8	7.6	1.6	6.9	17.0
Lambert's Point .....	8	2.9	1.2	0.3	1.1	2.6
Estimated Total Pile Driving Days per Year .....	<sup>2</sup> 574	208	84	18	76	188
Percentage of Total Pile Driving Days .....		36	15	3	13	33

<sup>1</sup> While the Navy plans to conduct work at additional locations not listed here, these locations are assumed to be representative of the overall project site (ex: all pile driving lumped together at Lambert's Point Deperming Station), as noted in Appendix A of the Navy's application. Pile driving at these additional locations is included in the total number of pile driving days assumed here.

<sup>2</sup> NMFS recognizes that due to rounding, the sum of the estimated number of work days at each location is 576, not 574. However, as mentioned previously, the Navy expects construction to last 574 days across all five years.

<sup>3</sup> The number of pile driving days indicated per year at each location is intended to inform our assessment of both the total and maximum annual taking allowable under the rule. NMFS does not expect that the Navy will conduct exactly the fractional number of days of pile driving indicated for each year in each location.

TABLE 7—ANNUAL LEVEL B HARASSMENT TAKES OF BOTTLENOSE DOLPHIN BY PROJECT LOCATION

Location	Largest Level B harassment zone (km <sup>2</sup> )	Level B harassment takes <sup>1</sup>					Total
		2021	2022	2023	2024	2025	
Pier 3 .....	10.3	350.2	141.4	30.3	128.0	316.6	966.6
Pier 12 .....	13.1	2,305.9	931.2	199.6	842.5	2,084.2	6,363.5
MWR Marina .....	0.2	5.2	2.1	0.5	1.9	4.7	14.4
V-Area .....	0.2	4.4	1.8	0.4	1.6	4.0	12.1
Craney Island .....	2.2	57.2	23.1	5.0	20.9	51.7	157.9
Lambert's Point .....	4.7	18.8	7.6	1.6	6.9	17.0	51.9
Total Level B Harassment Takes per Year .....	.....	2,742	1,107	237	1,002	2,478	7,566
Annual Takes as Percentage of Five-Year Total .....	.....	36.2	14.6	3.1	13.2	32.8	.....

<sup>1</sup> Note actual calculations were not rounded at each step as they are shown in Table 6 and Table 7.

The Level A harassment zones for mid-frequency cetaceans extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect Level A harassment take of bottlenose dolphins. Additionally, the Navy is planning to implement a 10 m shutdown zone for bottlenose dolphins during all pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize Level A harassment take of bottlenose dolphin.

Harbor Porpoise

Harbor porpoises are known to occur in the coastal waters near Virginia Beach (Hayes *et al.* 2019). Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Harbor porpoise sighting data collected by the U.S. Navy near NAVSTA Norfolk and Virginia Beach from 2012 to 2015 (Engelhaupt *et al.*

2014; 2015; 2016) did not produce enough sightings to calculate densities. One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016). Elsewhere in their range, harbor porpoises typically occur in groups of two to three individuals (Carretta *et al.* 2001; Smultea *et al.* 2017).

Because there are no density estimates for the species in the MPU project area, the Navy conservatively estimated two takes of harbor porpoise by Level B harassment per 60 pile driving days (Table 4), resulting in 20 takes by Level B harassment across the five year rule, and no more than seven takes by Level B harassment in one year. NMFS corrected this estimate in this final rule to reflect that an estimated two takes of harbor porpoise by Level B harassment per 60 pile driving days results in 24 takes by Level B harassment over the five year duration of the rule, with no more than eight takes by Level B harassment in one year (Table 9). NMFS may authorize 24 takes by Level B harassment of harbor porpoise.

The Level A harassment zones for high-frequency cetaceans extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor porpoise. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11). Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of harbor porpoise.

Harbor Seal

The expected number of harbor seals in the project area was estimated using systematic, land- and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from 2014 through 2019 (Jones *et al.* 2020). The average daily seal count from the 2014 through 2019 field seasons ranged from 8 to 23, with an average of 13.6 harbor seals across all the field seasons (Table 8).

TABLE 8—HARBOR SEAL COUNTS AT CHESAPEAKE BAY BRIDGE TUNNEL

Field season	"In season" survey days	Total seal count	Average daily seal count	Max daily seal count
2014–2015 .....	11	113	10	33
2015–2016 .....	14	187	13	39
2016–2017 .....	22	308	14	40
2017–2018 .....	15	340	23	45
2018–2019 .....	10	82	8	17
Average .....	.....	.....	13.6	34.8

Source: Jones *et al.* 2020.

The Navy expects, and NMFS concurs, that harbor seals are likely to be present from November to April. In the proposed rule, NMFS calculated take by Level B harassment by

multiplying 14 seals by the number of pile driving days expected in each year if fewer than 183 project days (half of the year) were expected. To account for seasonal occurrence (November to

April), NMFS calculated take based on 183 project days for years which have more than 183 expected project days (2021, 2025). In this final rule, NMFS calculated take in a parallel manner to

that done in the proposed rule, except NMFS estimated 13.6 seals per day, rather than 14 seals per day to produce a more exact take estimate using the average daily seal count from Jones *et al.* (2020). Therefore, NMFS may authorize 7,399 takes by Level B harassment of harbor seals across the five-year duration of this rule, with no more than 2,489 takes by Level B harassment in one year (Table 9).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of harbor seal.

Gray Seal

Very little information is available about the occurrence of gray seals in the Chesapeake Bay and coastal waters. Although the population of the United States may be increasing, there are only a few records at known haulout sites in Virginia used by harbor seals, strandings are rare, and they have not been reported in shipboard surveys. Assuming that they may utilize the Chesapeake Bay waters, the Navy conservatively estimates that one gray seal may be exposed to noise levels above the Level B harassment threshold for every 60 days of vibratory pile driving during the six month period when they are most likely to be present. NMFS concurs, and calculated take based on the number of project days for years which have fewer than 183 project days (half of the year). To account for the expected seasonal presence of gray seals, NMFS calculated take based on 183 project days for years which have

more than 183 expected project days (2021, 2025). Therefore, NMFS may authorize nine takes by Level B harassment of gray seals over the five-year duration of the rule, with no more than three takes by Level B harassment in one year (Table 9).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones and the low occurrence of gray seals in the project area, we do not expect Level A harassment take of gray seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of gray seal.

TABLE 9—ESTIMATED TAKE BY LEVEL B HARASSMENT, BY SPECIES

Species	2021	2022	2023	2024	2025	Total
Humpback whale	8	4	2	4	6	24
Bottlenose dolphin	2,742	1,107	237	1,002	2,478	7,566
Harbor porpoise <sup>1</sup>	8	4	2	4	6	24
Harbor seal <sup>1</sup>	2,489	1,142	245	1,034	2,489	7,399
Gray seal	3	1	1	1	3	9

<sup>1</sup> Updated since publication of the proposed rule.

TABLE 10—ESTIMATED TAKE BY LEVEL B HARASSMENT (GREATEST ANNUAL TAKE EXPECTED), BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE

Species	Stock	Stock abundance	Level B harassment take	Percent of stock
Humpback Whale	Gulf of Maine	<sup>b</sup> 12,312	8	0.6
Bottlenose Dolphin	WNA Coastal, Northern Migratory <sup>a</sup>	6,639	1,353	20.4
	WNA Coastal, Southern Migratory <sup>a</sup>	3,751	1,353	36.1
	NNCES <sup>c</sup>	823	36	4.4
Harbor Porpoise	Gulf of Maine/Bay of Fundy	95,543	<sup>e</sup> 8	0.008
Harbor Seal	Western North Atlantic	75,834	<sup>e</sup> 2,489	<sup>e</sup> 3.3
Gray Seal	Western North Atlantic	<sup>d</sup> 27,131	3	0.01

<sup>a</sup> Take estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present would follow same probability of presence in the project area. Please see the Small Numbers section for additional information.

<sup>b</sup> West Indies DPS.

<sup>c</sup> Assumes multiple repeated takes of same individuals from small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see the Small Numbers section for additional information.

<sup>d</sup> This stock abundance estimate includes only the U.S. portion of this stock. The actual stock abundance, including the Canadian portion of the population, is estimated to be approximately 451,431 animals.

<sup>e</sup> Updated since publication of the proposed rule.

Mitigation Measures

Under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar

significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of

conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as

well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In addition to the measures described later in this section, the Navy will employ the following mitigation measures:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain stearage and safe working conditions;

- The Navy will conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

- For those marine mammals for which Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level B harassment zone; and

- If take reaches the authorized limit for an authorized species, pile installation/removal will shut down immediately if these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures apply to the Navy's in-water construction activities.

**Establishment of Shutdown Zones**—The Navy will establish shutdown zones for all pile driving and removal activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 11).

**Protected Species Observers (PSOs)**—The placement of PSOs during all pile driving and removal activities (described in the Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile driving and removal. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (e.g., fog, heavy rain, night), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

**Monitoring for Level B Harassment**—The Navy will monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable, and the Level A harassment zones. The Navy will monitor at least a portion of the Level B harassment zone on all pile driving days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of

activity should the animal enter the shutdown zone.

**Pre-activity Monitoring**—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period.

If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence. A determination that the shutdown zone is clear must be made during a period of good visibility (i.e., the entire shutdown zone and surrounding waters must be visible to the naked eye).

**Soft Start**—Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

The Navy does not plan to use a pile driving energy attenuator during construction.

TABLE 11—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL

Site	Pile size and type	Shutdown zone			
		LF cetacean	MF cetacean	HF cetacean	Phocid
Pier 3 .....	16-in Composite .....	20	10m		
Pier 12 .....	16-in Composite .....	20			
MWR Marina .....	24-in Concrete .....	55			
V-Area .....	16-in Composite .....	20			
	24-in Concrete .....	55			
Craney Island .....	16-in Composite .....	20			
	16-in Composite .....	20			
Lambert's Point .....	16-in Composite .....	20			
Pier 3 .....	16-in Composite/12-in Timber .....		10m		

TABLE 11—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL—Continued

Site	Pile size and type	Shutdown zone			
		LF cetacean	MF cetacean	HF cetacean	Phocid
Pier 12 MWR Marina V-Area Craney Island Lambert's Point	16-in Composite/12-in Timber	10m			

Based on our evaluation of the Navy's planned measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

**Monitoring and Reporting**

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. NMFS' MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104 (a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (e.g., presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (e.g., source characterization, propagation, ambient noise); (2) affected species (e.g., life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (e.g., age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term

fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (e.g., marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

The Navy will submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of construction.

*Visual Monitoring*

Marine mammal monitoring during pile driving and removal must be conducted by PSOs meeting NMFS' standards and in a manner consistent with the following:

- Independent PSOs (i.e., not construction personnel) who have no other assigned tasks during monitoring periods must be used;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience; and
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction

activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

At least three PSOs must be used during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point, as recommended by the Commission in its comments on the proposed rule. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020). Depending on available resources, and depending on the size of the zone associated with the activity, additional PSOs may be utilized as necessary. PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures. (See Figure 13-1 of the Navy's application for example representative monitoring locations.)

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

*Acoustic Monitoring*

Since publication of the proposed rule, the Navy has determined that SSV may not be feasible given budget constraints associated with the individual, small-scale projects planned. However, subject to funding availability, the Navy may conduct a SSV study for pile types other than timber piles (prioritizing composite pile types) and would follow accepted methodological standards to achieve

their objectives. The Navy would submit an acoustic monitoring plan to NMFS for approval prior to implementation of the plan. Upon review of the Navy's SSV results, NMFS may update the Level A and Level B harassment zone sizes and the associated shutdown zones, as appropriate.

#### Reporting

The Navy will submit a draft report to NMFS within 45 workdays of the completion of required monitoring for each MPU project. The report will detail the monitoring protocol and summarize the data recorded during monitoring. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, impact or vibratory);
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance);
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;
- Age and sex class, if possible, of all marine mammals observed;
- PSO locations during marine mammal monitoring;
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;
- Number of marine mammals detected within the harassment zones, by species;
- Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and

- Estimated percentage of the Level B harassment zone that was not visible.

If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301-427-8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. The Navy must not resume their activities until notified by NMFS.

The report must include the following information:

- i. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- ii. Species identification (if known) or description of the animal(s) involved;
- iii. Condition of the animal(s) (including carcass condition if the animal is dead);
- iv. Observed behaviors of the animal(s), if alive;
- v. If available, photographs or video footage of the animal(s); and
- vi. General circumstances under which the animal was discovered.

#### Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity,

duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in Table 1, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment, identified above, while activities are underway.

No serious injury or mortality would be expected even in the absence of the required mitigation measures. For all species other than humpback whale, no Level A harassment is anticipated given the nature of the activities. For humpback whale, no Level A harassment is anticipated due to the required mitigation measures, which we expect the Navy will be able to effectively implement given the small Level A harassment zone sizes and high visibility of humpback whales.

The Navy's planned pile driving activities and associated impacts will occur within a limited portion of the confluence of the Chesapeake Bay area. Localized noise exposures produced by project activities may cause short-term behavioral modifications in affected cetaceans and pinnipeds. However, as described previously, the mitigation and monitoring measures are expected to

further reduce the likelihood of injury as well as reduce behavioral disturbances.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (e.g., Thorson and Reyff 2006). Individual animals, even if taken multiple times, will most likely move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. Furthermore, many projects similar to this one are also believed to result in multiple takes of individual animals without any documented long-term adverse effects. Level B harassment will be minimized through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is located on a busy waterfront with high amounts of vessel traffic.

As described in the proposed rule (85 FR 83001; December 21, 2020), Unusual Mortality Events (UMEs) have been declared for Northeast pinnipeds (including harbor seal and gray seal) and Atlantic humpback whales. However, we do not expect takes that may be authorized under this rule to exacerbate or compound upon these ongoing UMEs. As noted previously, no injury, serious injury, or mortality is expected or will be authorized, and Level B harassment takes of humpback whale, harbor seal and gray seal will be reduced to the level of least practicable adverse impact through the incorporation of the required mitigation measures. For the WNA stock of gray seal, the estimated stock abundance is 451,431 animals, including the Canadian portion of the stock (estimated 27,131 animals in the U.S. portion of the stock). Given that only 1 to 3 takes by Level B harassment may be authorized for this stock annually, we do not expect this authorization to exacerbate or compound upon the ongoing UME.

With regard to humpback whales, despite the UME, the relevant

population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.*, 12,312 (95% CI 8,688–15,954) whales in 2004–05 (Bettridge *et al.* 2003)), and appears to be experiencing consistent growth. Further, NMFS will authorize no more than eight takes by Level B harassment annually of humpback whale.

For the WNA stock of harbor seals, the estimated abundance is 75,834 individuals. The estimated M/SI for this stock (350) is well below the PBR (2,006). As such, the Level B harassment takes of harbor seal that may be authorized are not expected to exacerbate or compound upon the ongoing UMEs.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities will not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected (with no known particular importance to marine mammals), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species

or stock through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or will be authorized;
- No Level A harassment take is anticipated or will be authorized;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks;
- The number of anticipated takes is very low for humpback whale, harbor porpoise, and gray seal;
- The specified activity and associated ensouffed areas are very small relative to the overall habitat ranges of all species and do not include habitat areas of special significance (Biologically Important Areas or ESA-designated critical habitat);
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the planned monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

#### Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The instances of take of humpback whale, harbor porpoise, harbor seal, and gray seal which NMFS expects to authorize, comprises less than one-third of the best available stock abundance (Table 10). The number of animals that we expect to authorize to be taken from these stocks would be considered small relative to the relevant stock's



abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

Three bottlenose dolphin stocks occur in the project area: WNA Coastal Northern Migratory, WNA Coastal Southern Migratory, and NNCES stocks. Therefore, the estimated takes of bottlenose dolphin by Level B harassment would likely be portioned among these stocks. Based on the stocks' respective occurrence in the area, NMFS estimated that there would be 100 takes from the NNCES stock over the five-year period (no more than 36 in one year), with the remaining takes evenly split between the northern and southern migratory coastal stocks. Based on consideration of various factors described below, we have determined the numbers of individuals taken would likely comprise less than one-third of the best available population abundance estimate of either coastal migratory stock.

Both the WNA Coastal Northern Migratory and WNA Coastal Southern Migratory stocks have expansive ranges, and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these stocks it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The WNA Coastal Northern Migratory stock occurs during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold-water months, dolphins may occur in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia. During January–March, the WNA Coastal Southern Migratory stock appears to move as far south as northern Florida. From April to June, the stock moves back north to North Carolina. During the warm water months of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of its mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Chesapeake Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~two months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur to only a small portion of either of the migratory coastal stocks.

Both migratory coastal stocks likely overlap with the NNCES stock at various times during their seasonal migrations. The NNCES stock is defined as animals that primarily occupy waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July–August). Animals from this stock also use coastal waters ( $\leq 1$  km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. Comparison of dolphin photo-identification data confirmed that limited numbers of individual dolphins observed in Roanoke Sound have also been sighted in the Chesapeake Bay (Young, 2018). Like the migratory coastal dolphin stocks, the NNCES stock covers a large range. The spatial extent of most small and resident bottlenose dolphin populations is on the order of 500 km<sup>2</sup>, while the NNCES stock occupies over 8,000 km<sup>2</sup> (LeBrecque *et al.* 2015). Given this large range, it is again unlikely that a preponderance of animals from the NNCES stock would depart the North Carolina estuarine system and travel to the northern extent of the stock's range. However, recent evidence suggests that there is likely a small resident community of NNCES dolphins of indeterminate size that inhabits the Chesapeake Bay year-round (E. Patterson, NMFS, pers. comm.).

Many of the dolphin observations in the Chesapeake Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (J. Mann, Potomac-Chesapeake Dolphin Project, pers. comm.). Similarly, using available photo-identification data, Engelhaupt *et*

*al.* (2016) determined that specific individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 km from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by Level B harassment. Furthermore, the existence of a resident dolphin population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

In summary and as described above, the following factors primarily support our determination regarding the incidental take of small numbers of the affected stocks of bottlenose dolphin:

- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of any one stock concentrated in a relatively small area such as the project area or the Chesapeake Bay;

- The Chesapeake Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries; and

- Many of the takes would likely be repeats of the same animals and likely from a resident population of the Chesapeake Bay.

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

#### **Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

#### **Adaptive Management**

The regulations governing the take of marine mammals incidental to Navy maintenance construction activities

contain an adaptive management component.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

#### Endangered Species Act

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

#### National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must evaluate our proposed action (*i.e.*, the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in

Categorical Exclusion B4 of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that this action qualifies to be categorically excluded from further NEPA review.

#### Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The U.S. Navy is the sole entity that would be subject to the requirements in these regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. No comments were received regarding this certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

This rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports.

#### List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: April 30, 2021.

**Samuel D. Rauch, III,**

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

For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

### PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Add subpart A to part 218 to read as follows:

#### Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

Sec.

- 218.1 Specified activity and geographical region.
- 218.2 Effective dates.
- 218.3 Permissible methods of taking.
- 218.4 Prohibitions.
- 218.5 Mitigation requirements.
- 218.6 Requirements for monitoring and reporting.
- 218.7 Letters of Authorization.
- 218.8 Renewals and modifications of Letters of Authorization.
- 218.9 [Reserved]

#### Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

##### § 218.1 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station (NAVSTA) Norfolk.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs at NAVSTA Norfolk and adjacent Navy facilities.

##### § 218.2 Effective dates.

Regulations in this subpart are effective from June 7, 2021 to June 7, 2026.

##### § 218.3 Permissible methods of taking.

Under an LOA issued pursuant to §§ 216.106 of this chapter and 218.7, the Holder of the LOA (hereinafter “Navy”)

may incidentally, but not intentionally, take marine mammals within the area described in § 218.1(b) by Level B harassment associated with construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

#### § 218.4 Prohibitions.

(a) Except for the takings contemplated in § 218.3 and authorized by a LOA issued under §§ 216.106 of this chapter and 218.7, it is unlawful for any person to do any of the following in connection with the activities described in § 218.1 may:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 218.7;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

#### § 218.5 Mitigation requirements.

(a) When conducting the activities identified in § 218.20(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 218.7 must be implemented. These mitigation measures shall include but are not limited to:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA;

(2) The Navy shall conduct briefings for construction supervisors and crews, the monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures;

(3) For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, the Navy shall cease operations and reduce vessel speed to the minimum level required to maintain steerage and safe working conditions;

(4) For all pile driving activity, the Navy shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease;

(5) For all pile driving activity, the Navy shall implement shutdown zones with radial distances as identified in a LOA issued under §§ 216.106 of this chapter and 218.7. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease;

(6) The Navy shall deploy protected species observers (observers) as indicated in its Marine Mammal Monitoring Plan approved by NMFS;

(7) A minimum of three PSOs shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs must be stationed at the best vantage points practicable during vibratory pile driving at Lambert's Point. For all other pile driving activities, a minimum of two observers shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures;

(8) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior shall be monitored and documented. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. Monitoring shall occur throughout the time required to drive a pile. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye);

(9) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. If pile driving is halted or delayed due to the presence of a marine

mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal;

(10) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;

(11) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain, night), the Navy shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected;

(12) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. The Navy shall adhere to the following additional observer qualifications:

(i) Independent observers are required;

(ii) At least one observer must have prior experience working as an observer;

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience;

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer;

(v) Personnel who are engaged in construction activities may not serve as observers.

(13) The Navy shall use soft start techniques for impact pile driving. Soft start for impact drivers requires the Navy and those persons it authorizes or funds to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

(b) [Reserved]

**§ 218.6 Requirements for monitoring and reporting.**

(a) The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) The Navy shall deploy at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point. For all other pile driving activities, the Navy shall deploy a minimum of two PSOs.

(c) Observers shall be trained in marine mammal identification and behaviors. Observers shall have no other construction-related tasks while conducting monitoring.

(d) For all pile driving activities, a minimum of two observers shall be stationed at the active pile driving site or in reasonable proximity in order to monitor the shutdown zone.

(e) The Navy shall monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable and the shutdown zones. The Navy shall monitor at least a portion of the Level B harassment zone on all pile driving days.

(f) The Navy shall submit a draft monitoring report to NMFS within 45 work days of the completion of required monitoring for each marine structure maintenance, pile replacement, and upgrades project. The report must detail the monitoring protocol and summarize the data recorded during monitoring. If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. Specifically, the report must include:

(1) Dates and times (begin and end) of all marine mammal monitoring;

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, impact or vibratory);

(3) Environmental conditions during monitoring periods (at beginning and end of observer shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance);

(4) The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;

(5) Age and sex class, if possible, of all marine mammals observed;

(6) Observer locations during marine mammal monitoring;

(7) Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);

(8) Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;

(9) Number of marine mammals detected within the harassment zones, by species;

(10) Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;

(11) Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and

(12) Estimated percentage of the Level B harassment zone that was not visible.

(g) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301-427-8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. The Navy must not resume their activities until notified by NMFS.

(1) The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

**§ 218.7 Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 218.8.

(e) The LOA shall set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

**§ 218.8 Renewals and modifications of Letters of Authorization.**

(a) An LOA issued under §§ 216.106 of this chapter and 218.7 for the activity identified in § 218.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations, and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a

notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under § 216.106 of this chapter and § 218.7 for the activity identified in § 218.1(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies;

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to § 216.106 of this chapter and § 218.7, a LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

#### § 218.9 [Reserved]

[FR Doc. 2021-09512 Filed 5-5-21; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

[Docket No. 180117042-8884-02; RTID 0648-XB001]

#### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule, closure.

**SUMMARY:** NMFS closes the Angling category Gulf of Mexico area incidental trophy fishery for large medium and giant ("trophy" (*i.e.*, measuring 73 inches (185 cm) curved fork length or greater)) Atlantic bluefin tuna (BFT). This action is being taken to prevent further overharvest of the Angling category Gulf of Mexico incidental trophy BFT subquota.

**DATES:** Effective 11:30 p.m., local time, May 4, 2021, through December 31, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Larry Redd, Jr., [larry.redd@noaa.gov](mailto:larry.redd@noaa.gov), 301-427-8503, Nicholas Velseboer, [nicholas.velseboer@noaa.gov](mailto:nicholas.velseboer@noaa.gov), 978-675-2168, or Lauren Latchford, [lauren.latchford@noaa.gov](mailto:lauren.latchford@noaa.gov), 301-427-8503.

**SUPPLEMENTARY INFORMATION:** Atlantic highly migratory species (HMS) fisheries, including BFT fisheries, are managed under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. Section 635.27 divides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Atlantic HMS FMP and its amendments. NMFS is required under the MSA to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

Under § 635.28(a)(1), NMFS publishes a closure notice with the Office of the Federal Register for publication when a BFT quota (or subquota) is reached or is projected to be reached. Retaining, possessing, or landing BFT under that quota category is prohibited on or after the effective date and time of a closure notice for that category, for the remainder of the fishing year, until the opening of the relevant subsequent quota period or until such date as specified.

#### Angling Category Large Medium and Giant Gulf of Mexico "Trophy" Fishery Closure

The 2021 BFT fishing year, which is managed on a calendar-year basis and subject to an annual calendar-year quota, began January 1, 2021. The Angling category season opened January 1, 2021, and continues through December 31, 2021. The current Angling category quota is 232.4 metric tons (mt), of which 5.3 mt is allocated for the harvest of large medium and giant (trophy) BFT by vessels fishing under the Angling category quota, with 1.8 mt allocated for each of the following areas: North of 39°18' N. lat. (off Great Egg Inlet, NJ); south of 39°18' N. lat. and outside the Gulf of Mexico (the "southern area"); and in the Gulf of Mexico. Per § 635.27(a)(2)(iii), the Gulf of Mexico region includes all waters of the U.S. exclusive economic zone (EEZ) west and north of the boundary stipulated at § 600.105(c). Trophy BFT measure 73 inches (185 cm) curved fork length or greater.

Based on reported landings from the NMFS Automated Catch Reporting System, NMFS has determined that the codified Angling category Gulf of Mexico trophy BFT subquota of 1.8 mt has been reached and exceeded and that a closure of the Gulf of Mexico incidental trophy BFT fishery is warranted. Therefore, retaining, possessing, or landing large medium or giant BFT in the Gulf of Mexico by persons aboard HMS Angling category and the HMS Charter/Headboat permitted vessels (when fishing recreationally) must cease at 11:30 p.m. local time on May 4, 2021. This closure will remain effective through December 31, 2021. This action is intended to prevent further overharvest of the Angling category Gulf of Mexico incidental trophy BFT subquota, and is taken consistent with the regulations at § 635.28(a)(1). NMFS previously closed the 2021 trophy BFT fishery in the southern area on March 1, 2021 (86 FR 12548, March 4, 2021).

If needed, subsequent Angling category adjustments will be published in the **Federal Register**. Information regarding the Angling category fishery for Atlantic tunas, including daily retention limits for BFT measuring 27 inches (68.5 cm) to less than 73 inches and any further Angling category adjustments, is available at [hmspermits.noaa.gov](https://hmspermits.noaa.gov) or by calling (978) 281-9260. HMS Angling category and HMS Charter/Headboat permit holders may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release

and tag-and-release programs at § 635.26. Anglers are also reminded that all BFT that are released must be handled in a manner that will maximize survival, and without removing the fish from the water, consistent with requirements at § 635.21(a)(1). For additional information on safe handling, see the “Careful Catch and Release” brochure available at <https://www.fisheries.noaa.gov/resource/outreach-and-education/careful-catch-and-release-brochure>.

HMS Angling category and HMS Charter/Headboat permitted vessel owners are required to report the catch of all BFT retained or discarded dead, within 24 hours of the landing(s) or end of each trip, by accessing [hmspermits.noaa.gov](https://hmspermits.noaa.gov), using the HMS Catch Reporting app, or calling (888) 872-8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

#### Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is consistent with regulations at 50 CFR part 635, which were issued pursuant to section 304(c) of the Magnuson-Stevens Act and the Atlantic Tunas Convention Act, and is exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons: The regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments and fishery closures to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. The closure of the Angling category Gulf of Mexico incidental trophy fishery is necessary to prevent any further overharvest of the Gulf of Mexico incidental trophy subquota. NMFS provides notification of closures by publishing the notice in the **Federal Register**, emailing individuals who have subscribed to the Atlantic HMS News electronic newsletter, and updating the information posted on the Atlantic Tunas Information Line and on [hmspermits.noaa.gov](https://hmspermits.noaa.gov).

These fisheries are currently underway, and delaying this action would be contrary to the public interest as it could result in excessive trophy BFT landings that may result in future potential quota reductions for the Angling category, depending on the

magnitude of a potential Angling category overharvest. NMFS must close the Gulf of Mexico incidental trophy BFT fishery before additional landings of these sizes of BFT occur. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For all of the above reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

**Authority:** 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: May 3, 2021.

**Kelly Denit,**

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

[FR Doc. 2021-09614 Filed 5-3-21; 4:15 pm]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 210503-0094]

RIN 0648-BK32

#### Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder Fishery; Fishing Year 2021

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

**ACTION:** Final rule.

**SUMMARY:** NMFS announces management measures for the 2021 summer flounder recreational fishery. The implementing regulations for this fishery require NMFS to publish recreational measures for the fishing year. The intent of this action is to achieve, but not exceed, the 2021 summer flounder recreational harvest limit and thereby prevent overfishing on the summer flounder stock.

**DATES:** This rule is effective May 5, 2021.

**FOR FURTHER INFORMATION CONTACT:** Emily Keiley, Fishery Policy Analyst, (978) 281-9116.

**SUPPLEMENTARY INFORMATION:** The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission jointly manage summer flounder. The Council and Commission’s Summer Flounder Management Board meet jointly each year to recommend recreational management measures for summer flounder.

In this final rule, NMFS is implementing conservation equivalency to manage the 2021 summer flounder recreational fishery, as proposed on April 6, 2021 (86 FR 17764). The approval of conservation equivalency means that we are waiving Federal summer flounder recreational measures in Federal waters for all federally permitted summer flounder party/charter vessels, regardless of where they fish. States, through the Commission, are collectively implementing measures designed to constrain landings to the 2021 recreational harvest limit. Vessels fishing in Federal waters and Federal party/charter vessels are subject to the regulations in the state they land. These measures are consistent with the recommendations of the Council and the Commission. Additional information on the development of these measures is provided in the proposed rule and not repeated here.

Conservation equivalency, as established by Framework Adjustment 2 (66 FR 36208; July 11, 2001), allows each state to establish its own recreational management measures (possession limits, fish size, and fishing seasons) to achieve its state harvest limit established by the Commission from the coastwide recreational harvest limit, as long as the combined effect of all of the states’ management measures achieves the same level of conservation as Federal coastwide measures. Framework Adjustment 6 (71 FR 42315; July 26, 2006) allows states to form regions for conservation equivalency in order to minimize differences in regulations for anglers fishing in adjacent waters.

Similar to the 2016–2020 program, the 2021 management program adopted by the Commission divides the recreational fishery into six management regions: (1) Massachusetts; (2) Rhode Island; (3) Connecticut-New York; (4) New Jersey; (5) Delaware-Virginia; and (6) North Carolina. Each state within a region must implement identical or equivalent measures (fish size, bag limit, and fishing season length), and the combination of those measures must be sufficient to achieve, but not exceed, the recreational harvest limit.

Based on the Commission’s recommendation, we find that the 2021 recreational fishing measures required to be implemented in state waters are, collectively, the conservation equivalent of the season, fish size, and possession limit prescribed in 50 CFR 648.104(b), 648.105, and 648.106(a). According to § 648.107(a)(1), vessels subject to the recreational fishing measures are not subject to Federal measures, and instead are subject to the recreational fishing measures implemented by the state in

which they land. Section 648.107(a) is amended through this final rule to recognize state-implemented measures as the conservation equivalent of the Federal coastwide recreational management measures for 2021.

In addition, this action reaffirms the default coastwide measures (a 19-inch (48.3-cm) minimum size, four-fish possession limit, and May 15 through September 15 open fishing season), that becomes effective January 1, 2022, upon the expiration of the 2021 conservation equivalency program.

### Changes From the Proposed Rule

There are no changes from the proposed rule.

### Comments and Responses

NMFS received seven comments on the proposed rule, none of which were directly related to the proposed measures. Four comments were related to state-specific measures and offered concerns over the minimum fish sizes and a perceived lack of recognition of changing fish distribution. Two comments relayed concerns about commercial fishing regulations and general complaints over the management of summer flounder. One commenter discussed a number of ongoing management actions that may impact the future management of the recreational summer flounder fishery. Although there may be future changes to recreational summer flounder management, at this time we are required to either approve conservation equivalency, as this final rule does, or implement coastwide measures. None of these commenters suggested the adoption of coastwide measures or the imposition of the precautionary default measures, which would be alternatives to the conservational equivalent approach of the proposed rule. All comments received were outside the scope of this action. No changes to the final rule are made based on the submitted comments.

### Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this final rule is consistent with the Summer

Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

The Assistant Administrator for Fisheries, NOAA, finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay of effectiveness period for this rule, to ensure that the final management measures are in place as soon as possible.

The Federal coastwide regulatory measures for recreational summer flounder fishing that were codified last year (85 FR 36802; June 18, 2020) remain in effect until the decision to waive Federal measures for 2021 is made effective by this final rule. Many states have already implemented their conservationally equivalent 2021 measures; a delay in implementing the measures of this rule will increase confusion on what measures are in place in Federal waters. Inconsistencies between the states' measures and the Federal measures could lead to potential confusion and misunderstanding of the applicable regulations and could increase the likelihood of noncompliant landings. Additionally, the Federal measures currently in place are more restrictive than many of the measures in state waters, unnecessarily disadvantaging federally-permitted vessels, which are subject to these more restrictive measures until this final rule is effective.

An adjustment period is not needed for regulated entities to comply with this rule. Recreational and charter/party operators will not need new equipment or otherwise need to expend time or money to comply with these management measures. Rather, complying with this final rule simply requires adhering to the published state management measures for summer flounder while the recreational and charter/party operators are engaged in fishing activities.

For these reasons, the Assistant Administrator finds good cause to waive the 30-day delay of effectiveness period and to implement this rule upon filing for public inspection in the **Federal Register**.

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

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

### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 3, 2021.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

### PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.107, revise paragraph (a) introductory text to read as follows:

#### § 648.107 Conservation equivalent measures for the summer flounder fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2021 are the conservation equivalent of the season, size limits, and possession limit prescribed in §§ 648.104(b), 648.105, and 648.106. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

\* \* \* \* \*

[FR Doc. 2021-09604 Filed 5-5-21; 8:45 am]

BILLING CODE 3510-22-P



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

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Parts 50 and 52

[Docket No. PRM-50-117; NRC-2019-0063]

#### Criteria To Return Retired Nuclear Power Reactors to Operations

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; denial.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM), dated December 26, 2018, submitted by George Berka (petitioner). The petition was docketed by the NRC on February 19, 2019, and was assigned Docket No. PRM-50-117. The petitioner requested that the NRC allow the owner or operator of a nuclear power reactor an opportunity to return a retired facility to full operational status, even if the operating license for the facility had previously been surrendered. The NRC is denying the petition because the issue does not involve a significant safety or security concern and the existing regulatory framework may be used to address the issue raised by the petitioner. In addition, the nuclear industry has not expressed a strong interest in returning retired plants to operational status and proceeding with rulemaking to develop a new regulatory framework that may not be used is not a prudent use of resources.

**DATES:** The docket for the petition for rulemaking PRM-50-117 is closed on May 6, 2021.

**ADDRESSES:** Please refer to Docket ID NRC-2019-0063 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2019-0063. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407;

email: [Dawn.Forder@nrc.gov](mailto:Dawn.Forder@nrc.gov). For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section.

- *Attention:* The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov) or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Nicole Fields, Office of Nuclear Material Safety and Safeguards, telephone: 630-829-9570; email: [Nicole.Fields@nrc.gov](mailto:Nicole.Fields@nrc.gov); U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

#### SUPPLEMENTARY INFORMATION:

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- VI. Conclusion

#### I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking—requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On December 26, 2018, the NRC received a petition for rulemaking (PRM) from George Berka (petitioner). The petitioner requested that the NRC revise 10 CFR part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," to establish criteria that would allow retired nuclear

power reactors return to operation after their licenses no longer authorize operation. This circumstance could occur either after the NRC has docketed a licensee's certifications that it has permanently ceased operations and permanently removed fuel from the reactor vessel or when a final legally effective order to permanently cease operations has come into effect.

The petitioner requested "a fair, reasonable, and unobstructed opportunity to return a retired facility to full operational status, even if the operating license for the facility had previously been surrendered." The petitioner requested that facilities "only have to meet the safety standards that had been in place at the time the facility had last operated, and not the latest standards." Specifically, the petitioner requested that a nuclear power reactor be allowed to return to operational status, if "the facility had been in an operational condition at the time of retirement, had last operated no more than twenty-one (21) calendar years prior to the retirement date," the facility "remains intact," and the facility passes a "general safety inspection." Alternatively, the petitioner proposes, if the nuclear power reactor "had not been in an operational condition at the time of retirement, had last operated more than twenty-one (21) calendar years prior to the retirement date, is not intact, and/or has had significant decommissioning and/or dismantling activities commence," then the nuclear power reactor must be repaired or rebuilt "to the safety standards that had been in place at the time the facility had last operated," and pass a safety inspection "appropriate to the degree of repairs or reconstruction that had been performed," which would be, "[a]t the very least . . . a general safety inspection."

The petitioner stated that this proposal would be "'pennies on the dollar,' compared to building new nuclear, or trying to replace the same capacity with wind or solar sources." The petitioner also stated that through this proposal, "several gigawatts of ultra-clean, and very low-carbon, electrical generating capacity could be restored to the electrical grid, which would help to reduce carbon dioxide levels in the atmosphere." The petitioner provided a calculation comparing the cost and time of the



proposal to the cost and time required for replacing similar electrical generating capacity with renewables or new nuclear builds. The petitioner referenced the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, to support the petitioner's statements regarding reducing carbon dioxide emissions.

## II. Public Comments on the Petition

On July 26, 2019, the NRC published a notice of docketing of PRM-50-117 in the **Federal Register** in conjunction with a request for public comment on the PRM. The comment period closed on October 9, 2019; the NRC received 33 comment submissions on the PRM. A *comment submission* is a communication or document submitted to the NRC by an individual or entity, with one or more individual comments addressing a subject or issue. All of the comment submissions received on this petition are available at <https://www.regulations.gov> under Docket ID NRC-2019-0063.

Given the number of comment submissions and the similarities among a number of the comments, the NRC addressed those comments in a separate document, "NRC Response to Public Comments for PRM-50-117," as listed in the "Availability of Documents" section of this document. This comment response document includes a table of comment submissions and ADAMS Accession Nos. for the comment submissions, a summary of each "bin" of similar comments, and the NRC's response to the comments. A brief summary of the most common comments received and the general NRC response is included here.

Of the 33 comment submissions received, 30 supported the PRM and 3 opposed it. The comment submissions supporting the petition provided reasons related to clean energy, environmental considerations, and climate change; the economic considerations and cost-effectiveness of restarting a decommissioning nuclear power plant; and plant closures that occurred solely due to economic factors. The NRC considers these comments to concern issues outside of NRC regulatory authority.

Several comment submissions supporting the petition also stated that there is no practical process for returning decommissioning power plants to operations. The NRC agrees that there is no explicit process for returning a decommissioning power plant to operations but notes that power reactor licensees have expressed minimal interest in pursuing such an

option. Furthermore, the NRC may consider requests from licensees to resume operations under the existing regulatory framework.

Comment submissions opposing the petition stated that plants should be required to meet the latest safety standards before resuming operations, rather than the safety standards in place at the time the facility last operated, as proposed by the petitioner. If the NRC receives a request from the licensee for a decommissioning reactor to resume operations, the NRC would review the request consistent with applicable regulatory requirements. This review would include consideration of relevant safety standards to assure adequate protection of public health and safety.

The comments received do not present additional information supporting the petitioner's proposal that the NRC amend its regulations. After considering the public comments, however, the NRC identified the need to further engage the public to understand the degree to which the nuclear industry would use a new regulatory process for reauthorizing operation of decommissioning power reactors.

## III. Public Meeting on the Petition and Other Topics

On February 25, 2020, the NRC held a public meeting to collect public input on potential regulatory frameworks for power reactors, including the resumption of operation for decommissioning power reactors, deferred status for operating reactors, and reinstatement of terminated combined licenses. These topics are broader than but fully encompass the issue raised by the petitioner, and allow the NRC to evaluate it in a more holistic context.

The public meeting had a total of 41 individuals in attendance. Seven participants asked questions or provided feedback; one of these participants represented a nuclear power plant licensee, one of these participants was the petitioner for this PRM, and five of these participants represented four public interest organizations. The meeting was transcribed, and the full detailed transcript as well as other documents related to the public meeting are listed in the "Availability of Documents" section of this document.

The key insight from the public meeting, as it relates to this PRM, is that there was little support from the participants for the NRC undertaking a rulemaking creating a new regulatory process for the resumption of operations for decommissioning power reactors. Additionally, the nuclear industry

representatives expressed minimal interest in using such a process.

## IV. Reasons for Denial

The NRC is denying the petition because the issue raised by the petitioner does not involve a significant safety or security concern and the existing regulatory framework may be used to address the issue raised by the petitioner. In addition, the nuclear industry has not expressed a strong interest in returning retired plants to operational status and proceeding with rulemaking to develop a new regulatory framework that may not be used is not a prudent use of resources. The following factors were considered by the NRC in making this determination.

### *Current Regulatory Processes*

Under the current requirements in §§ 50.82, "Termination of license," and 52.110, "Termination of license," once a power reactor licensee has submitted written certifications to the NRC for both the permanent cessation of operations and the permanent removal of fuel from the reactor vessel, and the NRC has docketed those certifications, the 10 CFR part 50 or part 52 license no longer authorizes operation of the reactor. No nuclear power plant licensee to date has requested reauthorization of operation after filing both of these certifications. There have been instances in which a licensee submitted to the NRC—and then subsequently withdrew—a certification of an intent to cease operations under § 50.82(a)(1)(i). In those cases, the licensee had not submitted the certification of permanent removal of fuel from the reactor vessel.

While current regulations do not specify a particular mechanism for reauthorizing operation of a nuclear power plant after both certifications are submitted, there is no statute or regulation prohibiting such action. Thus, the NRC may address such requests under the existing regulatory framework. The NRC previously stated this position in an August 2016 letter responding to similar questions raised by Mr. David Kraft, Director, Nuclear Energy Information Service (see NRC response to Question 4). In addition, the NRC previously discussed this topic in a 2014 letter responding to Mr. Robert Abboud of RGA Labs, Inc., a member of the public, concerning relicensing Kewaunee Power Station. These letters are listed in the "Availability of Documents" section of this document.

### *Safety and Security*

This petition does not raise a safety or security concern, nor does it offer any improvements to safety or security. The

current regulations and processes provide reasonable assurance of adequate protection of public health and safety for both operating and decommissioning power reactors. The lack of a safety or security concern would contribute to the low priority of this petition, were it to be considered in rulemaking.

**Resources**

Based on the complexity of the issue raised by the petitioner, a rulemaking on this issue would entail a significant

expenditure of NRC resources. Any such rulemaking effort would likely address a wide variety of technical and regulatory topics including, but not limited to, decommissioning status, aging management, quality assurance, equipment maintenance, personnel, license expiration, hearing process, and appropriate licensing basis.

As discussed in the “Public Meeting on the Petition and Other Topics” section of this document, power reactor licensees expressed minimal interest in a rulemaking establishing a new process

for reauthorization of operation for decommissioning power reactors. Given this minimal interest from the nuclear industry, the NRC expects few, if any, requests for reauthorization. Thus, the benefits of any such rulemaking would not be expected to outweigh the costs.

**V. Availability of Documents**

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No./Federal Register citation
PRM-50-117—Petition of George Berka to Revise the Criteria to Return Retired Nuclear Power Reactors to Operations, December 26, 2018.	ML19050A507
<b>Federal Register</b> Notice, “Criteria to Return Retired Nuclear Power Reactors to Operations,” July 26, 2019 .....	84 FR 36036
NRC Response to Public Comments for PRM-50-117 .....	ML20205L311
Public Meeting Notice: Potential Regulatory Frameworks for Power Reactors, February 25, 2020 .....	ML20043F003
Public Meeting Materials: Potential Regulatory Frameworks for Power Reactors, February 25, 2020 .....	ML20049A021
Public Meeting Transcript: Category 3 Public Meeting Transcript RE: Potential Regulatory Frameworks for Power Reactors, February 25, 2020.	ML20072H393
Public Meeting Summary: Category 3 Public Meeting Summary RE: Potential Regulatory Frameworks for Power Reactors, March 25, 2020.	ML20072H288
NRC Letter to Mr. David A. Kraft of Nuclear Energy Information Service, August 4, 2016 .....	ML16218A266
Letter from Mr. David A. Kraft of Nuclear Energy Information Service, June 16, 2016 .....	ML16175A449
NRC Letter to RGA Labs, Inc., October 21, 2014 .....	ML14288A407
Regulatory Analysis for Regulatory Basis for Regulatory Improvements for Power Reactors Transitioning to Decommissioning, January 2018.	ML17332A075

**VI. Conclusion**

For the reasons cited in this document, the NRC is denying PRM-50-117. The NRC’s existing regulatory framework may be used to address the issue raised by the petitioner, who does not raise a significant safety or security concern, and current requirements continue to provide for the adequate protection of public health and safety and to promote the common defense and security. In addition, the nuclear industry has not expressed a strong interest in returning retired plants to operational status and proceeding with rulemaking to develop a new regulatory framework that may not be used is not a prudent use of resources.

Dated May 3, 2021.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

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**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 240**

[Release No. 34-91603; IC-34246; File No. S7-24-16]

**RIN 3235-AL84**

**Reopening of Comment Period for Universal Proxy**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) is reopening the comment period for its proposal to require the use of universal proxy cards in all non-exempt solicitations in connection with contested elections of directors (“Proposed Rules”). The Proposed Rules were set forth in a release published in the **Federal Register** on November 10, 2016 (Release No. 34-79164) (“2016 Release”), and the related comment period ended on January 9, 2017. The reopening of this comment period is intended to allow interested persons further opportunity to analyze and comment upon the Proposed Rules in light of developments since the

publication of the Proposed Rules, including developments in corporate governance matters affecting funds.

**DATES:** The comment period for the proposed rule published on November 10, 2016 (81 FR 79122), is reopened. Comments should be received on or before June 7, 2021.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission’s internet comment form (<https://www.sec.gov/rules/submitcomments.htm>).

*Paper Comments*

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number S7-24-16. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission’s Public

Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Due to pandemic conditions, however, access to the Commission’s public reference room is not permitted at this time. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the “Stay Connected” option at [www.sec.gov](http://www.sec.gov) to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:**

David M. Plattner, Special Counsel, Christina Chalk, Senior Special Counsel, or Joshua Shainess, Special Counsel, in the Office of Mergers and Acquisitions, at (202) 551–3440, or Steven G. Hearne, Senior Special Counsel, in the Office of Rulemaking, at (202) 551–3430, Division of Corporation Finance, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

As described more fully in the 2016 Release,<sup>1</sup> Section 14 of the Securities Exchange Act of 1934<sup>2</sup> (“Exchange Act”) authorizes the Commission to establish rules and regulations governing the solicitation of any proxy or consent or authorization with respect to any security registered pursuant to the Exchange Act. In regulating the proxy process, the Commission has sought to facilitate the exercise of voting rights shareholders have under state law.<sup>3</sup> To allow shareholders to exercise fully these rights in contested director elections, the Commission proposed to amend the proxy rules to permit shareholders to vote by proxy for any combination of candidates for the board of directors, as they could if they

attended the shareholder meeting in person and cast a written ballot.<sup>4</sup>

The Proposed Rules would establish new procedures for the solicitation of proxies, the preparation and use of proxy cards, and the dissemination of information about all director nominees in contested elections. Among other things, the Proposed Rules would:

- Revise the consent requirement for a bona fide nominee and eliminate the “short slate rule;”<sup>5</sup>
- Create new 17 CFR 240.14a–19 (Rule 14a–19) which, if adopted, would require the use of universal proxy cards—that is, proxy cards that include the names of all duly nominated director candidates for whom proxies are solicited—in all non-exempt solicitations for contested elections;
- Establish procedural requirements for dissidents and registrants to notify each other of their respective director nominees; and
- Require dissidents in a contested election subject to Rule 14a–19 to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors.

The Proposed Rules also include other improvements to the proxy voting process, such as mandating that proxy cards include an “against” voting option when permitted under state laws and requiring disclosure about the effect of a “withhold” vote in an election. Finally, in the 2016 Release, the Commission declined to propose extending the Proposed Rules to registered investment companies and business development companies (“BDCs,” and together with registered investment companies, “funds,”) at that time. Instead, the Commission shared certain observations about the corporate governance of funds and requested comment and data on several topics to determine whether to extend the proposed universal proxy rules to funds in the future.

**II. Reopening of Comment Period**

Since the publication of the Proposed Rules in 2016, there have been important developments in proxy contests, corporate governance, and shareholder activism. For example, there have been several contests in the United States where one or both parties used a universal proxy card since the

2016 Release.<sup>6</sup> During the same time period, there has been increased adoption of proxy access bylaws<sup>7</sup> and use of virtual shareholder meetings.<sup>8</sup> Some registrants have adopted advance notice bylaw provisions that require dissident nominees to consent to being named in the registrant’s proxy statement and on its proxy card.<sup>9</sup>

In addition, there have been developments in corporate governance matters affecting funds, particularly registered closed-end funds and BDCs. In the 2016 Release, the Commission observed that contested elections at open-end funds<sup>10</sup> are rare, because open-end funds generally do not hold annual meetings and their shares can be redeemed at net asset value (or in the case of ETFs, traded at or near net asset value).<sup>11</sup> The 2016 Release also noted that exchange-listed BDCs and registered closed-end funds, unlike most open-end funds, typically do hold annual shareholder meetings, and contested elections occur more frequently for these funds.<sup>12</sup> Contested elections of directors for registered closed-end funds and BDCs have been more common in recent years, as

<sup>6</sup> For example, both the dissident group and the registrant used universal proxy cards at EQT Corporation’s 2019 Annual Meeting. See DEFC14A filed May 20, 2019 by dissidents and DEFC14A filed May 22, 2019 filed by EQT Corp. The registrant but not the dissident group used a universal proxy card at the Sandridge Energy’s 2018 Annual Meeting. See DEFC14A filed May 10, 2018 by Sandridge Energy, Inc. and DEFC14A filed May 11, 2018 by dissidents.

<sup>7</sup> Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, Sidley Austin LLP (Feb. 4, 2020), <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/> (noting that proxy access bylaws have been adopted by 76% of S&P 500 companies and just over half of the companies in the Russell 1000).

<sup>8</sup> See the following report from Broadridge with statistics on the increasing use of virtual shareholders meetings from 2016–2020: [https://www.broadridge.com/\\_assets/pdf/vsm-facts-and-figures-2020-brochure-january-2021.pdf](https://www.broadridge.com/_assets/pdf/vsm-facts-and-figures-2020-brochure-january-2021.pdf).

<sup>9</sup> Tiffany Fobes Campion, Christopher R. Drewry and Joshua M. Dubofsky, *Universal Proxies: What Companies Need to Know*, LATHAM & WATKINS LLP (Dec. 5, 2018), <https://corpgov.law.harvard.edu/2018/12/05/universal-proxies-what-companies-need-to-know/> (stating that more than 80 companies have adopted such advance notice bylaw provisions).

<sup>10</sup> References to open-end funds include both mutual funds and exchange-traded funds (“ETFs”).

<sup>11</sup> Based on staff review of DEFC14A and DFAN14A filings for open-end fund registrants, as was the case in 2016, we are unaware of any contested election involving open-end funds since 2000. See also 2016 Release at notes 182, 190, and accompanying text.

<sup>12</sup> *Id.* The Commission further explained that its understanding at the time was that when dissident shareholders initiated a proxy contest for electing directors, such dissidents normally solicited a complete slate of nominees for all director positions up for election, though the Commission noted some exceptions from that general observation.

<sup>1</sup> See *Universal Proxy*, Release No. 34–79164 (Oct. 26, 2016) [81 FR 79122 (Nov. 10, 2016)].

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> Registrants only reporting pursuant to Exchange Act Section 15(d) are not subject to the federal proxy rules, while foreign private issuers are exempt from the requirements of Section 14(a). 17 CFR 240.3a12–3(b).

<sup>4</sup> As part of this effort, the staff is also considering recommending that the Commission propose amendments to the proxy rules to facilitate vote confirmations for shareholders and improve voting accuracy in the proxy system.

<sup>5</sup> 17 CFR 240.14a–4(d)(1) and (4).

compared to the few years preceding the 2016 Release.<sup>13</sup> Other corporate governance developments relating to funds since the 2016 Release include, for example, an increase in interest by closed-end funds in including provisions in their governing documents requiring that directors be elected by a majority of all shares outstanding, rather than of shares voted, and funds opting into a state's control share acquisition statute.<sup>14</sup>

In light of these developments since the 2016 Release, the Commission is reopening the comment period for the Proposed Rules until June 7, 2021 to provide the public with an additional opportunity to analyze and comment upon the Proposed Rules. Commenters may submit, and the Commission will consider, comments on any aspect of the Proposed Rules. Comments are particularly helpful to us if accompanied by quantified estimates or other detailed analysis and supporting data regarding the issues in those comments. Where possible, when providing data and information regarding funds, please provide distinct data and information for open-end

<sup>13</sup> Based on staff review of PREC14A and DEFC14A filings, for calendar years 2017 through 2020, we estimate that there have been 46 contested director elections involving funds, representing over two times the rate of such contests per year than that reported in the 2016 Release (for 2014 through 2015). We estimate that there were a total of 686 registered closed-end funds and 85 BDCs active in 2020, based on staff review of filings from July 1, 2019, through June 30, 2020. Excluding contests where the same dissident targeted additional funds in the same fund complex in the same year, we estimate that the rate of contested director elections involving funds from 2017 to 2020 was about 25% higher than that reported in the 2016 Release. We are aware of three contests involving funds in 2017 through 2020 in which the dissident sought fewer than the total number of seats up for election (overall or for certain shareholders voting as a separate class). Approximately 85% of funds involved in a contested election had a classified board, based on FactSet Corporate Governance data. Accordingly, dissident shareholders often presented a full slate of nominees for the director seats up for election, which, if elected, would have constituted a minority of the board. Along with nominating directors, such dissidents sometimes also presented proposals to declassify the board and require that all directors be elected annually. As the Commission observed in 2016, along with contested director elections, dissident shareholders commonly included proposals consistent with reducing the discount of the share price to the net asset value, such as terminating the advisory contract and commencing a self-tender offer.

<sup>14</sup> Control share acquisition statutes provide a company with the right to prevent or restrict certain changes in corporate control by altering or removing voting rights when a person acquires control shares. In May 2020, the staff withdrew a prior staff position discussing the intersection of control share acquisition statutes and Section 18(i) of the Investment Company Act. Division of Investment Management Staff Statement, May 27, 2020, *avail. at* <https://www.sec.gov/investment/control-share-acquisition-statutes>.

funds, registered closed-end funds, and BDCs. In addition to the requests for comment included in the 2016 Release, the Commission specifically seeks comments on the following:

1. The Proposed Rules would require dissidents in a contested election subject to proposed Rule 14a-19 to solicit the holders of shares representing at least a majority of the voting power of shares entitled to vote on the election of directors. Should we instead require dissidents to solicit a greater percentage of the voting power? For example, should the threshold be 67% or 75% of the voting power, or some other percentage? What would be the incremental effects of a higher minimum solicitation requirement on the cost of proxy contests?

2. How should we consider the recent increase in the number of companies with dual or multi-class stock structures in determining a minimum solicitation requirement?

3. Would a higher minimum solicitation threshold, such as 67% or 75%, prevent more nominal contests, in which the dissidents incur little more than the basic required costs to pursue a contest, as compared to the proposed majority solicitation requirement? Would it be more likely to deter other contests than the proposed majority solicitation requirement and, if so, what are the costs and benefits of that outcome?

4. Since the 2016 Release, there have been several high-profile contested elections at registrants that were significantly larger than the typical proxy contest target. To what extent does this development affect any of the aspects, including the costs and benefits, of the Proposed Rules? Should these contests affect our consideration of the appropriate minimum solicitation requirement? If so, how?

5. We request any estimates or data that would allow us to refine our characterization of costs and benefits of nominal contests under the current state of the proxy process and how such effects would differ under the availability of a universal proxy card. In particular, we request specific estimates of the costs that are incurred by registrants in such contests, including the costs of disclosure, solicitation, and board and management time; and the costs and benefits to shareholders.

6. As discussed above, there have been several contests in the United States since the 2016 Release in which one or both parties used a universal proxy card. Do the experiences of registrants, shareholders, dissidents, and other participants in the proxy process in these situations provide any

new information about any of the aspects, including the costs and benefits, of the Proposed Rules? To what extent does the experience with advance notice bylaws that require dissident nominees to consent to being included on the registrant's proxy card (e.g., as part of the director questionnaire) affect any aspects of the Proposed Rules?

7. The Proposed Rules would require a dissident to provide notice to a registrant of its intent to solicit proxies in support of director nominees other than the registrant's nominees no later than 60 calendar days prior to the anniversary of the previous year's annual meeting date. Have there been any developments since the 2016 Release with respect to the frequency with which contests are settled or withdrawn after the proposed deadline for dissidents to provide notice of their intent to solicit proxies for their own nominees? We request specific data on the timing and frequency of such actions. Would such settlements or withdrawals of proxy contests and the related actions of registrants and dissidents be changed by the proposed notice requirement and mandatory use of a universal proxy card and, if so, are there any modifications we should make to the Proposed Rules in response?

8. In the 2016 Release, the Commission noted that the burden of attending a meeting for the purpose of voting a split ticket may be lower in the case of a virtual shareholder meeting, but that such meetings were relatively rare and that the Commission was unaware of any proxy contest that culminated in a virtual meeting. Virtual shareholder meetings have increased in frequency since then, particularly due to the unique circumstances presented by COVID-19 in 2020. To what extent should this development affect our assessment of the Proposed Rules? Is the increase likely to continue if concerns about COVID-19 are reduced or eliminated? Are increased virtual meetings likely to affect the cost of split-ticket voting in the future, even in the absence of a universal proxy card? Are virtual meetings unlikely to be used in the case of a contest? How are virtual meetings likely, or not, to affect the nature of proxy contests, such as their frequency or targets, in the future?

9. There have been several changes in the governance, activism, and voting landscape in recent years, such as an increase in the adoption of proxy access bylaws and other changes discussed above. To what extent do any of these developments affect any of the aspects, including the costs and benefits, of the Proposed Rules?

10. Are there any other developments since the 2016 Release that should affect our consideration of adopting a universal proxy card requirement? Are there any other developments that affect any of the aspects, including the costs and benefits, of the Proposed Rules? Are there any changes we should consider in the analytical methodologies and estimates presented in the 2016 Release? Are there any other types of changes we should consider in light of developments since the 2016 Release?

11. Would any presentation and formatting requirements in addition or as an alternative to those discussed in the 2016 Release be appropriate or helpful for universal proxy cards used in contested elections? For example, should we consider requiring a uniform format for the voting options listed next to the nominees' names?

12. Is there a need for the Proposed Rules to facilitate a standardized presentation of all nominees on voting instruction forms and electronic proxy voting platforms in the context of contested elections?

13. In the 2016 Release, the Commission proposed to exclude all funds from the application of the Proposed Rules at that time, regardless of whether the fund was structured as a closed-end fund or an open-end fund. In light of the differences noted both in the 2016 Release and by commenters, as well as the fact there have been no contests in open-end funds since 2000, but proxy contests for registered closed-end funds have increased in recent years relative to the years preceding the 2016 Release, we are considering whether we should differentiate between open-end funds, registered closed-end funds, BDCs, and other registrants. In particular, we are considering whether we should apply the proposed universal proxy card requirements to registered closed-end funds and BDCs. We request comment on the extent to which the similarities or differences among open-end funds, registered closed-end funds, and BDCs should result in similar or differential application of the universal proxy rules.

14. In the 2016 Release, the Commission discussed the use of cluster and unitary boards by funds and whether dissident board members on a board within such a fund complex could reduce the efficiencies of such board structures. Commenters on the Proposed Rules also discussed these concerns, particularly for open-end funds. How commonly do registered closed-end funds and BDCs utilize a unitary structure, where a single board oversees every fund in a fund complex? How frequently do they use a cluster

board structure, where two or more boards each oversee a different set of funds in the complex? Do the same concerns noted by commenters about a dissident director disrupting this cluster board structure in open-end fund complexes apply to these registered closed-end funds and BDCs? To the extent a universal proxy card requirement would cause disruptions for open-end funds, closed-end funds, or BDCs, are the costs of these disruptions justified by the benefits to shareholders of the ability to vote by proxy as if they were attending the shareholder meeting in person? To what extent would disclosure to shareholders in the proxy materials regarding such potential losses in efficiency be sufficient to mitigate the risk of such disruptive outcomes?

15. We have observed that a large fraction of the recent contests at closed-end funds involve a dissident contesting elections of multiple funds in the same fund complex. To what extent is any potential disruption to unitary or cluster boards different in situations where a dissident is seeking election of directors for multiple funds in a complex? How, if at all, should such contests affect our consideration of whether to extend the mandatory universal proxy card requirement to some or all funds?

16. In reviewing proxy contests since 2016, we observed that many closed-end funds subject to a proxy contest utilized a classified board structure, meaning that only a minority of the board was up for election each year. Accordingly, even when dissidents ran a full slate of directors, such directors, if elected, would still only represent a minority of the board. How common is a classified board structure for registered closed-end funds and BDCs? How, if at all, does such a structure affect contested elections, or our assessment of whether the Proposed Rules should apply to registered closed-end funds or BDCs? In particular, does a classified board structure itself increase the chance of dissident directors disrupting unitary and cluster boards, regardless of whether funds with classified boards are subject to the Proposed Rules?

17. We request any data or examples that would help us to better ascertain the degree of interest by shareholders in funds in splitting their votes in contested elections.

18. In the 2016 Release, the Commission noted that the types of changes pursued by dissidents at registered closed-end funds and BDCs, such as converting a closed-end fund to an open-end fund, have tended to be binary in nature. Are there other types of goals or compromise approaches that

dissidents have pursued at such registrants in more recent years? To what extent are mixed board outcomes, where some but not all of a dissident's nominees are elected, an effective means of achieving dissident goals in contests at registered closed-end funds and BDCs?

19. If we extended the Proposed Rules to some or all funds, would a different minimum solicitation requirement be appropriate for these registrants than for others? If so, what threshold would be appropriate, and why? How, if at all, would the appropriate threshold differ across open-end funds, registered closed-end funds and BDCs? How does the concentration of ownership and types of holders of open-end funds, registered closed-end funds and BDCs differ from other registrants that may be the subject of proxy contests? Does the solicitation process differ for contests at open-end funds, registered closed-end funds or BDCs as compared to other registrants? How would the costs and other effects of the minimum solicitation requirement differ when applied to contests at these registrants as opposed to other registrants?

20. As discussed above, we have observed recent developments in the area of corporate governance affecting funds, particularly registered closed-end funds and BDCs. How, if at all, are such developments, or other developments, relevant to our assessment of whether the Proposed Rules should apply to registered closed-end funds and BDCs? Would a universal proxy card facilitate shareholder voting in registered closed-end fund and BDC elections?

21. What would be the costs and benefits and other economic effects of applying the Proposed Rules to registered closed-end funds and BDCs, or more broadly to other kinds of funds? To what extent do any developments since the 2016 Release affect the anticipated costs and benefits? How, if at all, have any such developments changed the differences in the likely economic effects of applying the Proposed Rules to some or all funds as compared to operating companies?

22. As noted above, we have not observed any proxy contests in open-end funds since 2000. Would there be benefits to applying the Proposed Rules to all funds, including open-end funds, to the extent open-end funds do face proxy contests? What would be the costs of applying the Proposed Rules to open-end funds in the absence of contests?

23. The Commission noted in the 2016 Release that in the absence of the proposed universal proxy card requirement applying to funds, the current rules would continue to apply,

including the short slate and bona fide nominee rules. Do commenters believe that these rules are necessary or appropriate for any fund not required to use a universal proxy card? Or does the lack of proxy contests in open-end funds indicate that it would be appropriate to rescind these rules even if we do not extend the application of the Proposed Rules to open-end funds?

24. There are registered closed-end funds and BDCs that, like open-end funds, do not hold annual meetings to elect directors because of their state of incorporation or type of corporate entity, or because they are not listed on an exchange. If we were to exclude open-end funds from the Proposed Rules because of the lack of annual meetings, should the exclusion apply to registered closed-end funds and BDCs that do not hold annual meetings? Should such funds continue to be subject to the short slate and bona fide nominee rules?

25. Are there any other developments since 2016 we should consider in our assessment of whether the Proposed Rules should apply to open-end funds, closed-end funds or BDCs? What are the economic effects of any such developments?

We request and encourage any interested person to submit comments regarding the Proposed Rules, specific issues discussed in this release or the 2016 Release, and other matters that may have an effect on the Proposed Rules. We request comment from the point of view of registrants, shareholders, directors, and other market participants. We note that comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments, particularly quantitative information as to the costs and benefits. If alternatives to the Proposed Rules are suggested, supporting data and analysis and quantitative information as to the costs and benefits of those alternatives are of particular assistance. Commenters are urged to be as specific as possible. All comments received to date on the Proposed Rules will be considered and need not be resubmitted. If any commenters who have already submitted a letter wish to provide supplemental or updated comments, we encourage them to do so.

By the Commission.

Dated: April 16, 2021.

**J. Lynn Taylor**,  
Assistant Secretary.

[FR Doc. 2021-08301 Filed 5-5-21; 8:45 am]

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### 20 CFR Part 655

[DOL Docket No. ETA-2020-0005]

RIN 1205-AB99

#### Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H-2A Program

**AGENCY:** Employment and Training Administration (ETA), Labor.

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

**SUMMARY:** The Department of Labor (the Department) proposes to amend its regulations regarding the adjudication of temporary need for employers seeking herding or production of livestock on the range job opportunities under the H-2A program. Consistent with a court-approved settlement agreement, this notice of proposed rulemaking (NPRM or proposed rule) would rescind the regulation that governs the period of need for such job opportunities to ensure the Department's adjudication of temporary or seasonal need is conducted in the same manner for all applications for temporary agricultural labor certification.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before June 7, 2021.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB99, by the following method:

*Electronic Comments:* Comments may be sent via <http://www.regulations.gov>, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type in '1205-AB99' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

*Instructions:* All submissions must include the agency's name and the RIN 1205-AB99. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

#### SUPPLEMENTARY INFORMATION:

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#### I. Background on 20 CFR Part 655, Subpart B

##### A. Statutory Framework

The H-2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services where the Secretary of Labor (Secretary) certifies that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the aliens in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. See section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1101(a)(15)(H)(ii)(a); section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1). The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC). Secretary's Order 06-2010 (Oct. 20, 2010).<sup>1</sup> Once OFLC issues a temporary agricultural labor certification, employers may then

<sup>1</sup> In addition, the Secretary has delegated to the Department's Wage and Hour Division the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H-2A program. Secretary's Order 01-2014 (Dec. 19, 2014).

petition the U.S. Department of Homeland Security (DHS) to employ a nonimmigrant worker in the United States in the H-2A visa classification.

### B. Regulatory Framework

Since 1987, the Department has operated the H-2A temporary agricultural labor certification program under regulations promulgated pursuant to the INA.<sup>2</sup> With limited exceptions, including those set forth below, the Department's current regulations governing the H-2A program were published in 2010.<sup>3</sup> The standards and procedures applicable to the certification and employment of workers under the H-2A program are found in 20 CFR part 655, subpart B and 29 CFR part 501.<sup>4</sup>

Historically, employers in a number of states (primarily but not exclusively in the western continental United States) have used what is now the H-2A program to bring in foreign workers to work as sheep and goat herders.<sup>5</sup> Beginning in 1989, and consistent with Congress' historical approach, the Department established variances from certain H-2A regulatory requirements and procedures through sub-regulatory guidance to allow employers of open range sheep and goat herders to use the

H-2A program. The Department established similar variances or "special procedures" through sub-regulatory guidance in 2007 for employers seeking to employ H-2A workers for open range herding or production of livestock positions. In 2015, the Department incorporated these "special procedures" provisions for the employment of workers in the herding and production of livestock on the range, with some modifications, into its H-2A regulation. *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*, 80 FR 62958 (Oct. 16, 2015) (2015 Rule).<sup>6</sup> The variances codified in the 2015 Rule continued the agency's recognition of the unique occupational characteristics of herding positions, which involve spending extended periods of time herding animals across remote range lands and being on call to protect and maintain herds for up to 24 hours a day, 7 days a week. These variances are codified at §§ 655.200 through 655.235.<sup>7</sup>

Section 101(a)(15)(H)(ii)(a) of the INA permits only "agricultural labor or services . . . of a temporary or seasonal nature" to be performed under the H-2A visa category. 8 U.S.C. 1101(a)(15)(H)(ii)(a). Thus, as part of the Department's adjudication of applications for temporary agricultural labor certification, the Department assesses on a case-by-case basis whether the employer has established a temporary or seasonal need for the agricultural work to be performed. See 20 CFR 655.161(a). In its initial rulemaking on the H-2A program in 1987, the Department explained that it would be appropriate for an employer to apply annually for recurring job opportunities in the same occupation when it involved "truly 'seasonal'

employment," but acknowledged that "the longer the employer needs a 'temporary' worker, the more likely it would seem that the job has in fact become a permanent one." *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20498 (June 1, 1987). The Department's current regulations, which adopted DHS's definition of "temporary or seasonal nature," specify that employment is of a temporary nature "where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year," and "of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A); 75 FR 6884, 6890 (adopting DHS's definition "was not intended to create any substantive change in how the Department administers the program"). DHS regulations further provide that the Department's finding that employment is of a temporary or seasonal nature is "normally sufficient" for the purpose of an H-2A petition, but state that notwithstanding this finding, DHS adjudicators will not find employment to be temporary or seasonal in certain situations, such as when "substantial evidence" exists that the employment is not temporary or seasonal. 8 CFR 214.2(h)(5)(iv)(B).

Notwithstanding the regulatory definition found in 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A), a rancher seeking to employ a sheep or goat herder under the 2015 Rule could continue to seek a temporary agricultural labor certification for up to a 364-day period, as it could under the special procedures that preceded the rule. 80 FR 62958, 62999–63000; see 20 CFR 655.215(b)(2) ("The period of need identified on the *H-2A Application for Temporary Employment Certification* and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days."). The 2015 Rule also restricted range livestock occupations to periods of need lasting not more than 10 months. 80 FR 62958, 63000; see 20 CFR 655.215(b)(2) ("The period of need identified on the *H-2A Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months."). For

<sup>2</sup> The Immigration and Nationality Act of 1952 created the H-2 temporary worker program. Public Law 82-414, 66 Stat. 163. In 1986, IRCA divided the H-2 program into separate agricultural and nonagricultural temporary worker programs. See Public Law 99-603, section 301, 100 Stat. 3359 (1986). The H-2A agricultural worker program designation corresponds to the statute's agricultural worker classification in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

<sup>3</sup> *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010).

<sup>4</sup> The Department is currently engaged in a separate rulemaking that seeks to amend these regulations as they pertain to the H-2A program. *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 FR 36168 (July 26, 2019) (2019 NPRM). The 2019 NPRM proposed amendments to the current regulations that focus on modernizing the H-2A program and eliminating inefficiencies. The 2019 NPRM also proposed to amend the regulations for enforcement of contractual obligations for temporary foreign agricultural workers and the Wagner-Peyser Act regulations to provide consistency with revisions to H-2A program regulations governing the temporary agricultural labor certification process.

<sup>5</sup> As the Department explained in its 2015 herder rulemaking, Congress enacted statutes during the early 1950s authorizing the permanent admission of a certain number of "foreign workers skilled in sheepherding." See *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States*, 80 FR 20300, 20301–20302 (Apr. 15, 2015). Congress subsequently permitted these special laws to expire and signaled that sheepherders should be admitted under the existing temporary (then H-2) program. *Id.*; see also *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 76891, 76906–76907 (Dec. 18, 2008).

<sup>6</sup> The 2015 Rule followed litigation in *Mendoza v. Perez*, in which the U.S. Court of Appeals for the District of Columbia Circuit held the special procedures pertaining to sheep, goat, and other open range herding or production of livestock were subject to the Administrative Procedure Act's (APA) notice and comment requirements. 754 F.3d 1002, 1024 (D.C. Cir. 2014); see *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) (remedial order setting a rulemaking schedule).

<sup>7</sup> The 2019 NPRM proposed clarifying and technical revisions to certain provisions for employment of workers in herding and production of livestock on the range (e.g., portions of 20 CFR 655.205, 655.211, 655.220, and 655.225) that are not the subject of this proposal. 84 FR 36168, 36220–21. The 2019 NPRM also proposed to incorporate into the H-2A regulations, with some modifications, the standards and procedures currently found in Training and Employment Guidance Letters related to animal shearing, commercial beekeeping, and custom combining, and to rescind the general provision that allows for the creation of "special procedures" (i.e., sub-regulatory variances from the regulations). *Id.* at 36171–73.



the reasons discussed below, including a recent court decision and related settlement agreement, the Department is now proposing to rescind § 655.215(b)(2) in its entirety.

### C. The Hispanic Affairs Project Litigation and Need for Rulemaking

On September 22, 2015, four shepherders and a nonprofit member organization for Hispanic immigrant workers filed a lawsuit in the U.S. District Court for the District of Columbia challenging aspects of the 2015 Rule. *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348 (D.D.C. 2016).<sup>8</sup> As relevant to this rulemaking, the plaintiffs challenged the Department's decision to allow employers seeking temporary agricultural labor certifications for sheep or goat herder positions to apply for periods of need that last up to 364 days at a time. See *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 182 (D.D.C. 2017) (citing 20 CFR 655.215(b)(2)). The plaintiffs also challenged DHS's alleged practice of automatically approving sheep and goat herder petitions for recurring periods up to 364 days, asserting that the Department's regulation at § 655.215(b)(2) and DHS's alleged practice did not conform with the INA or the Departments' regulations, in violation of the APA. See *id.* Specifically, the plaintiffs argued § 655.215(b)(2) and DHS's alleged practice are inconsistent with 8 U.S.C. 1101(a)(15)(H)(ii)(a), which provides that H-2A visas be only for "temporary" work, and conflicts with the Departments' regulations defining when employment is of a "temporary or seasonal nature." See *id.*; compare 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A) (employer's "need to fill the position with a temporary worker will . . . last no longer than one year") with 20 CFR 655.215(b)(2) ("The period of need identified on the [application and job order] . . . must be no more than 364 calendar days."). The district court dismissed the challenge on procedural grounds, concluding the plaintiffs waived their claim against the Department and did not properly or timely raise their claim against DHS. *Id.* at 185–86, 190.<sup>9</sup>

<sup>8</sup> On April 3, 2017, the district court granted two employer associations' motion to intervene as defendants in the litigation. Minute Order Granting Mountain Plains Agricultural Service and Western Range Association's Joint Motion to Intervene, *Hispanic Affairs Project, et al. v. Perez et al.*, No. 15-cv-1562 (D.D.C. Apr. 3, 2017).

<sup>9</sup> Plaintiffs also challenged two other aspects of the 2015 Rule: (1) Certain definitions and requirements that limit the scope and location of work that H-2A workers in sheep and goat herding

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed and remanded the district court's decision on these claims for a resolution on the merits. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 396–97 (D.C. Cir. 2018). The court held the plaintiffs preserved their challenge to the Department's decision in the 2015 Rule to classify sheep and goat herding as "temporary" employment. *Id.* at 385. In dicta, the court noted the "agency has no power under the statute—it is actually forbidden—to include non-temporary or non-seasonal workers in the H-2A program." *Id.* at 389. The court also held the complaint adequately raised a challenge to DHS's alleged practice of extending "temporary" H-2A petitions beyond the regulatory definition of temporary employment. *Id.* at 385, 388. Taking the evidence submitted by the plaintiffs as true, the court concluded the plaintiffs had "plausibly shown that [DHS]'s *de facto* policy of authorizing long-term visas is arbitrary, capricious, and contrary to law, in violation of the APA and [INA] because it 'authorizes the creation of permanent herder jobs that are not temporary or seasonal.'" *Id.* at 386 (original alterations omitted).

Following the D.C. Circuit's decision, the parties reached a settlement agreement that was approved by the district court on November 12, 2019. Order Approving the Parties' Settlement Agreement, ECF No. 136, *Hispanic Affairs Project, et al. v. Perez et al.*, No. 15-cv-1562 (D.D.C. Nov. 12, 2019). As part of the settlement, the Department agreed to engage in rulemaking to propose to rescind § 655.215(b)(2) and DHS, through U.S. Citizenship and Immigration Services (USCIS), agreed to publish a policy memorandum that provided guidance on the determination of temporary or seasonal need for H-2A sheep and goat herder petitions. Joint Status Report at 1, ECF No. 135, *Hispanic Affairs Project, et al. v. Perez et al.*, No. 15-cv-1562 (D.D.C. Nov. 8, 2019) (noting "Intervenor Defendants do not object to the Settlement Agreement"). On November 14, 2019, USCIS issued a draft of the memorandum for public comment. After a 30-day public comment period, USCIS published a final memorandum on

positions may perform, 80 FR 62958, 62963–73; and (2) the methodology by which the Department calculates the minimum required wage that such workers (and any non-H-2A workers in corresponding employment) must be offered and paid, *id.* at 62986–96. The Department and DHS prevailed on these issues. See *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 391–96 (D.C. Cir. 2018), *aff'd in part* 263 F. Supp. 3d 160, 190–207 (D.D.C. 2017).

February 28, 2020, which became effective on June 1, 2020. See USCIS, *Policy Memorandum: Updated Guidance on Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production* (Feb. 28, 2020) (USCIS Policy Memorandum).<sup>10</sup>

The Department's proposed rescission of § 655.215(b)(2) would eliminate that provision's presumptive period of need for employment involving range sheep or goat herding and absolute restriction on the period of need for employment involving other range livestock activities. The 2015 Rule suggested that the unique nature and history of herding work permitted a variance, on an occupational basis, from the standard H-2A requirements governing the adjudication of an employer's temporary need. As such, § 655.215(b)(2) permits certification of a specific period of time without requiring the Department to assess the true nature of the labor or services to be provided by the H-2A nonimmigrant. The Department, however, is now proposing to rescind § 655.215(b)(2) so that all employers applying for temporary agricultural labor certifications must individually demonstrate their need for the agricultural labor or services to be performed is temporary or seasonal in nature, regardless of occupation. The Department believes this proposed rescission of § 655.215(b)(2) is not only consistent with the D.C. Circuit's decision in *Hispanic Affairs Project* and the guidance issued by USCIS but also better complies with the requirements of the INA implemented in the Departments' regulations that define when employment is of a "temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(A) (defining an H-2A nonimmigrant as an alien coming to perform services of a temporary or seasonal nature); 20 CFR 655.103(d); 75 FR 6884, 6890 (adopting DHS's definition of "temporary or seasonal nature" set forth in 8 CFR 214.2(h)(5)(iv)(A)).

## II. Discussion of Proposed Revision to 20 CFR Part 655, Subpart B

The Department proposes to rescind § 655.215(b)(2) so that the temporary or seasonal need of an employer seeking to fill a herding or production of livestock on the range position would be adjudicated according to the requirement in § 655.103(d) that governs the adjudication of employment of a temporary or seasonal nature for all

<sup>10</sup> See [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/2-PMH2A-SeasonalSheepGoatHerder\\_PolicyMemo.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/2-PMH2A-SeasonalSheepGoatHerder_PolicyMemo.pdf).



other H-2A applications. See 20 CFR 655.200(a) (noting that employers whose job opportunities meet the qualifying criteria under §§ 655.200–655.235 must fully comply with all the requirements of §§ 655.100–655.185 unless otherwise specified in §§ 655.200–655.235).

In particular, the Department would examine—on a case-by-case basis and taking into consideration the totality of the facts presented—whether an employer’s need to fill a herding or production of livestock on the range position is of a temporary or seasonal nature, as those terms are defined in the Department’s and DHS’s regulations. See 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A). Section 655.103(d) states that employment “is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” The same section states “employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” This proposal does not alter the regulatory definition and standards under which the Department adjudicates temporary or seasonal need for all other H-2A job opportunities under § 655.103(d).

Although recurring year-round activities cannot be classified as temporary, see 75 FR 6884, 6891, the Department recognizes that some herder employers may be able to establish a need to fill positions on a recurring annual basis consistent with the definition of employment of a seasonal nature in § 655.103(d). See 80 FR 62958, 62999–63000 (2015 Rule describing comments that delineated seasonal aspects of herder work); 52 FR 20496, 20498 (acknowledging it is appropriate to apply annually for truly “seasonal” employment); see also USCIS Policy Memorandum at 3 n.3 (explaining that an employer’s need for workers that recurs annually at a given time of year does not mean its need is permanent in nature as employment of a seasonal nature is defined as being tied to a certain time of year). The Department also acknowledges that some employers may have a “temporary” need to fill herding and range livestock job opportunities, which is permissible provided they can show the nature of their need is temporary under § 655.103(d). See *Temporary Workers Under § 301 of the Immigration Reform and Control Act*, 11 Op. O.L.C. 39, 40 & n.4 (1987) (noting “‘temporary’ means something other than seasonal” and

explaining employers may fill “permanent jobs that an employer needs to fill on a temporary basis—for example, because the regular American employee has fallen ill or extra hands are needed during a busy period”); 11 Op. O.L.C. at 42 (“The nature of the job itself is irrelevant. What is relevant is whether the employer’s need is truly temporary.”).

The proposed rule aligns the Department’s adjudication of the temporary or seasonal need of herder applications with corresponding changes DHS has implemented in the USCIS Policy Memorandum. The memorandum explains, for example, that USCIS will adjudicate H-2A sheep and goat herder petitions filed on or after June 1, 2020, on a case-by-case basis, taking into consideration the totality of the facts presented, and in the same manner as all other H-2A petitions. USCIS Policy Memorandum at 1, 9. Under this memorandum, past periods of need approved by USCIS prior to June 1, 2020, will be one element considered when determining whether an H-2A petition demonstrates a true temporary or seasonal need. *Id.* at 9.

The Department requests comments on all issues related to this proposed rule, including economic or other regulatory impacts of this rule on the public. As noted above, on July 26, 2019, the Department issued a separate notice of proposed rulemaking that proposed to amend the regulations regarding the certification of temporary employment for nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. 84 FR 36168. In the 2019 NPRM, the Department sought public comment on the possibility of moving the adjudication of an employer’s temporary or seasonal need exclusively to DHS or exclusively to DOL. *Id.* at 36178. The 2019 NPRM also proposed other amendments to the Department’s regulations governing the H-2A program at 20 CFR part 655, subpart B. Because the comment period for that rulemaking closed on September 24, 2019, the change proposed here—rescission of § 655.215(b)(2)—does not affect the request for comments in that NPRM. The Department expects to publish a separate final rule for the 2019 NPRM, responding to public comment on the proposals contained therein. The Department does not anticipate the rulemaking associated with the 2019 NPRM will affect the change proposed here and comments on the proposals

contained in that NPRM are outside the scope of this limited rulemaking. To the extent a final rule associated with the 2019 NPRM substantively affects this rulemaking, the Department will consider, as appropriate, extending or reopening the public comment period for this proposal.

### III. Administrative Information

#### *A. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review*

Under E.O. 12866, the Office of Management and Budget (OMB)’s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and OMB review. Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the E.O. This proposed rule is a significant, but not economically significant, regulatory action under Section 3(f) of E.O. 12866. The Department has prepared a Regulatory Impact Analysis (RIA) in connection with this proposed rule, as required under section 6(a)(3) of E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

### Overview of This Rule

The Department has determined that this proposed rule is necessary as it would clarify the Department's adjudication of temporary or seasonal need for herding and range livestock applications for temporary agricultural labor certification under the H-2A program, and would align that adjudication with the requirements of the INA. The proposed rule would also standardize the Department's adjudication of temporary need under the H-2A program. The Department's definition of "temporary or seasonal nature" for the H-2A program, with the exception of its current definition of "temporary" for herding and range livestock occupations, is consistent with the Department of Homeland Security's definition specifying that employment is of a temporary nature "where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year," and "of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A).

Notwithstanding the regulatory definition found in 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A), the 2015 Rule allowed employers of sheep and goat herders to apply for a temporary agricultural labor certification for a period of up to 364 days. Conversely, the same rule limited employers of range livestock occupations to a temporary agricultural labor certification with a period of need not to exceed 10 months. As discussed above, an appellate court held that plaintiffs preserved their challenge to the Department's decision in the 2015 Rule to classify sheep and goat herding as "temporary" employment. The court additionally held the complaint adequately raised a challenge to DHS's alleged practice of extending "temporary" H-2A petitions beyond the regulatory definition of temporary employment. Taking the evidence submitted by the plaintiffs as true, the court concluded the plaintiffs had plausibly shown DHS's alleged practice of automatically extending H-2A petitions would convert job opportunities that should be temporary or seasonal in nature into permanent positions, which is inconsistent with Section 101(a)(15)(H)(ii)(a) of the INA. The parties subsequently reached a settlement agreement in which the

Department agreed to engage in rulemaking to propose to rescind § 655.215(b)(2) and DHS, through USCIS, agreed to publish a policy memorandum that provided guidance on the determination of temporary or seasonal need for H-2A sheep and goat herder petitions.

In this proposed rule, the Department proposes to rescind § 655.215(b)(2), which would eliminate that provision's presumptive period of need for employment involving range herding and absolute restriction on the period of need for employment involving range livestock activities. Instead, all employers applying for H-2A temporary agricultural labor certifications under the proposed rule must individually demonstrate that their need for workers is temporary or seasonal, regardless of occupation.

### Economic Impact

The Department estimates that the proposed rule, if finalized, would result in costs to employers associated with their familiarization with the rule. The cost of the proposed rule is associated with rule familiarization requirements for all herding and range livestock employers utilizing the H-2A program.

In addition to the rule familiarization cost, the Department believes that employers may incur other costs from the implementation of the proposed rule attributed to changes in business operations, transportation, staffing turnover, and training requirements. As explained above, although recurring year-round activities cannot be classified as temporary, the Department recognizes that there may be seasonal aspects of herder work for which employers may still establish a need to fill positions on a recurring annual basis consistent with the definition of employment of a "seasonal" nature in § 655.103(d) and that some herder employers may also still present a need that is truly "temporary" under § 655.103(d) in certain circumstances. The Department qualitatively discusses the potential costs to employers incurred by the implementation of this rule but does not quantify them due to a lack of available data and the wide spectrum of possible responses by employers that cannot be predicted with specificity. The Department seeks public comment on how these employers may be impacted by the proposed change in regulation. Transfer payments under the proposed rule, if finalized, would result from eliminating the absolute restriction on the period of need for employment involving other range livestock activities and the presumptive period of need for

employment involving range sheep or goat herding. In particular, some employers engaged in non-sheep and/or goat herding activities<sup>11</sup> could potentially extend their period of need beyond 10 months, provided they can show the nature of their need is temporary.<sup>12</sup> In addition, sheep and/or goat herding employers whose need is temporary or seasonal in nature and whose period of need currently exceeds 10 months would be expected to reduce their period of need to 10 months or less.<sup>13</sup> See the costs and transfer payments subsections below for a detailed explanation.

As shown in Exhibit 1, the Department estimates the changes proposed in this rule would result in a quantified annualized cost of \$3,144 at a discount rate of 7 percent and \$2,588 at a discount rate of 3 percent, as well as unquantified costs associated with changes in business operations, transportation, staffing turnover, and training requirements. Additionally, the proposed rule, if finalized, is expected to result in transfers for all herding and range livestock employers. Some employers engaged in non-sheep and/or goat herding activities would incur a transfer from employers to employees due to rescinding the restriction on the period of need for employment involving range livestock activities. The Department estimates that the proposed rule would result in annualized transfers of \$95,556 at a discount rate of 7 percent and \$91,983 at a discount rate of 3 percent for these employers. Furthermore, employers engaged in sheep and/or goat herding activities would experience a transfer from employees to employers due to a reduction in the allowed period of need for the majority of the aforementioned employers. The Department estimates that the proposed rule would result in annualized transfers of \$8.42 million at a discount rate of 7 percent and \$8.11 million at a discount rate of 3 percent for these employers.

<sup>11</sup> This includes range herding or production of cattle, horses, or other domestic hooved livestock except sheep and goats.

<sup>12</sup> For the purpose of this analysis, employers engaged in non-sheep and/or goat herding activities with a minimum period of need of 300 days and a maximum period of need of 308 days were used to make the Department's transfer estimates.

<sup>13</sup> The Department's records indicate that the majority of employers engaged in sheep and/or goat herding occupations would likely reduce their requested period of need to 10 months or less. The Department used 300 days to represent a period of 10 months.

EXHIBIT 1—ESTIMATED COSTS AND TRANSFER PAYMENTS OF THE PROPOSED RULE

	Costs	Transfer payments from employers of non-sheep and/or goat herding	Transfer payments to employers of sheep and/or goat herding
Undiscounted 10-Year Total .....	\$22,079	\$893,043	\$78,731,848
10-Year Total with a Discount Rate of 3% .....	22,079	784,637	69,174,659
10-Year Total with a Discount Rate of 7% .....	22,079	671,143	59,168,812
Annualized at a Discount Rate of 3% .....	2,588	91,983	8,109,380
Annualized at a Discount Rate of 7% .....	3,144	95,556	8,424,308

The Department was unable to quantify some costs, cost savings, and benefits of the proposed rule. The Department, however, invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs and transfer payments from this proposed rule.

i. Costs

a. Rule Familiarization Costs

Should the proposed rule take effect, herding and range livestock employers would need to familiarize themselves with the new regulations; consequently, this will impose a one-time cost in the first year. The Department's analysis assumes that the changes introduced by the rule would be reviewed by Human Resources Specialists (SOC 13-1071). The median hourly wage for these workers is \$29.77 per hour.<sup>14</sup> In addition, the Department assumes that benefits are paid at a rate of 46 percent<sup>15</sup> and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully-loaded hourly wage of \$48.53.<sup>16</sup> This hourly wage was multiplied by the estimated number of herding and range livestock employers (910)<sup>17</sup> and by the estimated amount of time required to review the rule (.5 hours). This calculation results in a one-time cost of \$22,079 in the first year after the proposed rule takes effect. The annualized cost over the 10-year period is \$2,588 and \$3,144 at discount rates of 3 and 7 percent, respectively.

b. Other Costs

The Department assumes some employers will experience increased costs associated with changes in business operations, transportation, staffing turnover, and training requirements under this proposed rule. In accordance with the Department's current regulation, employers of sheep and goat herders are permitted to apply for a temporary agricultural labor certification for a period of up to 364 days. Under the proposed rule if finalized, sheep and goat herding employers whose need is temporary or seasonal in nature and whose period of need currently exceeds 10 months would be expected to reduce their period of need to 10 months or less. The Department notes that, in instances where employers have recurring year-round labor needs that are actually permanent, rather than temporary or seasonal in nature, the Department expects some employers might utilize the employment-based immigrant petition process to hire foreign workers, which includes options for skilled workers, professionals, and other workers under 8 U.S.C. 1153(b)(3). The Department seeks comment on how employers might adjust their business models to accommodate the reduction in the permitted length of employment, and what effect this might have on costs of operations. Although the Department does not anticipate the proposed rule will have a significant adverse effect as

employers must already adjust to DHS's guidelines, the Department acknowledges that some employers of sheep and goat herders will need to replenish their labor supply by hiring additional U.S. workers to account for the reduced period of need, or extending the work schedule for U.S. workers that they employ if they are available. This may lead to increased costs due to staffing turnovers, the need to train new employees, overtime incurred due to increased work hours, as well as potential changes to their business practices. The Department does not have data available to assess how the universe of sheep and goat herding employers may be impacted by this change and seeks public comment on how these employers may be impacted by the proposed rule.

Transfers

The first category of transfers associated with this proposed rule would be an employer to employee transfer incurred due to a potential increase in the maximum period of need from 10 months up to 1 year, or longer in extraordinary circumstances, for a small number of employers engaged in non-sheep and/or goat herding who can demonstrate their need is temporary.

Exhibit 2 presents the distribution of the period of need on approved applications filed by unique employers of non-sheep and/or goat herders during FYs 2017, 2018, and 2019.

EXHIBIT 2—DISTRIBUTION OF PERIOD OF NEED FOR UNIQUE CERTIFIED EMPLOYERS OF NON-SHEEP/GOAT HERDING BY YEAR [FY 17-19]

Period of need (days)	Year		
	2017	2018	2019
0-70 .....	5	5	10

<sup>14</sup> Median hourly wage for Human Resources Specialists were obtained from the Bureau of Labor Statistics Occupational Employment Statistics Survey, May 2019, <https://www.bls.gov/oes/current/oes131071.htm>.

<sup>15</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for

Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

<sup>16</sup> \$29.77 + \$29.77(0.46) + \$29.77(0.17) = \$48.53.

<sup>17</sup> The Department's estimate of 910 unique employers is based on H-2A certification data from Fiscal Years (FYs) 2017, 2018, and 2019. The

Department identified the average number of unique applicants engaged in sheep and/or goat herding activities across FYs 2017, 2018, and 2019 (744). This was then added to the average number of unique applicants engaged in non-goat/sheep and/or goat herding activities across the same time period (166). 744 + 166 = 910.

EXHIBIT 2—DISTRIBUTION OF PERIOD OF NEED FOR UNIQUE CERTIFIED EMPLOYERS OF NON-SHEEP/GOAT HERDING BY YEAR—Continued  
[FY 17–19]

Period of need (days)	Year		
	2017	2018	2019
71–140	15	16	17
141–210	10	10	7
210–299	27	47	48
300–308	72	103	107
>308	0	0	0
Number of Unique Employers	129	181	189
Average Period of Need	254	260	257

Transfer payments were calculated by identifying unique employers engaged in non-sheep and/or goat herding from FYs 2017, 2018, and 2019.<sup>18</sup> The Department then identified employers within this group of unique employers whose applications contained periods of need between 300 and 308 days. The Department identified this subset because some employers whose applications contained periods of need that fall within this range are likely to extend their period of need up to a year, or longer in extraordinary circumstances, if they can demonstrate their need is temporary in nature (*i.e.*, their need is not for recurring year-round activities). The Department expects that an infrequent number of employers of non-sheep and/or goat herders would extend their period of

need beyond 10 months. For this analysis, the Department conservatively assumes that no more than 10 percent of the unique employers who were identified to have a period of need between 300 and 308 days would apply, and be approved by OFLC, to extend their period of temporary need beyond a 10-month period.<sup>19</sup> The Department invites comments regarding the assumptions on the percentage of unique employers affected. Based on OFLC’s performance data, the Department estimated the impact of extending the period of need by multiplying the number of workers certified for each of the unique non-sheep and/or goat herding employers by the basic rate of pay offered to these workers each year. The figures for each year were then multiplied by 2 in order

to estimate the impact from an additional two months of need, which yields an annualized transfer of \$95,556 at a discount rate of 7 percent and \$91,983 at a discount rate of 3 percent.

The second category of transfers associated with this proposed rule would be an employee to employer transfer incurred due to potential reductions in sheep and/or goat herding employers’ period of need from a maximum of 364 days to 10 months or less for annually recurring applications.<sup>20</sup>

Exhibit 3 presents the distribution of the period of need on approved applications filed by unique employers of sheep and/or goat herders during FYs 2017, 2018, and 2019.

EXHIBIT 3—DISTRIBUTION OF PERIOD OF NEED FOR UNIQUE CERTIFIED EMPLOYERS OF SHEEP/GOAT HERDING BY YEAR  
[FY 17–19]

Period of need (days)	Year		
	2017	2018	2019
0–70	0	2	3
71–140	1	4	9
141–210	6	5	3
210–299	4	7	7
>299	743	673	761
Number of Unique Employers	754	691	783
Average Period of Need	360	357	356

Transfer payments were calculated by identifying unique employers engaged in sheep and/or goat herding from FYs 2017, 2018, and 2019.<sup>21</sup> The Department identified employers within this group

of unique employers whose applications contained a period of need of 300 days or more. Based on OFLC’s performance data, the Department estimated the impact of reducing the period of

eligibility by multiplying the number of workers certified for each of the unique sheep and/or goat herding employers by the basic rate of pay offered to these workers each year. The figures for each

<sup>18</sup> Based on FYs 2017, 2018, and 2019 performance data obtained from OFLC, the Department estimates that the number of non-sheep and/or goat herding employers is unlikely to increase over the rule’s 10-year time forecast.

<sup>19</sup> The Department assumes a small percentage of the unique employers who were identified to have a period of need between 300 and 308 days will

apply to extend their period of temporary need beyond a 10-month period up to 1 year, or longer in extraordinary circumstances.

<sup>20</sup> The Department’s analysis of employers of sheep and goat herders represents the transfer from employer to employee. The Department assumes that in some instances that employers will seek to replace H–2A employees who have met the period

of need threshold with U.S. employees, which would constitute a transfer between H–2A employees and U.S. employees. This potential transfer could not be evaluated due to data limitations.

<sup>21</sup> Based on FYs 2017, 2018, and 2019 performance data obtained from OFLC.

year were then multiplied by the number of days requested for the period of need of 300 days or more in order to estimate the impact from reducing the period of need to 10 months or less, which yields an annualized transfer of \$8,424,308 at a discount rate of 7 percent and \$8,109,380 at a discount rate of 3 percent.

#### ii. Benefits

By rescinding 20 CFR 655.215(b)(2), the Department standardizes the adjudication of temporary need under the H-2A program and aligns the Department's adjudication of the temporary or seasonal need of herder applications with corresponding changes DHS has implemented in the USCIS Policy Memorandum. Furthermore, the proposed rescission of § 655.215(b)(2) better complies with pertinent provisions of the INA and the Departments' applicable implementing regulations that define when employment is of a "temporary or seasonal nature." Therefore, this proposed rule aims to help ensure the employment of H-2A workers in herding and range livestock operations does not adversely affect the wages and working conditions of workers in the United States similarly employed.

#### *B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a

regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department does not expect that this NPRM will have a significant economic impact on a substantial number of small entities. However, the Department is publishing this Initial Regulatory Flexibility Analysis (IRFA) to invite public comment on all aspects of this IRFA, including the estimates related to the number of small entities affected by the NPRM and expected costs. The Department also invites public comment on whether viable alternatives exist that would reduce the burden on small entities while remaining consistent with statutory requirements and the objectives of the NPRM.

#### 1. Why the Department Is Considering Action

The Department has determined that this proposed rule is necessary as it would clarify the Department's adjudication of temporary or seasonal need for herding and range livestock applications for temporary agricultural labor certification under the H-2A program, and would align that adjudication with the requirements of the INA. The proposed rule would also standardize the Department's adjudication of temporary need under the H-2A program. The Department's definition of "temporary or seasonal nature" for the H-2A program, with the exception of its current definition of "temporary" for herding and range livestock occupations, is consistent with the Department of Homeland Security's definition specifying that employment is of a temporary nature "where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year," and "of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A).

#### 2. Objectives of and Legal Basis for the NPRM

The Department's proposed rescission of § 655.215(b)(2) would eliminate that provision's presumptive period of need for employment involving range sheep or goat herding and absolute restriction on the period of need for employment involving other range livestock

activities. The 2015 Rule suggested that the unique nature and history of herding work permitted a variance, on an occupational basis, from the standard H-2A requirements governing the adjudication of an employer's temporary need. As such, § 655.215(b)(2) permits certification of a specific period of time without requiring the Department to assess the true nature of the labor or services to be provided by the H-2A nonimmigrant. The Department, however, is now proposing to rescind § 655.215(b)(2) so that all employers applying for temporary agricultural labor certifications must individually demonstrate their need for the agricultural labor or services to be performed is temporary or seasonal in nature, regardless of occupation. The Department believes this proposed rescission of § 655.215(b)(2) is not only consistent with the D.C. Circuit's decision in *Hispanic Affairs Project* and the guidance issued by USCIS but also better complies with the requirements of the INA implemented in the Departments' regulations that define when employment is of a "temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(A) (defining an H-2A nonimmigrant as an alien coming to perform services of a temporary or seasonal nature); 20 CFR 655.103(d); 75 FR 6884, 6890 (adopting DHS's definition of "temporary or seasonal nature" set forth in 8 CFR 214.2(h)(5)(iv)(A)).

#### 3. Estimating the Number of Small Entities Affected by the Rulemaking

The Department collected industry data from the Bureau of Labor Statistics' (BLS) Quarterly Census for Employment and Wage (QCEW) for FY 2020. This process allowed the Department to identify the number of entities impacted by this proposed rule for two North American Industry Classification System (NAICS) Codes that frequently request H-2A certification for herding and livestock production job opportunities: NAICS 112410: Sheep Farming, and NAICS 112111: Beef Cattle Ranching, and Farming. The Department was able to identify 9,329 establishments that are classified as part of the beef cattle ranching, and farming industry, and 233 Establishments that are classified as part of the sheep farming industry. Next, the Department used the SBA size standards to classify the vast majority of these employers (approximately 99 percent) as small.

#### 4. Compliance Requirements of the NPRM, Including Reporting and Recordkeeping

The Department has estimated the cost of the time to read and review the proposed rule. In addition, the Department assumes some employers will experience increased costs associated with changes in business operations, transportation, staffing turnover, and training requirements under this proposed rule. The Department seeks comment on how employers might adjust their business models to accommodate the reduction in the permitted length of employment, and what effect this might have on costs of operations.

#### 5. Calculating the Impact of the NPRM on Small Entities

The Department estimates that small businesses engaged in herding and livestock production would incur a one-time cost of \$24.27 to familiarize themselves with the changes proposed by this rule. Other costs that employers could incur are attributed to the potential need to adjust their staffing and business operations as well as employing more U.S. workers to offset the loss of H-2A workers. However, we do not expect that these costs will be significant, and we seek public comments on this matter. The Department reviewed the impacts of this proposed rule for two North American Industry Classification System (NAICS) Codes that frequently request H-2A certification for herding and livestock production job opportunities: NAICS 112410: Sheep Farming, and NAICS 112111: Beef Cattle Ranching, and Farming.

The Small Business Administration estimates that revenue for a small business with NAICS Code 112410 is \$1.0 million and for NAICS Code 112111 is \$1.0 million. Although the Department does not anticipate the proposed rule will have a significant adverse effect as employers must already adjust to DHS's guidelines, the Department acknowledges that some employers of sheep and goat herders will need to replenish their labor supply by hiring additional U.S. workers to account for the reduced period of need, or extending the work schedule for U.S. workers that they employ.

#### 6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the NPRM

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

#### 7. Alternative to the NPRM

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. As part of the settlement agreement, ECF No. 136, *Hispanic Affairs Project, et al. v. Perez et al.*, the Department agreed to engage in rulemaking to propose to rescind § 655.215(b)(2). The Department invites public comment on whether viable alternatives exist that would reduce the burden on small entities while remaining consistent with statutory requirements and the objectives of the NPRM.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This NPRM does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

#### D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on state, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in \$100 million or more in expenditures (adjusted annually for inflation) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. A Federal mandate is defined in 2 U.S.C. 658, in part, as any provision in a regulation that imposes an enforceable duty upon state, local, or tribal governments, or the private sector. Following consideration of these factors, the Department has concluded that, if finalized as proposed, this proposed rule would contain no unfunded Federal mandates, including no "Federal intergovernmental mandate" or "Federal private sector mandate."

This NPRM, if finalized as proposed, would not exceed the \$100 million in expenditures in any 1 year when adjusted for inflation, and this rulemaking does not contain such a mandate. The requirements of Title II of

the UMRA, therefore, do not apply, and the Department is not required to prepare a statement under the UMRA.

#### E. Executive Order 13132, Federalism

The Department has concluded that this NPRM, if finalized as proposed, does not have federalism implications, because it would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further agency action or analysis.

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

After consideration, the Department has determined that this NPRM, if finalized as proposed, would not result in "tribal implications," because it would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and tribal governments. Accordingly, E.O. 13175 would require no further agency action or analysis.

#### List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

For the reasons set forth above, the Department proposes to amend part 655 of title 20 of the Code of Federal Regulations as follows:

#### PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L.

106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C.

1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206,

107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

#### **§ 655.215 [Amended]**

■ 2. Amend § 655.215 by removing paragraph (b)(2) and redesignating paragraph (b)(3) as paragraph (b)(2).

**Suzan G. LeVine,**

*Principal Deputy Assistant Secretary for Employment and Training, Labor.*

[FR Doc. 2021–09639 Filed 5–5–21; 8:45 am]

**BILLING CODE 4510–FP–P**

# Notices

Federal Register

Vol. 86, No. 86

Thursday, May 6, 2021

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0078]

#### Addition of Republic of Korea to the List of Regions Affected With African Swine Fever

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice.

**SUMMARY:** We are advising the public that we have added the Republic of Korea (South Korea) to the list of regions that the Animal and Plant Health Inspection Services considers to be affected with African swine fever (ASF). We have taken this action because of confirmation of ASF in the Republic of Korea.

**DATES:** The Republic of Korea was added to the APHIS list of regions considered affected with ASF on September 17, 2019.

**FOR FURTHER INFORMATION CONTACT:** Dr. John Grabau, Regionalization Evaluation Services, Veterinary Services, APHIS, 920 Main Campus Drive, Raleigh, NC 27606. Phone: (919) 855–7738; email: [AskRegionalization@usda.gov](mailto:AskRegionalization@usda.gov).

**SUPPLEMENTARY INFORMATION:** The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of specified animals and animal products to prevent the introduction into the United States of various animal diseases, including African swine fever (ASF). ASF is a highly contagious disease of wild and domestic swine that can spread rapidly in swine populations with extremely high rates of morbidity and mortality. A list of regions where ASF exists or is reasonably believed to exist is maintained on the Animal and Plant Health Inspection Service (APHIS) website at <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal->

*and-animal-product-import-information/animal-health-status-of-regions/*. This list is referenced in § 94.8(a)(2) of the regulations.

Section 94.8(a)(3) of the regulations states that APHIS will add a region to the list referenced in § 94.8(a)(2) upon determining ASF exists in the region, based on reports APHIS receives of outbreaks of the disease from veterinary officials of the exporting country, from the World Organization for Animal Health (OIE), or from other sources the Administrator determines to be reliable, or upon determining that there is reason to believe the disease exists in the region. Section 94.8(a)(1) of the regulations specifies the criteria on which the Administrator bases the reason to believe ASF exists in a region. Section 94.8(b) prohibits the importation of pork and pork products from regions listed in accordance with § 94.8 except if processed and treated in accordance with the provisions specified in that section or consigned to an APHIS-approved establishment for further processing. Section 96.2 restricts the importation of swine casings that originated in or were processed in a region where ASF exists, as listed under § 94.8(a).

On September 17, 2019, the veterinary authorities of the Republic of Korea (South Korea) reported to the OIE the occurrence of ASF in that country. Therefore, in response to this outbreak, on September 17, 2019, APHIS added the Republic of Korea to the list of regions where ASF exists or is reasonably believed to exist. This notice serves as an official record and public notification of that action.

As a result, pork and pork products from the Republic of Korea, including casings, are subject to APHIS import restrictions designed to mitigate the risk of ASF introduction into the United States.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as not a major rule, as defined by 5 U.S.C. 804(2).

**Authority:** 7 U.S.C. 1633, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 21st day of April 2021.

**Jack Shere,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2021–09568 Filed 5–5–21; 8:45 am]

BILLING CODE 3410–34–P

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Kentucky Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Kentucky Advisory Committee (Committee) will hold a meeting via tele-conference on Wednesday, May 19, 2021, at 12:00 p.m. Eastern Time for the finalizing the Committee's report on bail reform and discussing the release of the report.

**DATES:** The meeting will be held on Wednesday, May 19, 2021, at 12:00 p.m. Eastern Time. Public Call Information:

Join online: <https://tinyurl.com/m7az9bu3>.

**FOR FURTHER INFORMATION CONTACT:** Barbara Delaviez at [bdelaviez@usccr.gov](mailto:bdelaviez@usccr.gov) or (202) 539–8246.

**SUPPLEMENTARY INFORMATION:** Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–



8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Barbara Delaviez at [bdelaviez@usccr.gov](mailto:bdelaviez@usccr.gov). in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Programs Unit Office at 202-539-8246.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlBAAQ> under the Commission on Civil Rights, Kentucky Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or phone number.

**Agenda**

1. Roll Call
2. Finalize Report/Gate 5 post-report planning
3. Next Steps
4. Public Comment
5. Adjourn

Dated: April 30, 2021.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2021-09532 Filed 5-5-21; 8:45 am]

**BILLING CODE P**

**COMMISSION ON CIVIL RIGHTS**

**Notice of Public Meeting of the Connecticut Advisory Committee**

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meetings.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that the Connecticut Advisory Committee to the U.S. Commission on Civil Rights will hold a meeting via web conference or phone call on Tuesday, May 25, 2021, at 12:00 p.m. The purpose of the meeting is for project planning.

**DATES:** May 25, 2021, Tuesday, at 12:00 p.m. (ET):

- To join by web conference, use WebEx link: <https://bit.ly/3h2DVQL>; password, if needed: USCCRCT2021
- To join by phone only, dial 1-800-360-9505; Access code: 199 471 5134

**FOR FURTHER INFORMATION CONTACT:**

Barbara Delaviez at [ero@usccr.gov](mailto:ero@usccr.gov) or by phone at 202-539-8246.

**SUPPLEMENTARY INFORMATION:** This meeting is available to the public through the WebEx link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing, may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the call-in number found through registering at the web link provided for this meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Barbara de La Viez at [ero@usccr.gov](mailto:ero@usccr.gov). Persons who desire additional information may contact the Regional Programs Unit at (202) 539-8246. Records and documents discussed during the meeting will be available for public viewing as they become available at [www.facadatabase.gov](http://www.facadatabase.gov). Persons interested in the work of this advisory committee are advised to go to the Commission's website, [www.usccr.gov](http://www.usccr.gov), or to contact the Regional Programs Unit at the above phone number or email address.

**Agenda: Tuesday, May 25, 2021 at 12:00 p.m. (ET)**

- I. Welcome and Roll Call
- II. Project Planning
- III. Public Comment
- IV. Next Steps
- V. Adjournment

Dated: April 30, 2021.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2021-09534 Filed 5-5-21; 8:45 am]

**BILLING CODE P**

**DEPARTMENT OF COMMERCE**

**Office of the Secretary**

**Estimates of the Voting Age Population for 2020**

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

**ACTION:** General notice announcing population estimates.

**SUMMARY:** This notice announces the voting age population estimates as of July 1, 2020, for each state and the District of Columbia. We are providing this notice in accordance with the 1976 amendment to the Federal Election Campaign Act. It is important to note that these estimates are based on the 2010 Census. Therefore, there may be differences between these estimates and results to be released from the 2020 Census.

**FOR FURTHER INFORMATION CONTACT:**

Karen Battle, Chief, Population Division, U.S. Census Bureau, Room HQ-6H174, 4600 Silver Hill Road, Washington, DC 20233. Phone: 301-763-2071. Email: [Karen.Battle@census.gov](mailto:Karen.Battle@census.gov).

**SUPPLEMENTARY INFORMATION:** Under the requirements of the 1976 amendment to the Federal Election Campaign Act, Title 52, United States Code, Section 30116(e), I hereby give notice that the estimates of the voting age population for July 1, 2020 for each state and the District of Columbia are as shown in the following table.

**ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2020**

Area	Population 18 and over
United States .....	256,662,010
Alabama .....	3,834,249
Alaska .....	552,427
Arizona .....	5,774,978
Arkansas .....	2,330,808
California .....	30,576,844
Colorado .....	4,557,684
Connecticut .....	2,838,054
Delaware .....	782,153
District of Columbia .....	583,228
Florida .....	17,482,580
Georgia .....	8,210,067
Hawaii .....	1,111,188
Idaho .....	1,375,870
Illinois .....	9,809,562
Indiana .....	5,188,514
Iowa .....	2,438,002
Kansas .....	2,217,059
Kentucky .....	3,475,334
Louisiana .....	3,564,038
Maine .....	1,101,973
Maryland .....	4,721,883
Massachusetts .....	5,552,051
Michigan .....	7,839,742
Minnesota .....	4,356,123
Mississippi .....	2,273,653
Missouri .....	4,780,119
Montana .....	850,894
Nebraska .....	1,462,537
Nevada .....	2,440,679
New Hampshire .....	1,113,141

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2020—Continued

Area	Population 18 and over
New Jersey .....	6,947,836
New Mexico .....	1,633,828
New York .....	15,348,422
North Carolina .....	8,294,423
North Dakota .....	583,680
Ohio .....	9,124,576
Oklahoma .....	3,027,263
Oregon .....	3,380,729
Pennsylvania .....	10,162,497
Rhode Island .....	855,276
South Carolina .....	4,100,115
South Dakota .....	674,238
Tennessee .....	5,373,433
Texas .....	21,925,627
Utah .....	2,320,603
Vermont .....	510,181
Virginia .....	6,724,143
Washington .....	6,027,818
West Virginia .....	1,428,520
Wisconsin .....	4,574,131
Wyoming .....	449,237

Source: U.S. Census Bureau, Population Division, Vintage 2020 Population Estimates (based on 2010 Census results).

Gina M. Raimondo, Secretary, U.S. Department of Commerce, has certified these estimates for the Federal Election Commission and approved the publication of this Notice in the **Federal Register**.

Dated: April 28, 2021.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2021-09422 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-07-P**

**DEPARTMENT OF COMMERCE**

**Foreign-Trade Zones Board**

[B-36-2021]

**Foreign-Trade Zone (FTZ) 208—New London, Connecticut; Notification of Proposed Production Activity; Sheffield Pharmaceuticals, LLC (Over-the-Counter (OTC) Healthcare Products); New London and Norwich, Connecticut**

Sheffield Pharmaceuticals, LLC (Sheffield) submitted a notification of proposed production activity to the FTZ Board for its facilities in New London and Norwich, Connecticut. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on April 21, 2021.

A separate application has been submitted for FTZ designation at the company’s facilities under FTZ 208. The facilities are used for the production of OTC healthcare products. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Sheffield from customs duty payments on the foreign-status components used in export production. On its domestic sales, for the foreign-status materials/components noted below, Sheffield would be able to choose the duty rate during customs entry procedures that applies to decongestant nasal spray, saline nasal spray and toothpaste (duty-free). Sheffield would be able to avoid duty on foreign-status components which become scrap/waste. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include plastic bottles, plastic stoppers with dip tubes, plastic spray pumps and caps for bottles, and plastic/foil laminate collapsible tubes (duty rate ranges from 3 to 5.3%). The request indicates that certain materials/components are subject to duties under Section 301 of the Trade Act of 1974 (Section 301), depending on the country of origin. The applicable Section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board’s Executive Secretary and sent to: [ftz@trade.gov](mailto:ftz@trade.gov). The closing period for their receipt is June 15, 2021.

A copy of the notification will be available for public inspection in the “Reading Room” section of the Board’s website, which is accessible via [www.trade.gov/ftz](http://www.trade.gov/ftz).

For further information, contact Diane Finver at [Diane.Finver@trade.gov](mailto:Diane.Finver@trade.gov) or (202) 482-1367.

Dated: April 30, 2021.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2021-09549 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**Foreign-Trade Zones Board**

[B-35-2021]

**Foreign-Trade Zone 210—St. Clair County, Michigan; Application for Reorganization Under Alternative Site Framework**

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Economic Development Alliance of St. Clair County, grantee of FTZ 210, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or “usage-driven” FTZ sites for operators/users located within a grantee’s “service area” in the context of the FTZ Board’s standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on April 29, 2021.

FTZ 210 was approved by the FTZ Board on November 28, 1995 (Board Order 783, 60 FR 64156, December 14, 1995).

The current zone includes the following sites: *Site 1* (2 acres)—Port Huron Seaway Terminal, 2336 Military Street, Port Huron; *Site 2* (300 acres)—Port Huron Industrial Park, 16th and Dove Streets, Port Huron; *Site 3* (15 acres)—International Industrial Park, 330 Griswold Road, Port Huron; and, *Site 4* (9 acres)—Wilkie Brothers Warehouse, 1765 Michigan Avenue, Port Huron.

The grantee’s proposed service area under the ASF would be Huron, Lapeer, Macomb, Sanilac and St. Clair Counties, Michigan, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies’ needs for FTZ designation. The application indicates that the proposed service area is within and adjacent to the Port Huron, Michigan, U.S. Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone to include all the existing sites as “magnet” sites. No subzones/usage-driven sites are being requested at this time.

In accordance with the FTZ Board’s regulations, Elizabeth Whiteman and Juanita Chen of the FTZ Staff are designated examiners to evaluate and analyze the facts and information

presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: [ftz@trade.gov](mailto:ftz@trade.gov). The closing period for their receipt is July 6, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 20, 2021.

A copy of the application will be available for public inspection in the "Reading Room" section of the FTZ Board's website, which is accessible via [www.trade.gov/ftz](http://www.trade.gov/ftz). For further information, contact Elizabeth Whiteman at [Elizabeth.Whiteman@trade.gov](mailto:Elizabeth.Whiteman@trade.gov) or Juanita Chen at [Juanita.Chen@trade.gov](mailto:Juanita.Chen@trade.gov).

Dated: April 30, 2021.

**Andrew McGilvray,**  
Executive Secretary.

[FR Doc. 2021-09550 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**Foreign-Trade Zones Board**

[Order No. 2112]

**Designation of New Grantee; Foreign-Trade Zone 156, Hidalgo County, Texas**

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

The Foreign-Trade Zones (FTZ) Board (the Board) has considered the application (docketed April 15, 2021) submitted by the City of Weslaco, grantee of FTZ 156, requesting reissuance of the grant of authority for said zone to the Hidalgo County Regional Foreign Trade Zone, which has accepted such reissuance subject to approval by the FTZ Board. Upon review, the Board finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest.

Therefore, the Board approves the application and recognizes the Hidalgo County Regional Foreign Trade Zone as the new grantee for Foreign-Trade Zone 156, subject to the FTZ Act and the Board's regulations, including Section 400.13.

Dated: April 30, 2021.

**Christian B. Marsh,**  
*Acting Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.*

[FR Doc. 2021-09547 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

[A-580-895]

**Low Melt Polyester Staple Fiber From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2019-2020**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that the sole producer/exporter subject to this administrative review made sales of subject merchandise at less than normal value (NV) during the period of review (POR) August 1, 2019, through July 31, 2020. Interested parties are invited to comment on these preliminary results.

**DATES:** Applicable May 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Alice Maldonado or Melissa Kinter, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-4682 or (202) 482-1413, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On October 6, 2020, based on a timely request for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review on low melt polyester staple fiber (low melt PSF) from the Republic of Korea (Korea).<sup>1</sup> The review covers one producer and exporter of the subject merchandise, Toray Advanced Materials Korea, Inc. (TAK). For a complete description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.<sup>2</sup>

<sup>1</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 FR 63081, 63084 (October 6, 2020).

<sup>2</sup> See Memorandum, "Decision Memorandum for the Preliminary Results of the 2019-2020 Administrative Review of the Antidumping Duty Order on Low Melt Polyester Staple Fiber from the Republic of Korea," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

**Scope of the Order**

The merchandise subject to this order is synthetic staple fibers, not carded or combed, specifically bi-component polyester fibers having a polyester fiber component that melts at a lower temperature than the other polyester fiber component (low melt PSF). The scope includes bi-component polyester staple fibers of any denier or cut length. The subject merchandise may be coated, usually with a finish or dye, or not coated.

Low melt PSF is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 5503.20.0015. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

**Methodology**

Commerce is conducting this review in accordance with sections 751(a)(1)(B) and (2) of the Tariff Act of 1930, as amended (the Act). Export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <https://enforcement.trade.gov/frn/>. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

**Preliminary Results of the Review**

As a result of this review, we preliminarily determine that the following estimated weighted-average dumping margin exists for TAK for the period August 1, 2019, through July 31, 2020:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Toray Advanced Materials Korea, Inc .....	3.00

### Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.<sup>3</sup> Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.<sup>4</sup> Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the time limit for filing case briefs.<sup>5</sup> Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.<sup>6</sup> Case and rebuttal briefs should be filed using ACCESS.<sup>7</sup>

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS within 30 days after the date of publication of this notice.<sup>8</sup> Hearing requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.<sup>9</sup> Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information.<sup>10</sup>

Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless otherwise extended.<sup>11</sup>

<sup>3</sup> See 19 CFR 351.224(b).

<sup>4</sup> See 19 CFR 351.309(c).

<sup>5</sup> Commerce is exercising its discretion, under 19 CFR 351.309(d)(1), to alter the time limit for filing of rebuttal briefs.

<sup>6</sup> See 19 CFR 351.309(c)(2) and (d)(2).

<sup>7</sup> See 19 CFR 351.303.

<sup>8</sup> See 19 CFR 351.310(c).

<sup>9</sup> See 19 CFR 351.310(d).

<sup>10</sup> See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19; Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

<sup>11</sup> See Section 751(a)(3)(A) of the Act.

### Assessment Rates

Upon completion of the administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.<sup>12</sup>

Pursuant to 19 CFR 351.212(b)(1), where the respondent reported the entered value of their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where the respondent did not report entered value, we calculated the entered value in order to calculate the assessment rate. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Commerce's "automatic assessment" will apply to entries of subject merchandise during the POR produced by TAK for which it did not know that the merchandise it sold to an intermediary (e.g., a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.<sup>13</sup> The all-others rate is 16.27 percent.<sup>14</sup>

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (i.e., within 90 days of publication).

<sup>12</sup> See 19 CFR 351.212(b).

<sup>13</sup> For a full discussion of this practice, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

<sup>14</sup> See *Low Melt Polyester Staple Fiber from the Republic of Korea and Taiwan: Antidumping Duty Orders*, 83 FR 40752, 40753 (August 16, 2018).

### Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for TAK will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for companies not participating in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, or the original less-than-fair-value (LTFV) investigation, but the producer is, then the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 16.27 percent, the all-others rate established in the LTFV investigation.<sup>15</sup> These deposit requirements, when imposed, shall remain in effect until further notice.

### Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

### Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 30, 2021.

**Christian Marsh,**

*Acting Assistant Secretary for Enforcement and Compliance.*

### Appendix

#### List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background

<sup>15</sup> *Id.*

III. Scope of the Order  
 IV. Discussion of the Methodology  
 V. Currency Conversion  
 VI. Recommendation

[FR Doc. 2021–09567 Filed 5–5–21; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C–357–821]

#### Biodiesel From Argentina: Rescission of Countervailing Duty Administrative Review; 2020

**AGENCY:** Enforcement and Compliance, International Trade Administration, United States Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) is rescinding the administrative review of the countervailing duty (CVD) order on biodiesel from Argentina for the period of review, (POR) January 1, 2020, through December 31, 2020, based on the timely withdrawal of the request for review.

**DATES:** Applicable May 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Elfi Blum, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0197.

#### SUPPLEMENTARY INFORMATION:

##### Background

On January 5, 2021, Commerce published a notice of opportunity to request an administrative review of the CVD duty order on biodiesel from Argentina for the POR.<sup>1</sup> On January 29, 2021, the National Biodiesel Board Fair Trade Coalition (the petitioner) timely requested an administrative review of the CVD order with respect to 18 companies.<sup>2</sup> On March 4, 2021, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the

CVD order for the POR with respect to these 18 companies.<sup>3</sup> On March 23, 2021, Commerce placed U.S. Customs and Border Protection (CBP) entry data for U.S. imports of biodiesel from Argentina for the POR on the record of this review.<sup>4</sup> On April 22, 2021, based on a lack of suspended entries from the companies subject to the review, Commerce placed its notice of intent to rescind this review on the record and invited interested parties to comment.<sup>5</sup> Then, on April 23, 2021, the petitioner timely withdrew its request for review for all 18 companies.<sup>6</sup>

#### Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested the review withdraw their requests within 90 days of the publication date of the notice of initiation of the requested review. The petitioner withdrew its request for review for all 18 companies within 90 days of the publication of the *Initiation Notice*, and no other party requested an administrative review of the CVD order for the POR. Therefore, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding the administrative review of the CVD order on biodiesel from Argentina for the POR, in its entirety.

#### Assessment

Commerce will instruct CBP to assess countervailing duties on all appropriate entries of biodiesel from Argentina during the POR at rates equal to the cash deposit rates for estimated countervailing duties that were required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

#### Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

#### Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 30, 2021.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2021–09538 Filed 5–5–21; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C–357–821]

#### Biodiesel From Argentina: Rescission of Countervailing Duty Administrative Review; 2020

**AGENCY:** Enforcement and Compliance, International Trade Administration, United States Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) is rescinding the administrative review of the countervailing duty (CVD) order on biodiesel from Argentina for the period of review, (POR) January 1, 2020, through December 31, 2020, based on the timely withdrawal of the request for review.

**DATES:** Applicable May 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Elfi Blum, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0197.

**Background:** On January 5, 2021, Commerce published a notice of opportunity to request an administrative review of the CVD duty order on biodiesel from Argentina for the POR.<sup>1</sup>

<sup>1</sup> See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity*

<sup>1</sup> See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 86 FR 291 (January 5, 2021).

<sup>2</sup> See Petitioner's Letter, "Biodiesel from Argentina: Request for Administrative Review of Countervailing Duty Order," dated January 29, 2021. The requested companies are: (1) Aceitera General Deheza S.A.; (2) Bio Nogoya S.A.; (3) Bunge Argentina S.A.; (4) Cargill S.A.C.I.; (5) COFCO Argentina S.A.; (6) Cámara Argentina de Biocombustibles; (7) Explora; (8) GEFCO Argentina; (9) LDC Argentina S.A.; (10) Molinos Agro S.A.; (11) Noble Argentina; (12) Oleaginosa Moreno Hermanos S.A.; (13) Patagonia Bioenergía; (14) Renova S.A.; (15) T6 Industrial SA (EcoFuel); (16) Unitec Bio S.A.; (17) Vicentin S.A.I.C.; and (18) Viluco S.A.

<sup>3</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 FR 12599, 12606 (March 2, 2021) (*Initiation Notice*).

<sup>4</sup> See Memorandum, "Administrative Review of the Countervailing Duty Order on Biodiesel from Argentina: Release of U.S. Customs entry Data for Respondent Selection; 2020," dated March 23, 2021.

<sup>5</sup> See Memorandum, "Administrative Review of Countervailing Duty Order on Biodiesel from Argentina; 2020: Notice of Intent to Rescind Review," dated April 22, 2021.

<sup>6</sup> See Petitioner's Letter, "Biodiesel from Argentina: Response to Notice of Intent to Rescind Reviews and Withdrawal of Request for Administrative Review of Countervailing Duty Order," dated April 23, 2021.

On January 29, 2021, the National Biodiesel Board Fair Trade Coalition (the petitioner) timely requested an administrative review of the CVD order with respect to 18 companies.<sup>2</sup> On March 4, 2021, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of the CVD order for the POR with respect to these 18 companies.<sup>3</sup> On March 23, 2021, Commerce placed U.S. Customs and Border Protection (CBP) entry data for U.S. imports of biodiesel from Argentina for the POR on the record of this review.<sup>4</sup> On April 22, 2021, based on a lack of suspended entries from the companies subject to the review, Commerce placed its notice of intent to rescind this review on the record and invited interested parties to comment.<sup>5</sup> Then, on April 23, 2021, the petitioner timely withdrew its request for review for all 18 companies.<sup>6</sup>

**Rescission of Review:** Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested the review withdraw their requests within 90 days of the publication date of the notice of initiation of the requested review. The petitioner withdrew its request for review for all 18 companies within 90 days of the publication of the *Initiation Notice*, and no other party requested an administrative review of the CVD order for the POR. Therefore, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding the administrative review of

to Request Administrative Review, 86 FR 291 (January 5, 2021).

<sup>2</sup> See Petitioner's Letter, "Biodiesel from Argentina: Request for Administrative Review of Countervailing Duty Order," dated January 29, 2021. The requested companies are: (1) Aceitera General Deheza S.A.; (2) Bio Nogoya S.A.; (3) Bunge Argentina S.A.; (4) Cargill S.A.C.I.; (5) COFCO Argentina S.A.; (6) Cámara Argentina de Biocombustibles; (7) Explora; (8) GEFCO Argentina; (9) LDC Argentina S.A.; (10) Molinos Agro S.A.; (11) Noble Argentina; (12) Oleaginosa Moreno Hermanos S.A.; (13) Patagonia Bioenergía; (14) Renova S.A.; (15) T6 Industrial SA (EcoFuel); (16) Unitec Bio S.A.; (17) Vicentin S.A.I.C.; and (18) Viluco S.A.

<sup>3</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 FR 12599, 12606 (March 2, 2021) (*Initiation Notice*).

<sup>4</sup> See Memorandum, "Administrative Review of the Countervailing Duty Order on Biodiesel from Argentina: Release of U.S. Customs entry Data for Respondent Selection; 2020," dated March 23, 2021.

<sup>5</sup> See Memorandum, "Administrative Review of Countervailing Duty Order on Biodiesel from Argentina; 2020: Notice of Intent to Rescind Review," dated April 22, 2021.

<sup>6</sup> See Petitioner's Letter, "Biodiesel from Argentina: Response to Notice of Intent to Rescind Reviews and Withdrawal of Request for Administrative Review of Countervailing Duty Order," dated April 23, 2021.

the CVD order on biodiesel from Argentina for the POR, in its entirety.

**Assessment:** Commerce will instruct CBP to assess countervailing duties on all appropriate entries of biodiesel from Argentina during the POR at rates equal to the cash deposit rates for estimated countervailing duties that were required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

**Notification Regarding Administrative Protective Orders:** This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

**Notification to Interested Parties:** This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: April 30, 2021.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2021-09548 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XB063]

### North Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of webconference.

**SUMMARY:** The North Pacific Fishery Management Council (NPFMC) Trawl Electronic Monitoring Committee will meet May 21, 2021.

**DATES:** The meeting will be held on Friday, May 21, 2021, from 8:30 a.m. to 4:30 p.m. Alaska Daylight Time.

**ADDRESSES:** The meeting will be a webconference. Join online through the

link at <https://meetings.npfmc.org/Meeting/Details/2065>.

**Council address:** North Pacific Fishery Management Council, 1007 W 3rd Ave, Anchorage, AK 99501-2252; telephone: (907) 271-2809. Instructions for attending the meeting are given under **SUPPLEMENTARY INFORMATION**, below.

**FOR FURTHER INFORMATION CONTACT:** Anna Henry, Council staff; phone; (907) 271-2809 and email: [Anna.Henry@noaa.gov](mailto:Anna.Henry@noaa.gov). For technical support please contact administrative Council staff, email: [npfmc.admin@noaa.gov](mailto:npfmc.admin@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

### Agenda

Friday, May 21, 2021

The agenda will include: (a) PCFMAC and FMAC updates on relevant issues; (b) EM cost reporting metrics; (c) 2021 Trawl EM program; (d) developing alternatives for the regulated Trawl EM program, and (e) scheduling, and other issues. The Agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/2065> prior to the meeting, along with meeting materials.

### Connection Information

You can attend the meeting online using a computer, tablet, or smartphone; or by phone only. Connection information will be posted online at: <https://meetings.npfmc.org/Meeting/Details/2065>.

### Public Comment

Public comment letters will be accepted and should be submitted electronically to <https://meetings.npfmc.org/Meeting/Details/2065>.

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

Dated: May 3, 2021.

**Tracey L. Thompson,**

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

[FR Doc. 2021-09605 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XA723]

### Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permits

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The National Marine Fisheries Service (NMFS) is issuing permits for a period of three years to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in certain U.S. commercial fisheries.

**DATES:** These permits are effective for a three-year period beginning May 6, 2021.

**ADDRESSES:** Reference materials for these permits, including the final negligible impact determinations, are available on the internet at <https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5E-authorization-commercial> or <http://www.regulations.gov>, identified by Docket Number NOAA–NMFS–2020–0096. Other supporting information is available on the internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/ endangered-species-conservation/ recovery-species-under-endangered-species-act>; MMPA List of Fisheries, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock Assessment Reports (SARs) by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

**FOR FURTHER INFORMATION CONTACT:** Suzie Teerlink, NMFS Alaska Region, (907) 586–7240, [Suzie.Teerlink@noaa.gov](mailto:Suzie.Teerlink@noaa.gov); Diana Kramer, NMFS Pacific Islands Region, (808) 725–5167, [Diana.Kramer@noaa.gov](mailto:Diana.Kramer@noaa.gov); Kara Shervanick, NMFS Southeast Region, (727) 824–5350, [Kara.Shervanick@noaa.gov](mailto:Kara.Shervanick@noaa.gov); or Caroline Good, NMFS Office of Protected Resources, (301) 427–8402, [Caroline.Good@noaa.gov](mailto:Caroline.Good@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: (1) The incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; (2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and (3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. We have made the determination that certain commercial fisheries meet these three requirements and are issuing permits to these fisheries to authorize the incidental take of ESA-listed marine mammal species or stocks under the MMPA for a period of 3 years. We are also providing a list of commercial fisheries that, based on their level of M/SI of ESA-listed marine mammal species, do not require authorization under MMPA 101(a)(5)(E) so long as any incidental mortality or injury is reported.

#### Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to 3 years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS

makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) Incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We originally evaluated ESA-listed stocks or species documented on the 2020 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02–238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, we proposed to issue permits under MMPA section 101(a)(5)(E) to vessels registered in five Category I or Category II commercial fisheries, as classified on the final 2020 MMPA LOF, to incidentally kill or seriously injure individuals from specific ESA-listed marine mammal stocks (85 FR 62709, October 5, 2020). Since our original assessment, the 2021 final MMPA LOF published on January 14, 2021 (86 FR 3028) and became effective on February 16, 2021. The 2021 LOF reflects new information on marine mammal incidental mortality and serious injury in commercial fisheries, which we incorporated in our updated assessment. The 2021 LOF removed one of the stocks (Central North Pacific stock of humpback whale) from the list of species/stocks incidentally killed or injured in the Category II Alaska Bering Sea, Aleutian Islands Pollock trawl fishery that we proposed to include on the list of authorized stocks to be taken incidental to fishing operations in this fishery (85 FR 62709, October 5, 2020). Thus, we have removed the Central North Pacific stock of humpback whale for the Alaska Bering Sea, Aleutian Islands pollock trawl fishery from the final list of commercial fisheries authorized to take specific threatened and endangered marine mammals incidental to fishing operations (see Table 1 below).



TABLE 1—LIST OF COMMERCIAL FISHERIES AUTHORIZED TO TAKE (M/SI) SPECIFIC THREATENED AND ENDANGERED MARINE MAMMALS INCIDENTAL TO FISHING OPERATIONS

Commercial fishery	LOF category	ESA-listed marine mammal stock
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline HI deep-set longline/Western Pacific pelagic longline (HI deep-set component).	I	Sperm whale, Northern Gulf of Mexico. False killer whale, Main HI Islands Insular; Humpback whale, Central North Pacific.
AK Bering Sea, Aleutian Islands flatfish trawl .....	II	Bearded seal, Alaska; Humpback whale, Western North Pacific; Ringed seal, Alaska; Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands pollock trawl .....	II	Bearded seal, Alaska; Steller sea lion, Western U.S.
AK Gulf of Alaska, sablefish longline .....	II	Sperm whale, North Pacific.

Category III fisheries are those commercial fisheries that have a remote likelihood of or no known incidental mortality or serious injury of marine mammals (MMPA section 118(c)(1)(A)(iii)). All commercial fisheries classified as Category III on the current LOF do not require MMPA 101(a)(5)(E) authorization, so long as any mortality or injury of marine mammals incidental to their operations is reported pursuant to MMPA section 118(e). Furthermore, per NMFS’ Procedural Directive 02–204–02 (procedural directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)” (NMFS 2020), NMFS considers such Category III fisheries to have a negligible impact on that marine mammal stock or species. Thus, we incorporate by reference all Category III fisheries included in the 2021 MMPA LOF (86 FR 3028, January 14, 2021).

In addition, for the purposes of MMPA section 101(a)(5)(E), commercial fisheries classified as Category I or II on the LOF solely because of incidental M/SI of non-ESA-listed marine mammals meet the definition of a Category III commercial fishery with respect to ESA-listed stocks or species because the fishery has a remote likelihood of or no known incidental M/SI of ESA-listed marine mammals. Based on the 2020 MMPA LOF, we previously determined that two Category II commercial fisheries, the AK Bering Sea, Aleutian Islands Pacific cod longline and the HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component), met this criterion (85 FR 62709, October 5, 2020). The HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component) changed classification from Category II to Category III in the 2021 LOF (86 FR 3028, January 14, 2021), but given that this was already considered a Category III commercial fishery with respect to ESA-listed stocks or species, this change in classification does not change our proposed determination. Thus, the AK Bering Sea, Aleutian

Islands Pacific cod longline and the HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component) commercial fisheries do not require 101(a)(5)(E) authorization.

NMFS is evaluating other commercial fisheries not listed here for purposes of making a negligible impact determination (NID) and anticipates addressing such fisheries in future **Federal Register** notices. More information about the commercial fisheries listed above is available in the 2021 MMPA LOF (86 FR 3028, January 14, 2021) and on the internet at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

Tribal fisheries conducted pursuant to a treaty with the United States are not included on the LOF, and are not subject to the requirements of section 101(a)(5)(E). In the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995), NMFS concluded that treaty tribal fisheries are conducted under the authority of the Indian treaties; the MMPA’s requirements in section 118 do not apply to treaty Indian tribal fisheries. In the 2010 final LOF (74 FR 58859, November 16, 2009), NMFS re-evaluated its 1995 conclusion to exempt tribal fisheries from the LOF (60 FR 45086, August 30, 1995) to determine whether it should be changed due to *Anderson v. Evans* 314 F.3d 1006 (9th Cir. 2002)(court found that the MMPA applied to the Makah tribe’s proposed whale hunt and the tribe’s proposed whale takings were not excluded by the treaty with the tribe).

NMFS considered, among other things, the public comments received on the proposed 2010 LOF and the 1994 amendments to the MMPA and accompanying legislative history, and determined that *Anderson v. Evans* did not alter NMFS’ original analysis in the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995). Thus, tribal fisheries are not included on the LOF nor considered for MMPA 101(a)(5)(E) authorizations.

Additional information on NMFS’ decision to continue to exclude tribal fisheries from the LOF is provided in the 2010 LOF final rule (74 FR 58859, November 16, 2009). NMFS continues to work on a government-to-government basis with the affected treaty tribal governments to gather data on injuries and mortalities of marine mammals incidental to tribal fisheries.

For each commercial fishery listed in Table 1 above, we reviewed the best available scientific information to determine if the fishery met the three requirements in MMPA 101(a)(5)(E) for issuing a permit. This information is included in the 2021 MMPA LOF (86 FR 3028, January 14, 2021), the marine mammal SARs, recovery plans for these species (available at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the documents describing the preliminary and final determinations supporting the permits (go to <https://www.regulations.gov> and enter “NOAA–NMFS–2020–0096” in the search box).

NMFS is in the process of reviewing humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized Procedural Directive 02–204–03: “Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are reviewed in light of the DPS designations, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (e.g.,



selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the ESA and has been incidentally killed or seriously injured incidental to the analyzed commercial fishery. NMFS considers humpback whale stock designation a high priority for revision. Once NMFS has completed our review, we will revise humpback whale stock designations in future SARs.

### Basis for Determining Negligible Impact

Prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival.”

### Criteria for Determining Negligible Impact

Through scientific analysis, peer review, and public notice, NMFS developed a quantitative approach for determining negligible impact. We finalized the NMFS Procedural Directive 02–204–02 (directive): “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)” effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>. This procedural directive describes a process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing an MMPA section 101(a)(5)(E) permit as noted above).

The procedural directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT<sub>T</sub>), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT<sub>S</sub>) represents the level of M/SI from

a single commercial fishery that NMFS considers negligible for a stock. NIT<sub>S</sub> was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI, but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT<sub>T</sub>. If NIT<sub>T</sub> is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT<sub>T</sub> is exceeded, then the Tier 2 analysis compares each individual fishery’s M/SI for a particular stock to NIT<sub>S</sub>. If NIT<sub>S</sub> is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT<sub>T</sub> and proceed directly to the Tier 2 NIT<sub>S</sub> analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing an MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue an MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These criteria rely on the best available scientific information, including estimates of a stock’s minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

### Negligible Impact Determinations

We evaluated the impact of each commercial fishery (listed in Table 1 above) following the procedural directive, and, based on the best

available scientific information, made NIDs. These NID analyses are presented in accompanying MMPA 101(a)(5)(E) determination documents that provide summaries of the information used to evaluate each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery. The final MMPA 101(a)(5)(E) determination documents are available at: <https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5e-authorization-commercial-or> <https://www.regulations.gov> under Docket Number “NOAA–NMFS–2020–0096”. Based on the criteria outlined in the procedural directive, the most recent SARs, and the best available scientific information, NMFS has determined that the M/SI incidental to the five Category I and II commercial fisheries listed in Table 1 will have a negligible impact on the associated ESA-listed marine mammal stocks. Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for these commercial fisheries.

### Recovery Plans

Recovery Plans for the ESA-listed species or stocks listed in Table 1 have either been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>) or are being developed. Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

### Take Reduction Plans

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stocks considered for these permits are designated as strategic stocks under the MMPA because they, or a component of the stocks, are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR, respectively. The obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs when funding is insufficient. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries.

As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS uses the most recent SARs and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

All of the evaluated fisheries listed in Table 1, for the affected marine mammal species or stocks, either have a TRP in place or, based on NMFS' priorities, implementation of a TRP is currently deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determinations supporting the permits available on the internet at <https://www.fisheries.noaa.gov/action/negligible-impact-determinations-and-mmpa-section-101a5E-authorization-commercial> or <https://www.regulations.gov> under docket number "NOAA-NMFS-2020-0096").

#### Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. Each of the fisheries listed in Table 1 considered for authorization under MMPA section 101(a)(5)(E) is monitored by NMFS fishery observer programs. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

#### Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

#### Conclusions for Permits

Based on the above evaluation for each commercial fishery listed in Table 1 as it relates to the three requirements of MMPA 101(a)(5)(E), we hereby issue MMPA 101(a)(5)(E) permits to the commercial fisheries in Table 1 to authorize the incidental take of ESA-

listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify that specific authorization, after notice and opportunity for public comment, or potentially suspend or revoke the permit. If the authorization for an individual fishery in Table 1 changes for any reason during the 3-year period, the authorizations for the other commercial fisheries in Table 1 will continue unchanged and effective until the end of the 3-year period. As noted above, under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries, or for the Category II commercial fishery listed above that meet the definition of a Category III commercial fishery with respect to ESA-listed species or stocks, so long as any incidental marine mammal mortality or injury is reported to NMFS pursuant to MMPA section 118(e).

#### Endangered Species Act Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of these commercial fisheries on ESA-listed marine mammals for which permits are proposed here, were analyzed in the appropriate Fishery Management Plan ESA section 7 Biological Opinions, and incidental take was exempted for those ESA-listed marine mammals for each of these fisheries as appropriate.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because these proposed permits would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plans is required for these permits. Issuing the proposed permits would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

#### Comments and Responses

NMFS received two comment letters on the proposed issuance of permits and

underlying preliminary determinations. The Center for Biological Diversity, Defenders of Wildlife, the Humane Society of the United States, Humane Society Legislative Fund, and Whale and Dolphin Conservation (CBD *et al.*) opposed issuing the permits, while the Hawaii Longline Association (HLA) supported issuing the permits. Several comments addressed ESA-related elements outside the scope of the proposed actions and are not included here. Under section 7 of the ESA, biological opinions analyze the impact of fishery-related mortalities on ESA-listed marine mammals, including those species analyzed as part of negligible impact determinations. MMPA section 101(a)(5)(E) permits authorize take of ESA-listed marine mammals under the MMPA while biological opinions authorize take of ESA-listed marine mammals under the ESA. Only responses to substantive comments pertaining to the proposed permits and preliminary determinations under MMPA section 101(a)(5)(E) are addressed below.

*Comment 1:* CBD *et al.* incorporate their previous comments submitted on NMFS' draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)," and reiterate NMFS' new approach to negligible impact determinations undermines key statutory protections for marine mammals protected as threatened or endangered under the ESA and disregards congressional intent that NMFS provide ESA-listed marine mammals with more protections than non-listed marine mammals.

*Response:* NMFS received several comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)." NMFS notes, that while we have used negligible impact determination criteria since 1999, these criteria were "never formalized as an official agency policy." As such, to say we are changing or increasing its thresholds or reducing protections is inaccurate because these thresholds were never formally established. The full response to comments on the procedural directive is available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

*Comment 2:* CBD *et al.* assert that NMFS improperly equates negligible

impact to a stock's PBR level, using the Main Hawaiian Islands Insular stock of false killer whales as an example.

*Response:* NMFS has previously responded to this broader comment in the responses to comments on the draft "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" procedural directive (see Comment #4). As noted, it is true that  $NIT_T$  is equivalent to PBR for an endangered stock if, and only if, the default Recovery Factor (Fr) is used in calculating PBR; but in all other cases (i.e., for threatened stocks and for any endangered stock not using the default Fr)  $NIT_T$  is less than PBR. Thus,  $NIT_T$ , and the negligible impact determination it informs, is afforded independent meaning. The full response to comments on the procedural directive is available at: <https://www.fisheries.noaa.gov/action/criteria-determining-negligible-impact-under-mmpa-section-101a5e>.

*Comment 3:* CBD *et al.* comment that the negligible impact criteria fail to assess the implications of unknown or declining population trends for conformity with the underlying assumptions of PBR, specifically for North Pacific sperm whale, bearded seal, ringed seal, Northern Gulf of Mexico sperm whale, and Main Hawaiian Islands insular false killer whales. As such, the resulting determinations are arbitrary and improper.

*Response:* Stocks or species with unreliable or unknown abundance trends do not necessarily deviate from the underlying assumptions of the PBR framework. Based on the most recent SARs and other available scientific information, the abundance trends for the North Pacific sperm whale, bearded seal, ringed seal, Northern Gulf of Mexico sperm whale, and Main Hawaiian Islands insular false killer whale are currently unknown. However, the lack of a clear abundance trend does not by itself indicate a stock does not conform to the PBR framework.

For the North Pacific sperm whale, there are insufficient data for estimating abundance and several key uncertainties regarding the stock assessment. However, uncertainty regarding the stock's assessment does not necessarily mean the stock fails to conform to the PBR framework. Unlike SARs for stocks that may not conform to the PBR framework (e.g., Beluga Whale, Cook Inlet stock), the current North Pacific sperm whale SAR does not note any such concerns. If a species or stock's population dynamics are thought to not conform to the underlying assumptions of PBR, this would be addressed through the stock assessment process

(NMFS 2016). The draft NID for the North Pacific sperm whale erroneously indicated that the stock fails to conform to the PBR framework because we lack sufficient information; we have modified the final determination accordingly. This 101(a)(5)(E) authorization remains active for up to 3 consecutive years, but should new information become available it may be shortened or revoked if necessary.

*Comment 4:* CBD *et al.* state that there is no recovery plan in place for the Main Hawaiian Islands (MHI) Insular false killer whale stock and without a recovery plan to address all potential anthropogenic impacts, allowing take would violate the precautionary principle. CBD *et al.* also state that no take should be authorized in the absence of a recovery plan for this stock.

*Response:* Since publication of the proposed authorizations, NMFS published the MHI Insular False Killer Whale DPS Draft Recovery Plan, which may be accessed here: <https://www.fisheries.noaa.gov/resource/document/draft-recovery-plan-main-hawaiian-islands-insular-false-killer-whale-distinct>. Following review of public comment, which closed on December 15, 2020, NMFS anticipates finalizing the recovery plan and recovery implementation strategy for the MHI Insular false killer whale.

*Comment 5:* CBD *et al.* note that none of the Alaska fisheries included in the proposed permits have TRPs in place and suggest they do not appear to be in development. CBD *et al.* point out that while NMFS has deferred establishment of TRTs for these fisheries to focus on establishing TRTs for other species or stocks that are a higher priority, the assessment of those species and stocks have not been made publicly available. CBD *et al.* believe that NMFS should not authorize take of ESA-listed species if a TRT is not in place, particularly where NMFS is not requiring additional mitigation measures to reduce the risk of entanglement through this permitting process.

*Response:* MMPA section 118 provides the framework for addressing marine mammal interactions in commercial fisheries nationwide and includes various metrics and guidance for managing the take reduction program as a whole. As noted earlier in this notice, MMPA section 118(f)(3) contains specific priorities for developing TRPs if insufficient funding is available to develop and implement TRPs for all applicable stocks and fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category

II fisheries. Thus, NMFS prioritizes which stocks and fisheries to address under a TRP. MMPA section 118(f) provides that if there is insufficient funding available to develop and implement a take reduction plan for stocks that interact with Category I and II fisheries, the Secretary shall give highest priority to the development of TRPs for species or stocks whose level of incidental mortality and serious injury exceeds PBR, that have small population size, and those that are declining most rapidly. As noted in the proposed permit, all stocks authorized to be incidentally taken under this permit are currently lower priorities for developing TRPs because of the low levels of M/SI incidental to commercial fishing compared to other marine mammal stocks and commercial fisheries.

*Comment 6:* CBD *et al.* state that NMFS cannot reasonably conclude that the impact of the Alaska Bering Sea, Aleutian Islands flatfish trawl fishery on the Western North Pacific humpback whale stock is negligible because NMFS relies on outdated M/SI data for its determination.

*Response:* The proposed negligible impact determination for the Alaska Bering Sea, Aleutian Islands flatfish trawl indicated that "recent M/SI" data were unavailable to analyze for the Western North Pacific humpback whale stock. We have modified this phrasing in the final determination to more clearly indicate that recent M/SI data are available for this species but that no M/SI incidental to the Alaska Bering Sea, Aleutian Islands flatfish trawl fishery has been documented.

*Comment 7:* CBD *et al.* disagree with NMFS that all Category III fisheries in the 2020 List of Fisheries are not subject to the ESA prohibition against incidentally taking marine mammals from endangered or threatened stocks, and counters that these Category III fisheries remain subject to the prohibition on take under the ESA unless and until take is authorized under one of the statutory processes enumerated by the ESA (e.g., an incidental take statement or incidental take permit).

*Response:* We concur that all fisheries remain subject to ESA prohibitions on the incidental taking of marine mammals from endangered or threatened species. We have modified the relevant language in this notice to clarify that all fisheries remain subject to ESA prohibitions on the incidental taking of marine mammals from endangered or threatened stocks.

*Comment 8:* CBD *et al.* comment that a Category III designation does not mean

that a fishery is unlikely to “take” an ESA-listed marine mammal, because any entanglement of an ESA-listed marine mammal constitutes a prohibited take under the ESA, regardless of whether it leads to mortality, and NMFS does not consider sub-lethal entanglements in categorizing fisheries.

*Response:* For the purposes of MMPA 101(a)(5)(E)(i)(I), only incidental mortality and serious injury are considered when making a negligible impact determination.

*Comment 9:* HLA agrees with NMFS’ preliminary determinations that the HI deep-set longline/Western Pacific pelagic longline (HI deep-set component) has a “negligible impact” on the Central North Pacific humpback whale stock and the MHI Insular false killer whale stock. They also note there have been no interactions between the fishery and Central North Pacific humpback whales.

*Response:* NMFS has finalized the NID for the HI deep-set longline/Western Pacific pelagic longline (HI deep-set component). To clarify, there was at least one observed serious injury of a Central North Pacific humpback whale incidental to the Hawaii deep-set longline fishery in 2014. However, known humpback whale mortality and serious injury in Hawaii-based fisheries involved whales from the Central North Pacific stock as designated under the MMPA, which has been identified as the Hawaii DPS of humpback whales. The Hawaii DPS is not listed as threatened or endangered under the ESA. Because MMPA Section 101(a)(5)(E) applies only to stocks designated as depleted because of their listing under the ESA, a Tier 2 analysis was not conducted for the Hawaii DPS.

*Comment 10:* HLA agrees that for the MHI Insular false killer whale stock, the deep-set longline fishery satisfies the NID requirements of Tier 1 and further notes that Tier 2 is also satisfied, because the deep-set longline fishery’s M/SI with the Insular false killer whale stock is 0.0 in the most recent SAR, which plainly falls below the Insular false killer whale stock’s NIT<sub>s</sub> value.

*Response:* Based on the best available scientific information, the total human caused M/SI (including M/SI from the HI deep-set longline/Western Pacific pelagic longline, HI deep-set component fishery) of MHI Insular false killer whales does not exceed NIT<sub>T</sub> as part of a Tier 1 analysis. Therefore, as defined in NMFS Procedural Directive 02–204–02, all commercial fisheries are considered to have a negligible impact on the stock, and no further analysis for individual fisheries, including a Tier 2

analysis, is required at this time (NMFS 2020).

## References

- National Marine Fisheries Service (NMFS). 2020. National Marine Fisheries Service Procedure 02–204–02: Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E). 20 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>
- National Marine Fisheries Service (NMFS). 2019. National Marine Fisheries Service Procedure 02–204–03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act. 9 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>
- National Marine Fisheries Service (NMFS). 2016. National Marine Fisheries Service Procedure 02–204–01: Guidelines for preparing stock assessment reports pursuant to the 1994 amendments to the Marine Mammal Protection Act. 23 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/guidelines-assessing-marine-mammal-stocks>
- National Marine Fisheries Service (NMFS). 2014. National Marine Fisheries Service Procedure 02–238–01: Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals. 42 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>

Dated: May 3, 2021.

**Catherine Marzin,**

*Acting Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2021–09569 Filed 5–5–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XB060]

#### Establishment of the Space Weather Advisory Group and Solicitation of Nominations for Membership

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of establishment of the Space Weather Advisory Group and solicitation of nominations for membership

**SUMMARY:** Pursuant to the Promoting Research and Observations of Space Weather to Improve the Forecasting of Tomorrow (PROSWIFT) Act of 2020 and the Federal Advisory Committee Act

(FACA), the Administrator of NOAA, with the Space Weather Interagency Working Group (interagency working group), announces the establishment of the Space Weather Advisory Group (SWAG). The SWAG shall advise the interagency working group established by the National Science and Technology Council. This advice will inform the interests and work of the interagency working group. The SWAG charter shall terminate 4 years from the date of its filing with the appropriate U.S. Senate and House of Representatives Committees unless earlier terminated or renewed by proper authority. This notice also requests nominations for membership on the SWAG.

**DATES:** Nominations should be sent to the web address specified below and must be received on or before May 30, 2021.

**ADDRESSES:** Nominations and applications should be submitted electronically to the Designated Federal Officer (DFO), SWAG, NOAA, at [jennifer.meehan@noaa.gov](mailto:jennifer.meehan@noaa.gov).

**FOR FURTHER INFORMATION CONTACT:** Dr. Jennifer Meehan, DFO, SWAG, and National Space Weather Program Manager, National Weather Service, NOAA, at [jennifer.meehan@noaa.gov](mailto:jennifer.meehan@noaa.gov) or 301–427–9798, and William Murtagh, Program Coordinator, Space Weather Prediction Center, NOAA, at [william.murtagh@noaa.gov](mailto:william.murtagh@noaa.gov) or 303–497–7492.

#### SUPPLEMENTARY INFORMATION:

##### I. Background and Authority

Establishment of the SWAG implements a statutory requirement of the PROSWIFT Act of 2020 (Pub. L. 116–181), 51 U.S.C. 60601 *et seq.* The SWAG is governed by the FACA, as amended, 5 U.S.C. App., which sets forth standards for the formation and use of advisory committees. The mission of the SWAG is to receive advice from the academic community, the commercial space weather sector, and nongovernmental space weather end users to advise the Space Weather Interagency Working Group (interagency working group) established by the National Science and Technology Council pursuant to 51 U.S.C. 60601(c). Duties include advising the interagency working group on the following: facilitating advances in the space weather enterprise of the United States; improving the ability of the United States to prepare for, mitigate, respond to, and recover from space weather phenomena; enabling the coordination and facilitation of research to operations and operations to research, as described in section 60604(d) of title 51, United

States Code; and developing and implementing the integrated strategy under 51 U.S.C. 60601(c), including subsequent updates and reevaluations. The SWAG shall also conduct a comprehensive survey of the needs of space weather products users to identify the space weather research, observations, forecasting, prediction, and modeling advances required to improve space weather products, as required by 51 U.S.C. 60601(d)(3).

## II. Structure

The SWAG shall consist of not more than 15 members, including a chair, of whom: Five members shall be representatives of the academic community; five members shall be representatives of the commercial space weather sector; and five members shall be nongovernmental representatives of the space weather end-user community. Members will be chosen to provide an appropriate range of views that represent the span of the space weather community and end-user sectors. Members shall serve in a representative capacity; they are, therefore, not Special Government Employees. As such, members are not subject to the ethics rules applicable to Government employees, except that they must not misuse Government resources or their affiliation with the Committee for personal purposes. All members of the SWAG will be appointed by the interagency working group for a 3-year term, with one member appointed by NOAA as the Chair. Members may not serve on the SWAG for more than two consecutive terms. A member of the SWAG may not serve as the Chair of the SWAG for more than two terms, regardless of whether the terms are consecutive. The SWAG will meet approximately three times each year, which may be conducted in person or by teleconference, webinar, or other means. Additional meetings may be called as appropriate, with approval by the Administrator of NOAA. Members are reimbursed for actual and reasonable travel and other per diem expenses incurred in performing such duties but will not be reimbursed for their time. As a Federal Advisory Committee, the SWAG's membership is required to be balanced in terms of viewpoints represented and the functions to be performed, as well as appointments shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, or cultural, religious, or socioeconomic status.

## III. Nominations

Interested persons may nominate themselves or third parties. An application is required to be considered for SWAG membership, regardless of whether a person is nominated by a third party or self-nominated. The application package must include: (1) The nominee's full name, title, institutional affiliation, and contact information; (2) identification of the nominee's area(s) of industry perspective—academia, commercial service provider, or end-user; (3) a short description of his/her qualifications relative to the kinds of advice being solicited by NOAA in this Notice; and (4) a current resume (maximum length four [4] pages). All nomination information should be provided in a single, complete package, and should be sent to the DFO of the SWAG at the electronic address provided above.

Dated: April 30, 2021.

### Benjamin Friedman,

*Deputy Under Secretary for Operations Performing the Duties of Under Secretary of Commerce for Oceans and Atmosphere and Administrator, National Oceanic and Atmospheric Administration.*

[FR Doc. 2021-09530 Filed 5-5-21; 8:45 am]

BILLING CODE 3510-KE-P

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

[Docket No. 210503-0097]

RIN 0660-XC050

### Telecommunications/ICT Development Activities, Priorities and Policies To Connect the Unconnected Worldwide in Light of the 2021 International Telecommunication Union (ITU) World Telecommunication Development Conference (WTDC-21)

**AGENCY:** National Telecommunications and Information Administration, U.S. Department of Commerce.

**ACTION:** Notice, request for public comment.

**SUMMARY:** As the United States prepares for the International Telecommunication Union's (ITU) World Telecommunication Development Conference (WTDC-2021) scheduled for November 8-19, 2021, in Addis Ababa, Ethiopia, the National Telecommunications and Information Administration is working closely with the U.S. Department of State, the Federal Communications Commission (FCC), other federal agencies, and members of the U.S. private sector. The

WTDC-2021 will set the priorities and activities for the ITU Telecommunication Development Sector in areas such as connectivity and digital inclusion. Through this Notice, NTIA is seeking public comments regarding activities, priorities, and policies that advance telecommunications and information and communications technology (ICT) development worldwide to assist the U.S. government in the development of its position for the conference.

**DATES:** Comments are due on or before June 7, 2021.

**ADDRESSES:** Written comments may be submitted by mail to the Office of International Affairs (OIA), National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4701, Washington, DC 20230. Written comments may also be submitted electronically to [WTDC21@ntia.gov](mailto:WTDC21@ntia.gov). Please submit electronic comments, either in Microsoft Word or Adobe PDF, using a text searchable format. NTIA will post comments to the NTIA website at <https://www.ntia.doc.gov/federal-register-notice/2021/request-comments-connecting-unconnected-worldwide-wtdc-21>.

### FOR FURTHER INFORMATION CONTACT:

Diane Steinour, Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4701, Washington, DC 20230; telephone: (202) 482-3180; email: [dsteinour@ntia.gov](mailto:dsteinour@ntia.gov). Please direct media inquiries to NTIA's Office of Public Affairs at (202) 482-7002 or [press@ntia.gov](mailto:press@ntia.gov).

**SUPPLEMENTARY INFORMATION:** The International Telecommunication Union's (ITU) World Telecommunication Development Conference (WTDC-21 or Conference), whose theme is "Connecting the Unconnected to Achieve Sustainable Development," is scheduled for November 8-19, 2021, in Addis Ababa, Ethiopia. The WTDC-2021 is a quadrennial conference that will bring together the ITU's 193 Member States and private sector organizations (sector members) that participate in the Development Sector of the ITU (ITU-D). As the United States prepares for the WTDC-21, NTIA is working closely with the U.S. Department of State, which is leading and coordinating the WTDC-21 preparatory process for the United States, along with several Executive Branch agencies, the FCC and members of the U.S. private sector. The Conference will set the priorities and

activities for the ITU Telecommunication Development Sector in areas such as connectivity and digital inclusion. To inform the development of the U.S. government's priorities and position for the Conference, NTIA is seeking comments and recommendations on activities, priorities, and policies that advance telecommunications and information and communications technology (ICT) development worldwide.<sup>1</sup>

In general, the U.S. government's goal is to strengthen open, inclusive, and secure digital ecosystems as nations work towards universal connectivity. Additionally, the U.S. government seeks to leverage private sector collaboration to strengthen local capacity, create improved outcomes for development and humanitarian assistance, encourage adoption of U.S. values, ensure adherence to internationally recognized standards, improve cybersecurity, and foster open markets to close the global digital divide. We seek to reach the U.S. telecommunication/ICT stakeholder community and expand this community with new connectivity stakeholders in order to obtain a diverse range of views and increase recognition about the positive contributions U.S. entities are making to connect the unconnected and increase digital inclusion. We welcome views, studies, reports and references to development projects and engagements that could bolster and help facilitate future partnerships and collaborative endeavors towards telecommunications/ICT development.

The COVID-19 global health emergency has underscored the need for greater connectivity around the globe to meet the challenges of daily life. Only 51 percent of the world's population is online, leaving nearly four billion people unable to connect to the internet. The United Nations (UN) estimates that it will cost \$428 billion to connect the unconnected by 2030. As we learn lessons from unserved and underserved communities in the United States and in other countries and regions, we seek greater stakeholder engagement, input

<sup>1</sup> NTIA is the President's principal adviser on telecommunications policy. See 47 U.S.C. 902(b)(2)(D). NTIA also develops and sets forth, in coordination with the Secretary of State and other interested agencies, plans, policies, and programs which relate to international telecommunications issues, conferences, and negotiations; coordinates economic, technical, operational, and related preparations for United States participation in international telecommunications conferences and negotiations; and provides advice and assistance to the Secretary of State on international telecommunications policies to strengthen the position and serve the best interests of the United States in support of the Secretary of State's responsibility for the conduct of foreign affairs. See 47 U.S.C. 902(b)(2)(G).

and advice: what works, what does not, and what lessons have been learned to help address affordable access to and uptake of telecommunications and ICT products and services worldwide.

NTIA is seeking to foster more active United States participation and leadership by stakeholders in the ITU. U.S. citizen Doreen Bogdan-Martin serves as the current Telecommunication Development Bureau Director and is the first female elected to the ITU leadership team. She is seeking to widen the communities of interest represented in ITU-D activities to help lead to more concrete results and outcomes in project and capacity building implementation. WTDC-21 will launch a four-year work program in 2022-25 for ITU-D, during which it will set out its priorities for development assistance, regional office capacity building, and study areas along thematic priorities.

The U.S. government's objectives for the WTDC and ITU-D include advancing U.S. efforts to:

- Improve global ICT connectivity and affordability to reach everyone
- Improve digital skills acquisition
- Reduce the global digital divide and promote inclusion, with a focus on women and girls and students, as drivers for adoption, especially in developing countries
- Demonstrate U.S. leadership in connecting the unconnected nationally, regionally, and globally
- Promote policies that spur competition, investment, and innovation
- Promote ITU-D's focus on capacity building, enabling policy environments to foster adoption of new technologies, and promote new business models and forms of partnership to connect the unconnected with affordable broadband services
- Leverage the WTDC-21 to kick-start new ICT development partnerships worldwide that produce sustainable and effective solutions
- Increase the value proposition for stakeholders, especially from the Americas region, to engage in ITU-D activities
- Strengthen our interactions with both developed and developing countries to accomplish shared ICT objectives.

This Notice and Request for Public Comment is the public's opportunity to: (1) Provide input to NTIA on the public's interest in general global telecommunications and ICT policy and development activities and priorities, (2) assist the U.S. delegation to the

WTDC as it prepares for the Conference, and (3) inform future U.S. telecommunications and ICT development goals and priorities including engagement with the ITU Development Sector on capacity building activities. NTIA seeks comments and supporting materials regarding the objectives listed above as well as proposals on U.S. policies and goals about telecommunications and ICT development activities. Comments are welcome from all interested stakeholders including the private sector, the technical community, academia, government, civil society, and individuals. The comments will help NTIA and the U.S. government leverage and prioritize resources and policy expertise most effectively.

Please address any of the following topics in any submission:

### 1. ICT Development Priorities

a. Over the next five years, what should the U.S. government priorities be for telecommunications/ICT development?

b. Are there particular areas of focus for economic development, as well as telecommunications/ICT development that might help the United States align with developing countries' development interests?

c. What are valuable venues, forums, or methods to focus this work?

### 2. U.S. Stakeholder Community

#### a. In General

i. What are the challenges or barriers towards connecting the unconnected? Are there particular lessons or policy approaches regarding the gender digital divide?

ii. What types of activities or projects have been most successful in building capacities of developing countries towards increasing telecommunications/ICT development and inclusion?

iii. How can virtual platforms increase capacity building, especially since COVID-19 began?

iv. How best can the U.S. government share its experiences and best practices on telecommunications/ICT deployment overcoming the digital divide, and other telecommunications/ICT developmental topics? In 2021? Longer term?

v. What interest or experience, if any, should the U.S. government be aware of entities participating in telecommunications/ICT projects, capacity-building efforts, and/or donation of ICT products and services globally and/or particularly those focused on meeting developing country needs?

vi. What types of financing or other partnership mechanisms, including

particular organizations or venues, may help advance global ICT development?

vii. What are some structured corporate social responsibility, goodwill programs, or corporate partnership programs that may be useful resources?

viii. What are some foundations or financial institutions or non-profits that can share donor experiences and best practices to encourage investment in underserved and unserved areas (domestically or internationally)?

*b. For the ITU and WTDC-21*

i. How might virtual platforms enhance the development and capacity building work of the ITU Bureau of Telecommunication Development (BDT) and ITU-D study groups, including U.S. participation, in a post-COVID-19 environment? Are other methods available or appropriate?

ii. How should we best engage U.S. stakeholders and ascertain their input before, during, and after the WTDC-21 (and on an ongoing basis)?

iii. BDT is seeking to ensure that WTDC-21 is a development-focused conference that mobilizes people and resources to “Connect the Unconnected to Achieve Sustainable Development” including thematic dialogues, a youth summit, and other events to bring stakeholders together to consider key telecommunications/ICT development topics. How can the U.S. government increase awareness or participation in WTDC-21 in order to help ensure concrete outcomes?

**3. WTDC-21**

a. What WTDC-21 outcomes would best help achieve the Conference’s goal to connect the unconnected and to help raise awareness and mobilize resources to close the digital divide?

b. What development projects, ideas, and activities might be useful for the U.S. government to advance through the ITU Development Sector?

c. What ITU-D accomplishments should the U.S. government encourage the ITU seek to replicate?

**4. Other**

a. Are there other telecommunications/ICT development matters that stakeholders want to raise with the U.S. government (unrelated to the ITU or UN)?

**Request for Public Comment**

In addition to the questions above, NTIA invites comment on the full range of issues that may be presented by this inquiry. We also welcome input and comments on any specific issues being advanced by other countries, private

sector organizations, and stakeholders for WTDC-2021.

*Instructions for Commenters*

Commenters are encouraged to address any or all of the questions in this RFC. Comments that contain references to studies, research, and other empirical data that are not widely published should include copies of the referenced materials with the submitted comments. Comments submitted by email should be machine-readable and should not be copy-protected.

Comments submitted by mail may be in hard copy (paper) or electronic (on CD-ROM or disk).

Commenters should include the name of the person or organization filing the comment, as well as a page number on each page of their submissions. All comments received are a part of the public record and generally will be posted on the NTIA website, <https://www.ntia.gov>, without change. All personal identifying information (for example, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Dated: May 3, 2021.

**Kathy Smith,**

*Chief Counsel, National Telecommunications and Information Administration.*

[FR Doc. 2021-09581 Filed 5-5-21; 8:45 am]

**BILLING CODE 3510-60-P**

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

[Docket No: CFPB-2021-0009]

**Agency Information Collection Activities: Notice of Approval of Information Collection Requirements**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is announcing Office of Management and Budget (OMB) approval of new information collection requirements contained in an interim final rule published in the **Federal Register** on April 22, 2021, “Debt Collection Practices in Connection with the Global COVID-19 Pandemic (Regulation F).” See the **SUPPLEMENTARY INFORMATION** section below for additional information about this OMB approval.

**FOR FURTHER INFORMATION CONTACT:**

Documentation prepared in support of this information collection request is available at [www.regulations.gov](http://www.regulations.gov). Requests for additional information should be directed to Suzan Muslu, Data Governance Program Manager, at (202) 435-9267, or email: [CFPB\\_PRA@cfpb.gov](mailto:CFPB_PRA@cfpb.gov). If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov). Please do not submit comments to this mailbox.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501 *et seq.*) the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. On April 22, 2021, the Bureau published an interim final rule in the **Federal Register** titled “Debt Collection Practices in Connection with the Global COVID-19 Pandemic (Regulation F)” to amend Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA). The interim final rule addresses certain debt collector conduct associated with an eviction moratorium issued by the Centers for Disease Control and Prevention (CDC) in response to the global COVID-19 pandemic. The amendments prohibit debt collectors from taking certain covered eviction actions unless the debt collectors provide written notice to certain consumers of their protections under the CDC temporary eviction moratorium and prohibit misrepresentations about consumers’ ineligibility for protection under such moratorium. This moratorium is in place now and currently set to expire at the end of June.

Pursuant to 5 CFR 1320.13, the Bureau submitted a request for emergency approval of these information collection on April 22, 2021, and OMB approved this ICR on April 30, 2021 and assigned it OMB Control Number 3170-0074. Therefore, in accordance with the PRA and 5 CFR 1320.11(k), the Bureau hereby announces OMB approval of the information collection requirements as contained in the subject interim final rule which is effective May 3, 2021.

Dated: April 30, 2021.

**Suzan Muslu,**

*Data Governance Program Manager, Bureau of Consumer Financial Protection.*

[FR Doc. 2021-09533 Filed 5-5-21; 8:45 am]

**BILLING CODE 4810-AM-P**



**DEPARTMENT OF EDUCATION****[Docket ID ED–2021–FSA–0005]****Privacy Act of 1974; Matching Program****AGENCY:** Department of Education.**ACTION:** Notice of a New Matching Program.

**SUMMARY:** This provides notice of the re-establishment of the matching program between the U.S. Department of Education (Department or ED) (recipient agency) and the U.S. Department of Veterans Affairs (VA) (source agency). The purpose of the matching program is to assist the Department with verification of a veteran's status during the processing of applications for financial assistance under title IV of the Higher Education Act of 1965, as amended (HEA).

**DATES:** Submit your comments on the proposed matching program on or before June 7, 2021.

The matching program will go into effect at the later of the following two dates: (1) July 3, 2021, or (2) 30 days after the publication of this notice, on May 6, 2021, unless comments have been received from interested members of the public requiring modification and replication of the notice. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months, if the respective Data Integrity Boards (DIBs) of ED and VA determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the “help” tab.

- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about this proposed matching program, address them to: Gerard Duffey, Management and Program Analyst, Wanamaker Building, U.S. Department of Education, Federal Student Aid, 100 Penn Square East, Suite 509.B10, Philadelphia, PA 19107. Telephone: (215) 656–3249.

*Privacy Note:* The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

*Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record:* On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Gerard Duffey, Management and Program Analyst, Wanamaker Building, U.S. Department of Education, Federal Student Aid, 100 Penn Square East, Suite 509.B10, Philadelphia, PA 19107. Telephone: (215) 656–3249.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** We provide this notice in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a); Office of Management and Budget (OMB) Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988, 54 FR 25818 (June 19, 1989); and OMB Circular No. A–108, 81 FR 94424 (December 23, 2016).

The prior notice of a new matching program was published in the **Federal Register** on December 4, 2018 (83 FR 62568). Under the provisions of the Computer Matching and Privacy Protection Act of 1988, Public Law 100–503, 102 Stat. 2507, the Computer Matching Agreement (CMA) became effective on January 3, 2019, and was renewed for an additional 12 months to make it effective through July 2, 2021, because: (1) The matching program was conducted without change; and (2) each Data Integrity Board Chairperson certified in writing that the matching program was conducted in compliance with the CMA. ED and VA are now re-establishing the matching program through this notice.

**Participating Agencies**

ED and VA.

**Authority for Conducting the Matching Program**

ED is authorized to participate in the matching program under sections 480(c)(1) and 480(d)(1)(D) of the HEA (20 U.S.C. 1087vv(c)(1) and (d)(1)(D)). VA is authorized to participate in the matching program under 38 U.S.C. 523.

**Purpose(s)**

The purpose of this matching program is to assist the Secretary of Education with verification of a veteran's status during the processing and review of applications for financial assistance under title IV of the HEA.

The Secretary of Education is authorized by the HEA to administer the title IV programs and to enforce the terms and conditions of the HEA.

Section 480(c)(1) of the HEA defines the term “veteran” to mean “any individual who—(A) has engaged in the active duty in the United States Army, Navy, Air Force, Marines, or Coast Guard; and (B) was released under a condition other than dishonorable.” (20 U.S.C. 1087vv(c)(1)). Under section 480(d)(1)(D) of the HEA, an applicant who is a veteran (as defined in section 480(c)(1)) is considered an independent student for purposes of title IV, HEA program assistance eligibility, and, therefore, does not have to provide parental income and asset information to apply for title IV, HEA program assistance. (20 U.S.C. 1087vv(d)(1)(D)).

**Categories of Individuals**

Individuals who have completed the Free Application for Federal Student Aid (FAFSA®) and have indicated that they are a veteran.

**Categories of Records**

ED will provide to the VA the Social Security number, first and last name, and date of birth of each applicant for financial assistance under title IV of the HEA who indicates veteran status in his or her application.

**System(s) of Records**

ED system of records: Federal Student Aid Application File (18–11–01), which was most recently published in the **Federal Register** at 84 FR 57856 (October 29, 2019).

VA system of records: Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records—VA (58VA21/22/28), which was most recently published in the **Federal Register** at 84 FR 4138 (February 14, 2019).

*Accessible Format:* On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain



this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Mark Brown,**

*Chief Operating Officer, Federal Student Aid.*

[FR Doc. 2021-09544 Filed 5-5-21; 8:45 am]

BILLING CODE 4000-01-P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. IC21-22-000]

#### Commission Information Collection Activities (Ferc-585); Comment Request; Extension

**AGENCY:** Federal Energy Regulatory Commission, Department of Energy.

**ACTION:** Notice of information collection and request for comments.

**SUMMARY:** In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC-585, (Reporting of Electric Energy Shortages and Contingency Plans Under PURPA Section 206).

**DATES:** Comments on the collection of information are due July 6, 2021.

**ADDRESSES:** You may submit copies of your comments (identified by Docket No. IC21-22-000) by one of the following methods:

Electronic filing through <http://www.ferc.gov>, is preferred.

- **Electronic Filing:** Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

- **Mail via U.S. Postal Service Only:** Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

- **Hand (Including Courier) Delivery:** Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

**Instructions:** All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov>. For user assistance, contact FERC Online Support by email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or by phone at (866) 208-3676 (toll-free).

**Docket:** Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Ellen Brown may be reached by email at [DataClearance@FERC.gov](mailto:DataClearance@FERC.gov), telephone at (202) 502-8663.

**SUPPLEMENTARY INFORMATION:**

**Title:** FERC-585 (Reporting of Electric Energy Shortages and Contingency Plans Under PURPA<sup>1</sup> Section 206).

**OMB Control No.:** 1902-0138.

**Type of Request:** Three-year extension of the FERC-585 information collection requirements with no changes to the current reporting requirements.

**Abstract:** The Commission uses the information collected under the requirements of FERC-585 to implement the statutory provisions of Section 206 of PURPA. Section 206 of PURPA amended the Federal Power Act (FPA) by adding a new subsection (g) to section 202, under which the Commission, by rule, was to require each public utility to report to the Commission and any appropriate state regulatory authority:

- Any anticipated shortages of electric energy or capacity which would affect the utility's capability to serve its wholesale customers; and
- a contingency plan that would outline what circumstances might give rise to such occurrences.

<sup>1</sup> PURPA = Public Utility Regulatory Policies Act of 1979 (Pub. L. 95-617, 92 Stat. 3117), enacted 11/9/1978.

<sup>2</sup> Final Rule in Docket RM92-12-000, issued on 1/13/1995.

<sup>3</sup> Final Rule in Docket RM05-19-000, issued on 5/27/2005.

- In Order No. 5752, the Commission modified the reporting requirements in 18 CFR 294.101(b) to provide that, if a public utility includes in its rates schedule, provisions that during electric energy and capacity shortages:

- It will treat firm power wholesale customers without undue discrimination or preference; and

- it will report any modifications to its contingency plan for accommodating shortages within 15 days to the appropriate state regulatory agency and to the affected wholesale customers, then the utility need not file with the Commission an additional statement of contingency plan for accommodating such shortages.

This revision merely changed the reporting mechanism; the public utility's contingency plan would be located in its filed rate rather than in a separate document. In Order No. 6593, the Commission modified the reporting requirements in 18 CFR 294.101(e) to provide that public utilities must comply with the requirements to report shortages and anticipated shortages by submitting this information electronically using the Office of Electric Reliability's alert system at [emergency@ferc.gov](mailto:emergency@ferc.gov) in lieu of submitting an original and two copies to the Secretary of the Commission. The Commission uses the information to evaluate and formulate an appropriate option for action in the event an unanticipated shortage is reported and/or materializes. Without this information, the Commission and State agencies would be unable to:

- Examine and approve or modify utility actions;
- prepare a response to anticipated disruptions in electric energy; and/or
- ensure equitable treatment of all public utility customers under the shortage situation.

The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR part 294.101.

**Type of Respondents:** Public Utilities.

**Estimate of Annual Burden:**<sup>4</sup> The Commission estimates the annual public reporting burden for the information collection as:

<sup>4</sup> "Burden" is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

FERC-585—REPORTING OF ELECTRIC SHORTAGES AND CONTINGENCY PLANS UNDER PURPA SECTION 206

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost per response <sup>5</sup> (4)	Total annual burden hours & total annual cost (3) * (4) = (5)	Cost per respondent (\$) (5) ÷ (1)
Contingency Plan .....	1	1	1	1 hrs.; \$83.00 .....	1 hrs.; \$83.00 .....	\$83.00
Capacity Shortage .....	1	1	1	1 hrs.; \$83.00 .....	1 hrs.; \$83.00 .....	83.00
Total .....					2 hrs.; \$166.00 .....	

*Comments:* Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: April 30, 2021.  
**Kimberly D. Bose,**  
*Secretary.*  
 [FR Doc. 2021-09554 Filed 5-5-21; 8:45 am]  
**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. ID-5999-011]

**Notice of Filing; Curtis, Kathryn B.**

Take notice that on April 29, 2021, Kathryn B. Curtis submitted for filing, application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d(b) and Part 45.8 of the Federal Energy Regulatory Commission’s (Commission) Rules of Practice and Procedure, 18 CFR part 45.8.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the

<sup>5</sup> The estimates for cost per response are derived using the following formula: Average Burden Hours per Response \* 83.00 per Hour = Average Cost per Response. This is Based upon FERC’s 2020 FTE average salary plus benefits. Commission staff believes that any industry effort applied to FERC-585 would be compensated similarly to FERC’s average salary.

Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission’s Home Page (<http://ferc.gov>) using the “eLibrary” link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission’s Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

*Comment Date:* 5:00 p.m. Eastern Time on May 20, 2021.

Dated: April 30, 2021.  
**Kimberly D. Bose,**  
*Secretary.*  
 [FR Doc. 2021-09559 Filed 5-5-21; 8:45 am]  
**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. AD21-8-000]

**Technical Conference on Reassessment of the Electric Quarterly Report Requirements; Supplemental Notice of Technical Conference**

On March 25, 2021, the Federal Energy Regulatory Commission (Commission) issued a notice that its staff will hold a technical conference related to the reassessment of the Electric Quarterly Report (EQR) requirements on May 19, 2021. The technical conference will take place from 10:00 a.m. to 5:00 p.m. Eastern Time. All interested persons are invited to participate. Access to the meeting will be available via WebEx.

Commission staff is hereby supplementing the March 25, 2021 notice with the agenda, including sample discussion topics. During the conference, Commission staff, EQR filers, and EQR users will discuss potential changes to the current EQR data fields. This technical conference is the second in a series of conferences related to the reassessment of the EQR requirements.

Information for the technical conference, including a link to the webcast, will be posted prior to the event on the meeting event page on the Commission’s website, available at: <https://www.ferc.gov/news-events/events/technical-conference-reassessment-electric-quarterly-report-requirements>. The presentation slides will be posted to the website prior to the conference. Any interested person that wishes to participate in the conference is required to register through the WebEx link.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to [accessibility@ferc.gov](mailto:accessibility@ferc.gov) or call toll free 1-866-208-3372 (voice) or 202-208-1659 (TTY). This notice is issued and published in accordance with 18 CFR 2.1.

For more information about the technical conference, please contact Jeff Sanders of the Commission's Office of Enforcement at (202) 502-6455, or send an email to [EQR@ferc.gov](mailto:EQR@ferc.gov).

Dated: April 30, 2021.

**Kimberly D. Bose,**

Secretary.

[FR Doc. 2021-09556 Filed 5-5-21; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RM98-1-000]

#### Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt

of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so

requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or for TTY, contact (202)502-8659.

Docket Nos.	File date	Presenter or requester
Prohibited:		
1. P-1494-438 .....	4-20-2021	FERC Staff <sup>1</sup> .
2. P-1494-438 .....	4-20-2021	FERC Staff <sup>2</sup> .
3. ER21-669-000 .....	4-20-2021	Carl Zichella.
4. P-1494-438 .....	4-22-2021	FERC Staff <sup>3</sup> .
5. P-1494-438 .....	4-23-2021	FERC Staff <sup>4</sup> .
6. P-1494-438 .....	4-26-2021	FERC Staff <sup>5</sup> .
7. P-1494-438 .....	4-28-2021	FERC Staff <sup>6</sup> .
Exempt:		
1. ER21-669-000 .....	4-19-2021	U.S. Congress <sup>7</sup> .
2. ER21-669-000 .....	4-22-2021	U.S. Senator Dianne Feinstein.

<sup>1</sup> Emailed comments dated 4/20/2021 from Leila Matson.

<sup>2</sup> Emailed comments dated 4/16/2021 from Jessie Thomas-Blate.

<sup>3</sup> Emailed comments dated 4/22/2021 from Terah Kennel.

<sup>4</sup> Emailed comments dated 4/22/2021 from Hao Wang.

<sup>5</sup> Emailed comments dated 4/22/2021 from Claire Hayhow.

<sup>6</sup> Emailed comments dated 4/28/2021 from Cate Enrooth.

<sup>7</sup> U.S. Representative Raul Ruiz, M.D. and U.S. Senator Alex Padilla.

Dated: April 30, 2021.

**Kimberly D. Bose,**

Secretary.

[FR Doc. 2021-09557 Filed 5-5-21; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC21-57-000.

*Applicants:* Exelon Generation Company, LLC.

*Description:* Response of Exelon Generation Company, LLC, et al. to

April 16, 2021 letter requesting additional information under.

*Filed Date:* 4/29/21.

*Accession Number:* 20210429-5376.

*Comments Due:* 5 p.m. ET 5/13/21.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10-2289-010; ER10-2564-010; ER10-2600-010; EL21-48-000.

*Applicants:* Tucson Electric Power Company, UNS Electric, Inc., UniSource Energy Development Company.

*Description:* Response to March 1, 2021 Show Cause Order of Tucson Electric Power Company, et al.  
*Filed Date:* 4/29/21.  
*Accession Number:* 20210429–5379.  
*Comments Due:* 5 p.m. ET 5/20/21.  
*Docket Numbers:* ER17–1821–004.  
*Applicants:* Panda Stonewall LLC.  
*Description:* Compliance filing: Compliance filing in Docket ER17–1821 to be effective 6/15/2017.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5380.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–195–002.  
*Applicants:* LS Power Grid California, LLC.  
*Description:* Tariff Amendment: LS Power Grid California Deferral Termination Request to be effective 12/23/2020.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5122.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1351–001.  
*Applicants:* Midcontinent Independent System Operator, Inc., American Transmission Company LLC.  
*Description:* Tariff Amendment: 2021–04–30 SA 2805 ATC-Rock Energy Cooperative Substitute 1st Rev CFA to be effective 5/12/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5256.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1352–001.  
*Applicants:* Public Service Company of Colorado.  
*Description:* Tariff Amendment: 2021–04–30 OATT–Att W–E&P–FormofSvcAgrmt–NSP–Amnd to be effective 6/29/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5239.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1585–001.  
*Applicants:* Public Service Company of Colorado.  
*Description:* Tariff Amendment: 2021–04–30 OATT–Att W–E&P–FormofSvcAgrmt–SPS–Amnd to be effective 6/29/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5257.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1797–000.  
*Applicants:* Midcontinent Independent System Operator, Inc.  
*Description:* § 205(d) Rate Filing: 2021–04–29 Revisions to Rate Schedule 1 to Establish an Evergreen Term to be effective 6/29/2021.  
*Filed Date:* 4/29/21.  
*Accession Number:* 20210429–5248.  
*Comments Due:* 5 p.m. ET 5/20/21.  
*Docket Numbers:* ER21–1798–000.  
*Applicants:* Orange and Rockland Utilities, Inc.

*Description:* § 205(d) Rate Filing: Filing of Second Revised ESA to be effective 3/31/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5000.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1799–000.  
*Applicants:* Consolidated Edison Company of New York, Inc.  
*Description:* § 205(d) Rate Filing: Amendment PASNY Tariff Separate Site 4–30–2–21 to be effective 5/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5046.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1800–000.  
*Applicants:* NorthWestern Corporation.  
*Description:* § 205(d) Rate Filing: RS 37–SD 2nd Rev—Emergency Tie Agreement with East River Electric Power Co-op to be effective 7/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5049.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1801–000.  
*Applicants:* Pacific Gas and Electric Company.  
*Description:* § 205(d) Rate Filing: Q1 2021 Quarterly Filing of City and County of San Francisco's WDT SA (SA 275) to be effective 3/31/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5068.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1802–000.  
*Applicants:* PJM Interconnection, L.L.C.  
*Description:* § 205(d) Rate Filing: Rate Component of Enhancements to Stability Limits Process to be effective 6/1/2022.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5103.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1803–000.  
*Applicants:* Southwest Power Pool, Inc.  
*Description:* § 205(d) Rate Filing: 2142R4 Golden Spread Electric Cooperative, Inc. NITSA NOA to be effective 4/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5113.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1804–000.  
*Applicants:* New England Power Pool Participants Committee.  
*Description:* § 205(d) Rate Filing: May 2021 Membership Filing to be effective 5/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5117.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1805–000.  
*Applicants:* Upper Missouri G. & T. Electric Cooperative, Inc.

*Description:* § 205(d) Rate Filing: Revised Rate Schedules FERC Nos. 1,2,3,5, and 11 to be effective 6/30/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5126.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1806–000.  
*Applicants:* Southwest Power Pool, Inc.  
*Description:* § 205(d) Rate Filing: Revisions to Clarify Surplus Interconnection Service Timing to be effective 7/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5130.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1807–000.  
*Applicants:* Hill Top Energy Center LLC.  
*Description:* Baseline eTariff Filing: Reactive Power Tariff Application to be effective 6/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5193.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1808–000.  
*Applicants:* Tri-State Generation and Transmission Association, Inc.  
*Description:* § 205(d) Rate Filing: Rate Schedule FERC No. 319 between Tri-State and Wheat Belt to be effective 2/26/2020.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5217.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1808–001.  
*Applicants:* Tri-State Generation and Transmission Association, Inc.  
*Description:* Tariff Amendment: Amendment to Rate Schedule FERC No. 319 to be effective 5/1/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5262.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1809–000.  
*Applicants:* Tri-State Generation and Transmission Association, Inc.  
*Description:* Tariff Cancellation: Notice of Cancellation of Rate Schedule FERC No. 115 to be effective 2/10/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5231.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1810–000.  
*Applicants:* Marco DM Holdings, L.L.C.  
*Description:* § 205(d) Rate Filing: Change in Seller Category Status to be effective 6/30/2021.  
*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5258.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1811–000.  
*Applicants:* Northern Pass Transmission LLC.  
*Description:* Tariff Cancellation: Northern Pass Transmission LLC Notice of Cancellation to be effective 5/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5260.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1812–000.  
*Applicants:* Tampa Electric Company.  
*Description:* Initial rate filing: Rate Schedule No. 103 MorganRD DaleMabry Interconnection to be effective 8/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5276.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1813–000.  
*Applicants:* Yellow Pine Energy Center I, LLC.

*Description:* Baseline eTariff Filing: Yellow Pine Energy Center I, LLC Application for MBR Authorization to be effective 7/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5283.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1814–000.  
*Applicants:* Yellow Pine Energy Center II, LLC.

*Description:* Baseline eTariff Filing: Yellow Pine Energy Center II, LLC Application for MBR Authorization to be effective 7/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5284.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1815–000.  
*Applicants:* Duke Energy Florida, LLC.

*Description:* § 205(d) Rate Filing: DEF 2021 Annual Filing of Cost Factor Updates to be effective 5/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5303.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1816–000.  
*Applicants:* KES Kingsburg, L.P.  
*Description:* Initial rate filing: KES Kingsburg LP RMR Filing to be effective 5/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5351.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1817–000.  
*Applicants:* California Power Exchange Corporation.

*Description:* § 205(d) Rate Filing: Rate Filing for Rate Period 39 to be effective 7/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5353.  
*Comments Due:* 5 p.m. ET 5/21/21.  
*Docket Numbers:* ER21–1818–000.  
*Applicants:* Entergy Louisiana, LLC.  
*Description:* § 205(d) Rate Filing: Iris Solar, LLC, LBA Agreement to be effective 5/1/2021.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5354.  
*Comments Due:* 5 p.m. ET 5/21/21.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES21–42–000.  
*Applicants:* PJM Interconnection, L.L.C.

*Description:* Application under Section 204 of the Federal Power Act for Authorization to Issue Securities for PJM Interconnection, L.L.C.

*Filed Date:* 4/29/21.  
*Accession Number:* 20210429–5354.

*Comments Due:* 5 p.m. ET 5/20/21.

*Docket Numbers:* ES21–43–000.

*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* Application under Section 204 of the Federal Power Act for Authorization to Issue Securities for Tri-State Generation and Transmission Association, Inc.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5090.

*Comments Due:* 5 p.m. ET 5/21/21.

*Docket Numbers:* ES21–44–000.

*Applicants:* Morongo Transmission LLC.

*Description:* Application under Section 204 of the Federal Power Act for Authorization to Issue Securities of Morongo Transmission LLC.

*Filed Date:* 4/30/21.  
*Accession Number:* 20210430–5091.

*Comments Due:* 5 p.m. ET 5/21/21.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.asp>) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: April 30, 2021.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2021–09555 Filed 5–5–21; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL–10023–13–Region 1]

### Notice of Availability of NPDES Aquaculture General Permit (AQUAGP) for Concentrated Aquatic Animal Production (CAAP) Facilities and Other Related Facilities in Massachusetts, New Hampshire, and Vermont

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of Availability of NPDES General Permit MAG130000, NHG130000, and VTG130000.

**SUMMARY:** U.S. Environmental Protection Agency—Region 1 (EPA), is providing a Notice of Availability of the National Pollutant Discharge Elimination System (NPDES) Aquaculture General Permit (AQUAGP) for discharges from Concentrated Aquatic Animal Production (CAAP) facilities and other related facilities to certain waters of the Commonwealth of Massachusetts, State of New Hampshire, and State of Vermont (federal facilities only). This NPDES AQUAGP (“General Permit”) establishes effluent limitations and requirements, effluent and ambient monitoring requirements, reporting requirements, and standard conditions for 12 eligible hatcheries currently covered by individual NPDES permits, five in Massachusetts, five in New Hampshire, and two in Vermont. The Commonwealth of Massachusetts and State of New Hampshire have provided Clean Water Act Section 401 certification for this permit and the State of Vermont has waived the 401 certification requirement.

**DATES:** The issuance date of this Final General Permit is the date of signature of the Final Permit. The Final General Permit will become effective the first day of the month following 60 days from the date of signature.

**ADDRESSES:** Copies of the General Permit and Response to Comments are available electronically on EPA Region 1's website at <https://www.epa.gov/npdes-permits/region-1-final-aquaculture-general-permit>. Written requests for copies should be submitted to U.S. EPA Region 1, Water Division, Attn: Nathan Chien, 5 Post Office Square, Suite 100, Mail Code 06–1, Boston, Massachusetts 02109–3912, or sent via email to: [Chien.Nathan@epa.gov](mailto:Chien.Nathan@epa.gov).

**FOR FURTHER INFORMATION CONTACT:** Nathan Chien, (617) 918–1649.

#### SUPPLEMENTARY INFORMATION:

*Obtaining Authorization:* To obtain coverage under the General Permit,

facilities meeting the eligibility requirements outlined in Part 4 of this General Permit must submit a notice of intent (NOI) in accordance with 40 CFR 122.28(b)(2)(i) and (ii) within 60 days of the effective date of this General Permit. The NOI must be submitted electronically through EPA's NPDES eReporting Tool (NeT) at <http://cdx.epa.gov>. EPA has determined that the 12 hatcheries identified in Attachment 1 of the Fact Sheet all meet the eligibility requirements for coverage under the General Permit and may be authorized to discharge under the General Permit by this type of notification.

**Endangered Species Act:** Section 7 of the Endangered Species Act [16 U.S.C. 1431 et al.] (ESA) requires Federal agencies to consult with the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service (USFWS) if their actions have the potential to either beneficially or adversely affect any threatened or endangered species. With respect to species under the jurisdiction of NOAA Fisheries, EPA has analyzed the discharges authorized by the General Permit, and their potential to adversely affect any of the threatened or endangered species or their designated critical habitat areas in the vicinity of the discharges. Based on this analysis, EPA has determined that the issuance of this permit is not likely to adversely affect any threatened or endangered species in the vicinity of the discharge. NOAA Fisheries has concurred with this determination. With respect to species under the jurisdiction of USFWS, the applicant must assess site-specific species impacts and seek input from USFWS directly. The NOI must document that one of the USFWS eligibility criteria is met at the time of submission or the facility is not eligible for coverage. Because each NOI is screened for eligibility upon submission, EPA has determined that the issuance of this permit is not likely to adversely affect any threatened or endangered species in the vicinity of the discharge.

**Essential Fish Habitat (EFH):** Under the 1996 Amendments (Pub. L. 104-267) to the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq. (1998)), EPA is required to consult with NOAA Fisheries if EPA's actions or proposed actions that it funds, permits or undertakes "may adversely impact any essential fish habitat" (EFH). 16 U.S.C. 1855(b). EPA finds that the general

permit action minimizes adverse effects to aquatic organisms, including those with designated EFH in the receiving waters, including Atlantic salmon and the life stages of a number of coastal EFH designated species. EPA has made the determination that additional mitigation is not warranted under section 305(b)(2) of the Magnuson-Stevens Act and transmitted that determination to NOAA Fisheries. NOAA Fisheries did not propose additional mitigation measures for protection of EFH.

**National Historic Preservation Act (NHPA):** Facilities which adversely affect properties listed or eligible for listing in the National Registry of Historic Places under the NHPA are not authorized to discharge under the General Permit. Based on the nature and location of the discharges, EPA has determined that the 12 hatcheries eligible for authorization under the General Permit do not have the potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

**Coastal Zone Management Act (CZMA):** An approved Coastal Zone Management Program (CZMP) must make a determination that a federally licensed activity affecting the coastal zone is consistent with the Coastal Zone Management Act, 16 U.S.C. 1451 et seq. (CZMA). In the case of general permits, EPA has the responsibility for making the consistency certification request and submitting it to the state for concurrence. EPA requested consistency determinations from both the Massachusetts and the New Hampshire CZMPs and received determinations that the General Permit is consistent with the enforceable policies of both CZMPs.

**Appeal of Permit:** Any interested person may appeal the General Permit in the Federal Court of Appeals in accordance with section 509(b)(1) of the Clean Water Act, 33 U.S.C. 1369(b)(1). This appeal must be filed within 120 days of the General Permit issuance date. Affected persons may not challenge the conditions of the General Permit in further EPA proceedings (see 40 CFR 124.19). Instead, they may either challenge the General Permit in court or apply for an individual permit.

**Authority:** This action is being taken under the Clean Water Act, 33 U.S.C. 1251 et seq.

Dated: May 3, 2021.

**Deborah Szaro,**

Acting Regional Administrator, EPA Region 1.

[FR Doc. 2021-09597 Filed 5-5-21; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL RESERVE SYSTEM

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

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue, NW, Washington DC 20551-0001, not later than June 7, 2021.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Manager) P.O. Box 442, St. Louis, Missouri 63166-2034.

Comments can also be sent electronically to

[Comments.applications@stls.frb.org](mailto:Comments.applications@stls.frb.org):

1. *OakStar Bancshares, Inc.*, Springfield, Missouri; to acquire First Colorado National Bank, Paonia, Colorado.

Board of Governors of the Federal Reserve System, May 3, 2021.

**Michele Taylor Fennell,**

Deputy Associate Secretary of the Board.

[FR Doc. 2021-09587 Filed 5-5-21; 8:45 am]

**BILLING CODE P**

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company**

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than May 21, 2021.

*A. Federal Reserve Bank of Kansas City* (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Christopher D. Stull and Andrea L. Stull, both of Timnath, Colorado; Douglas L. Hadden and Julie B. Hadden, both of Bridgeport, Nebraska; and Colton E. Stull and Jayden J. Stull, both of Hickman, Nebraska;* to join the Stull Family Group, a group acting in concert, and acquire voting shares of Farmers State Bancshares, Inc., and thereby indirectly acquire voting shares of Farmers State Bank, both of Dodge, Nebraska. *Also, the Richard A. Stull Trust, Richard A. Stull, as trustee, the Ogard Family Revocable Trust, Monty C. Ogard and Judy K. Ogard, each as trustees, all of Bridgeport, Nebraska; and the Louis Marcuzzo Revocable Trust, Louis J. Marcuzzo, as trustee, both of Omaha, Nebraska;* to join the Stull Family Group, a group acting in concert, and retain voting shares of Farmers State Bancshares, Inc. and thereby indirectly retain voting shares of Farmers State Bank.

Board of Governors of the Federal Reserve System, May 3, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021-09588 Filed 5-5-21; 8:45 am]

**BILLING CODE P**

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company**

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than May 21, 2021.

*A. Federal Reserve Bank of St. Louis* (Holly A. Rieser, Manager) P.O. Box 442, St. Louis, Missouri 63166-2034.

Comments can also be sent electronically to [Comments.applications@stls.frb.org](mailto:Comments.applications@stls.frb.org):

1. *W. Brian Porter, as trustee of the GST Exempt Lifetime Trust ESBT Share fbo W. Brian Porter, both of Louisville, Kentucky; and Kelly P. Coffey, as trustee of the GST Exempt Lifetime Trust ESBT Share fbo Kelly P. Coffey, both of Danville, Kentucky;* to retain voting shares of Lake Valley Bancorp, Inc., and thereby indirectly retain voting shares of Peoples Bank, both of Taylorsville, Kentucky.

Board of Governors of the Federal Reserve System, May 3, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021-09606 Filed 5-5-21; 8:45 am]

**BILLING CODE P**

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company**

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than May 21, 2021.

*A. Federal Reserve Bank of Kansas City* (Jeffrey Imgarten, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *The NBM Corporation 401(k) Employee Stock Option Plan, McAlester, Oklahoma, the Matthew M. McGowan Revocable Trust, the McGowan Children's Trust, both of Oklahoma City, Oklahoma, and Matthew M. McGowan, as trustee of the aforementioned trusts, McAlester, Oklahoma; the Mary Nancy McGowan Revocable Trust UTA, Oklahoma City, Oklahoma, Mary N. McGowan, as trustee, McAlester, Oklahoma; the Michelle Tompkins Living Trust, Michelle McGowan Tompkins, as trustee, and Pendleton T. Tompkins, all of Oklahoma City, Oklahoma; Michal Shannon McGowan Helvey and Hannah*



McGowan Hughes, both of Edmond, Oklahoma; William McGowan and Madeline McGowan, both of McAlester, Oklahoma; Michael J. Tompkins, Tulsa, Oklahoma; and certain minor child, Edmond, Oklahoma; to join the McGowan Family Group, a group acting in concert, to retain voting shares of NBM Corporation, and thereby indirectly retain voting shares of The Bank, National Association, both of McAlester, Oklahoma.

*B. Federal Reserve Bank of Dallas* (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *The DT 2020 Savings Trust, Debra June Tolleson and John Carter Tolleson, Jr., as co-trustees, the JT 2020 Secure Trust, John Carter Tolleson, as trustee, and Debra June Tolleson, all of Dallas, Texas;* to acquire voting shares of Tolleson Wealth Management, Inc., and thereby indirectly acquire Tolleson Private Bank, both of Dallas, Texas.

*Additionally, Kathryn Covert Tolleson, Amy Tolleson Baldwin, Peter Baldwin, the John Carter Tolleson 1999 Trust, John Carter Tolleson, Jr., as trustee, and four trusts fbo minor children, John Carter Tolleson, Jr. and Kathryn Covert Tolleson, as co-trustees and two trusts fbo minor children, Amy Tolleson Baldwin and Peter Baldwin, as co-trustees, and all of Dallas, Texas;* to join the Tolleson Family Control Group, a group acting in concert, to retain voting shares of Tolleson Wealth Management, Inc., and thereby indirectly retain voting shares of Tolleson Private Bank.

Board of Governors of the Federal Reserve System, April 30, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021–09608 Filed 5–5–21; 8:45 am]

**BILLING CODE P**

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## FEDERAL TRADE COMMISSION

### Agency Information Collection Activities; Submission for OMB Review; Comment Request

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice and request for comment.

**SUMMARY:** The Federal Trade Commission (FTC or Commission) requests that the Office of Management and Budget (OMB) extend for three years the current Paperwork Reduction Act (PRA) clearance for information collection requirements contained in the Commission's rules and regulations under the Wool Products Labeling Act of 1939 (Wool Rules). That clearance expires on May 31, 2021.

**DATES:** Comments must be received by June 7, 2021.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. The [reginfo.gov](http://reginfo.gov) web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

**FOR FURTHER INFORMATION CONTACT:** Jock K. Chung, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Mail Code CC–9528, 600 Pennsylvania Ave. NW, Washington, DC 20580, (202) 326–2984.

**SUPPLEMENTARY INFORMATION:**

*Title:* Rules and Regulations under the Wool Products Labeling Act of 1939, 16 CFR part 300.

*OMB Control Number:* 3084–0100.

*Type of Review:* Extension of a currently approved collection.

*Likely Respondents:* Manufacturers, importers, processors and marketers of wool products.

*Frequency of Response:* Third party disclosure; recordkeeping requirement.

*Estimated annual hours burden:* 1,880,000 hours (160,000 recordkeeping hours + 1,720,000 disclosure hours).

*Recordkeeping:* 160,000 hours [4,000 wool firms incur an average 40 hours per firm].

*Disclosure:* 1,720,000 hours [240,000 hours for determining label content + 480,000 hours to draft and order labels + 1,000,000 hours to attach labels].

*Estimated annual cost burden:* \$24,770,000 (solely relating to labor costs).<sup>1</sup>

*Abstract:* The Wool Products Labeling Act of 1939 (Wool Act) prohibits the misbranding of wool products. The Wool Rules establish disclosure requirements that assist consumers in making informed purchasing decisions and recordkeeping requirements that assist the Commission in enforcing the Rules.

### Request for Comment

On February 8, 2021, the FTC sought public comment on the information

<sup>1</sup> Due to newly available information on hourly wage rates, the estimated annual labor cost was adjusted downward from \$25,620,000 in the 60-Day FR Notice to \$24,770,000 in the 30-Day FR Notice.

collection requirements associated with the Rules. 86 FR 8640. The Commission received one germane comment from Agathon Associates that supported the Rules and the PRA collections the Rules require.<sup>2</sup> However, this comment did not provide any evidence regarding the estimates for the annual hours of burden or the associated labor costs. Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.*, the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule.

Your comment—including your name and your state—will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

**Josephine Liu,**

*Assistant General Counsel for Legal Counsel.*

[FR Doc. 2021–09525 Filed 5–5–21; 8:45 am]

**BILLING CODE 6750–01–P**

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Meeting of the COVID–19 Health Equity Task Force

**AGENCY:** Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

**ACTION:** Notice of meeting.

**SUMMARY:** As required by the Federal Advisory Committee Act, the U.S.

<sup>2</sup> See <https://www.regulations.gov/comment/FTC-2021-0012-0003>.



Department of Health and Human Services (HHS) is hereby giving notice that the COVID-19 Health Equity Task Force (Task Force) will hold a virtual meeting on May 28, 2021. The purpose of this meeting is to consider interim recommendations specific to discrimination and xenophobia. This meeting is open to the public and will be live-streamed at [www.hhs.gov/live](http://www.hhs.gov/live). Information about the meeting will be posted on the HHS Office of Minority Health website: [www.minorityhealth.hhs.gov/healthequitytaskforce/](http://www.minorityhealth.hhs.gov/healthequitytaskforce/) prior to the meeting.

**DATES:** The Task Force meeting will be held on Friday, May 28, 2021, from 2 p.m. to approximately 6 p.m. ET (date and time are tentative and subject to change). The confirmed time and agenda will be posted on the COVID-19 Health Equity Task Force web page: [www.minorityhealth.hhs.gov/healthequitytaskforce/](http://www.minorityhealth.hhs.gov/healthequitytaskforce/) when this information becomes available.

**FOR FURTHER INFORMATION CONTACT:** Minh Wendt, Designated Federal Officer for the Task Force; Office of Minority Health, Department of Health and Human Services, Tower Building, 1101 Wootton Parkway, Suite 100, Rockville, Maryland 20852. Phone: 240-453-6160; email: [COVID19HETF@hhs.gov](mailto:COVID19HETF@hhs.gov).

**SUPPLEMENTARY INFORMATION:**

*Background:* The COVID-19 Health Equity Task Force (Task Force) was established by Executive Order 13995, dated January 21, 2021. The Task Force is tasked with providing specific recommendations to the President, through the Coordinator of the COVID-19 Response and Counselor to the President (COVID-19 Response Coordinator), for mitigating the health inequities caused or exacerbated by the COVID-19 pandemic and for preventing such inequities in the future. The Task Force shall submit a final report to the COVID-19 Response Coordinator addressing any ongoing health inequities faced by COVID-19 survivors that may merit a public health response, describing the factors that contributed to disparities in COVID-19 outcomes, and recommending actions to combat such disparities in future pandemic responses.

The meeting is open to the public and will be live-streamed at [www.hhs.gov/live](http://www.hhs.gov/live). No registration is required. A public comment session will be held during the meeting. Pre-registration is required to provide public comment during the meeting. To pre-register, please send an email to [COVID19HETF@hhs.gov](mailto:COVID19HETF@hhs.gov) and include your name, title, and organization by

close of business on Friday, May 21, 2021. Comments will be limited to no more than three minutes per speaker and should be pertinent to the meeting discussion. Individuals are encouraged to provide a written statement of any public comment(s) for accurate minute-taking purposes. If you decide you would like to provide public comment but do not pre-register, you may submit your written statement by emailing [COVID19HETF@hhs.gov](mailto:COVID19HETF@hhs.gov) no later than close of business on Friday, June 4, 2021. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact: [COVID19HETF@hhs.gov](mailto:COVID19HETF@hhs.gov) and reference this meeting. Requests for special accommodations should be made at least 10 business days prior to the meeting.

Dated: May 3, 2021.

**Minh Wendt,**

*Designated Federal Officer, COVID-19 Health Equity Task Force.*

[FR Doc. 2021-09611 Filed 5-5-21; 8:45 am]

**BILLING CODE 4150-29-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Cell Biology Integrated Review Group; Maximizing Investigators' Research Award C Study Section.

*Date:* June 2-3, 2021.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170,

MSC 7840, Bethesda, MD 20892, 301-435-2406, [ariasj@csr.nih.gov](mailto:ariasj@csr.nih.gov).

*Name of Committee:* Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function A Study Section.

*Date:* June 7-8, 2021.

*Time:* 10:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, (301)-408-9072, [jollieda@csr.nih.gov](mailto:jollieda@csr.nih.gov).

*Name of Committee:* Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiology of Eye Disease—2 Study Section.

*Date:* June 7-8, 2021.

*Time:* 10:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Julius Cinque, MSC, MS Scientific Review, Officer Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, 301-435-1252, [cinquej@csr.nih.gov](mailto:cinquej@csr.nih.gov).

*Name of Committee:* Healthcare Delivery and Methodologies Integrated Review Group; Healthcare and Health Disparities Study Section.

*Date:* June 8-9, 2021.

*Time:* 9:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jessica Bellinger, Ph.D., Scientific Review, Administrator Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, 301-827-4446, [bellingerjd@csr.nih.gov](mailto:bellingerjd@csr.nih.gov).

*Name of Committee:* Center for Scientific Review, Special Emphasis Panel; Fellowships: Surgical Sciences, Biomedical Imaging and Bioengineering.

*Date:* June 15, 2021.

*Time:* 9:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301.402.9607, [Jan.Li@nih.gov](mailto:Jan.Li@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 3, 2021.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09600 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Minority Health and Health Disparities; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Minority Health and Health Disparities Special Emphasis Panel; NIMHD Mentored Career and Research Development Awards (Ks).

*Date:* June 24–25, 2021.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Gateway Plaza, 7201 Wisconsin Ave, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Deborah Ismond, Ph.D., Scientific Review Officer, Office of Extramural Research Administration, National Institute on Minority Health and Health Disparities, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301-402-1366, [ismonddr@mail.nih.gov](mailto:ismonddr@mail.nih.gov).

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09616 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; NHLBI Institutional Training Mechanism Review Committee.

*Date:* June 3–4, 2021.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Lindsay M. Garvin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–Y, Bethesda, MD 20892, (301) 827-7911, [lindsay.garvin@nih.gov](mailto:lindsay.garvin@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09584 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel; Research to Action: Assessing and Addressing Community Exposures to Environmental Contaminants.

*Date:* May 14, 2021.

*Time:* 10:30 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive Durham, NC 27713 (Virtual Meeting).

*Contact Person:* Alfonso R. Latoni, Ph.D., Scientific Review Officer and Chief, Scientific Review Branch, Division of Extramural Research and Training National Institute of Environmental, Health Sciences, Research Triangle Park, NC 27709 984-287-3279 [alfonso.latoni@nih.gov](mailto:alfonso.latoni@nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09575 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Diversity in Aging Research.

*Date:* June 15, 2021.

*Time:* 1:30 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Carmen Moten, Ph.D., MPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7703, [cmoten@mail.nih.gov](mailto:cmoten@mail.nih.gov).

*Name of Committee:* National Institute on Aging Special Emphasis Panel; Einstein Aging Research Study.

*Date:* June 17, 2021.

*Time:* 1:00 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

*Contact Person:* Carmen Moten, Ph.D., MPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7703, [cmoten@mail.nih.gov](mailto:cmoten@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 30, 2021.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09522 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; Single-Site and Pilot Clinical Trials Review Committee.

*Date:* June 23-24, 2021.

*Time:* 9:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6705 Rockledge Drive, Room 207-P, Bethesda, MD 20892-7924, 301-827-7942, [lismarin@nhlbi.nih.gov](mailto:lismarin@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09580 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; Heart, Lung, and Blood Program Project Review Committee.

*Date:* June 18, 2021.

*Time:* 10:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Melissa H Nagelin, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208-R, Bethesda, MD 20892, 301-827-7951, [nagelinmh2@nhlbi.nih.gov](mailto:nagelinmh2@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09582 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Clinical and Basic Science Review Committee.

*Date:* June 24-25, 2021.

*Time:* 11:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Keith A Mintzer, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Suite 207-G, Bethesda, MD 20892-7924, (301) 827-7949, [mintzerk@nhlbi.nih.gov](mailto:mintzerk@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09590 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Institute of Mental Health; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; BRAIN Initiative: Pilot resources for brain cell type-specific access and manipulation across vertebrate species (U01).

*Date:* June 3, 2021.

*Time:* 12:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Erin E. Gray, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Boulevard NSC 6152B, Bethesda, MD 20892, 301-402-8152, [erin.gray@nih.gov](mailto:erin.gray@nih.gov).

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: May 3, 2021.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09602 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Eye Institute; Notice of Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be held as a virtual meeting on June 11, 2021 and is open

to the public as indicated below. The open session (event) will be videocast by NIH with sign language interpretation and closed captioning at: <https://videocast.nih.gov/watch=41985>. The agenda can be found at: <https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec/national-advisory-eye-council-naec-meeting-agenda>.

A portion of this meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Eye Council National Institutes of Health.

*Date:* June 11, 2021.

*Open Session:* 9:30 a.m. to 1:30 p.m.

*Agenda:* Presentation of the NEI Director's report and discussion of NEI programs.

*Place:* National Institutes of Health 6700 Rockledge Drive, Suite 3400 Bethesda, MD 20892 (Virtual Meeting).

*Date:* June 11, 2021.

*Closed Session:* 2:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6700 Rockledge Drive, Suite 3400, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Kathleen C. Anderson, Ph.D., Director, Division of Extramural Activities, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Room 3440, Bethesda, MD 20892, 301-451-2020, [kanders1@nei.nih.gov](mailto:kanders1@nei.nih.gov).

Information is also available on the NEI Council page: <https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09601 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****National Institutes of Health****National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Grant (P50) Review.

*Date:* May 26, 2021.

*Time:* 11:00 a.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, NSC, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301-496-8683, [yangshi@nidcd.nih.gov](mailto:yangshi@nidcd.nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Chemical Senses Fellowship Review.

*Date:* June 3, 2021.

*Time:* 12:00 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Katherine Shim, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIH/NIDCD, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, 301-496-8683, [katherine.shim@nih.gov](mailto:katherine.shim@nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Application Review.

*Date:* June 10-11, 2021.

*Time:* 11:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, NSC, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Eliane Lazar-Wesley, Ph.D., Scientific Review Officer, Scientific

Review Branch, Division of Extramural Activities, 6001 Executive Boulevard, Room 8339, MSC 9670, Bethesda, MD 20892–8401, 301–496–8683, [el6r@nih.gov](mailto:el6r@nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Review of Translational Applications in Hearing and Balance.

*Date:* June 16, 2021.

*Time:* 1:00 p.m. to 3:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301–496–8683, [yangshi@nidcd.nih.gov](mailto:yangshi@nidcd.nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Trial Review.

*Date:* June 22, 2021.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Eliane Lazar-Wesley, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, 6001 Executive Boulevard, Room 8339, MSC 9670, Bethesda, MD 20892–8401, 301–496–8683, [el6r@nih.gov](mailto:el6r@nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; P50 Review.

*Date:* June 29, 2021.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Katherine Shim, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIH/NIDCD, 6001 Executive Blvd., Room 8351, Bethesda, MD 20892, 301–496–8683, [katherine.shim@nih.gov](mailto:katherine.shim@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: May 3, 2021.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–09563 Filed 5–5–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Diversity Research Education Program.

*Date:* June 8, 2021.

*Time:* 10:00 a.m. to 12:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Shelley S. Sehnert, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Suite 208–T, Bethesda, MD 20817, (301) 827–7984, [ssehnert@nhlbi.nih.gov](mailto:ssehnert@nhlbi.nih.gov).

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Catalyze: Product Definition.

*Date:* June 25, 2021.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Manoj Kumar Valiyaveetil, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–R, Bethesda, MD 20817, (301) 435–0270, [manoj.valiyaveetil@nih.gov](mailto:manoj.valiyaveetil@nih.gov).

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Mentored Career Development Award to Promote Faculty Diversity in Biomedical Research.

*Date:* June 30, 2021.

*Time:* 10:00 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Zhihong Shan, Ph.D., MD, Scientific Review Officer, Office of Scientific

Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 205–J, Bethesda, MD 20892, (301) 827–7085, [zhihong.shan@nih.gov](mailto:zhihong.shan@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–09579 Filed 5–5–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Transition to Independence Review Committee.

*Date:* June 10–11, 2021.

*Time:* 9:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 205–H, Bethesda, MD 20892, (301) 827–7969, [Pintucci@nhlbi.nih.gov](mailto:Pintucci@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09585 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Office of the Secretary, Muscular Dystrophy Coordinating Committee Call for Committee Membership Nominations

**AGENCY:** National Institutes of Health, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Office of the Secretary of the Department of Health and Human Services (HHS) is seeking nominations for two individuals to serve as non-federal public members on the Muscular Dystrophy Coordinating Committee.

**DATES:** Nominations are due by 5:00 p.m. EDT on June 7, 2021.

**ADDRESSES:** Nominations must be sent to Glen Nuckolls, Ph.D., by email to [nuckollg@ninds.nih.gov](mailto:nuckollg@ninds.nih.gov).

**FOR FURTHER INFORMATION CONTACT:** Glen Nuckolls, Ph.D., by email to [nuckollg@ninds.nih.gov](mailto:nuckollg@ninds.nih.gov) or (301) 496-5745.

**SUPPLEMENTARY INFORMATION:** The Muscular Dystrophy Coordinating Committee (MDCC) is a federal advisory committee established in accordance with the Muscular Dystrophy Community Assistance, Research, and Education Amendments of 2001 (MD-CARE Act; Pub. L. 107-84). The MD-CARE Act was reauthorized in 2008 by Public Law 110-361, and again in 2014 by Public Law 113-166. The MD-CARE Act specifies that the committee membership be composed of 2/3 governmental agency representatives and 1/3 public members. We are seeking nominations for two non-federal public members at this time, due to turnover of committee membership. Nominations will be accepted between May 7 and June 7, 2021.

**Who is Eligible:** Nominations are encouraged for new or reappointment of non-federal public members who can provide the public and/or patient perspectives to discussions of issues considered by the Committee. Self-nominations and nominations of other individuals are both permitted. Only one nomination per individual is required. Multiple nominations for the same individual will not increase likelihood of selection. Non-federal public members may be selected from

the pool of submitted nominations or other sources as needed to meet statutory requirements and to form a balanced committee that represents the diversity within the muscular dystrophy communities. Nominations are especially encouraged from leaders or representatives of muscular dystrophy research, advocacy, or service organizations, as well as individuals with muscular dystrophy or their parents or guardians. In accordance with White House Office of Management and Budget guidelines (FR Doc. 2014-19140), federally-registered lobbyists are not eligible.

**Committee Composition:** The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of all genders, all ethnic and racial groups, and people with disabilities are represented on HHS Federal advisory committees and, therefore, the Department encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. Requests for reasonable accommodation to enable participation on the Committee should be indicated in the nomination submission.

**Member Terms:** Non-Federal public members of the Committee serve for a term of 3 years and may serve for an unlimited number of terms if reappointed. Members may serve after the expiration of their terms, until their successors have taken office.

**Meetings and Travel:** As specified by Public Law 113-166, the MDCC "shall meet no fewer than two times per calendar year." Travel expenses are provided for non-federal public Committee members to facilitate attendance at in-person meetings. Members are expected to make every effort to attend all full committee meetings, twice per year, either in person or via remote access. Participation in relevant subcommittee, working and planning group meetings, and workshops, is also encouraged.

**Submission Instructions and Deadline:** Nominations are due by 5:00 p.m. EDT on June 7, 2021, and should be sent to Glen Nuckolls, Ph.D., by email to [nuckollg@ninds.nih.gov](mailto:nuckollg@ninds.nih.gov).

Nominations must include contact information for the nominee, a current

curriculum vitae or resume of the nominee, and a paragraph describing the qualifications of the person to represent some portion(s) of the muscular dystrophy research, advocacy, and/or patient care communities.

More information about the MDCC is available at <https://mdcc.nih.gov/>.

Dated: April 28, 2021.

**Walter J. Koroshetz,**

*Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.*

[FR Doc. 2021-09562 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

**Name of Committee:** National Human Genome Research Institute Initial Review Group; Genome Research Review Committee GNOM.

**Date:** June 10, 2021.

**Time:** 11:00 a.m. to 4:00 p.m.

**Agenda:** To review and evaluate grant applications.

**Place:** National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 300, Bethesda, MD 20892 (Virtual Meeting).

**Contact Person:** Ken D. Nakamura, Ph.D., Scientific Review Officer, Office of Scientific Review, National Human Genome Research Institute, National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, 301-402-0838.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: May 3, 2021.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09583 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**
**National Institutes of Health**
**Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; Archiving and Documenting Child Health and Human Development Data Sets.

*Date:* June 24, 2021.

*Time:* 1:00 p.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* NICHD Offices, 6710B Rockledge Drive, Room 2121A, Bethesda, MD 20892, (Video Assisted Meeting).

*Contact Person:* Christiane M. Robbins, Scientific Review Officer, Scientific Review Branch (SRB), DER, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS, 6710B Rockledge Drive, Rm. 2121A, Bethesda, MD 20817, 301-451-4989, [crobbs@mail.nih.gov](mailto:crobbs@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: May 3, 2021.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021-09610 Filed 5-5-21; 8:45 am]

**BILLING CODE 4140-01-P**

**DEPARTMENT OF THE INTERIOR**
**Bureau of Indian Affairs**

[212A2100DD/AAKC001030/  
A0A51010.999900]

**Proclaiming Certain Lands as Reservation for the Lower Elwha Tribal Community of Washington**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of reservation proclamation.

**SUMMARY:** This notice informs the public that the Assistant Secretary—Indian Affairs proclaimed approximately 559.203 acres, more or less, an addition to the reservation of the Lower Elwha Tribal Community.

**DATES:** This proclamation was made on January 14, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sharlene M. Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Room 319, Albuquerque, NM 87104, (505) 563-3132, [sharlene.roundface@bia.gov](mailto:sharlene.roundface@bia.gov).

**SUPPLEMENTARY INFORMATION:** This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

A proclamation was issued according to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 5110) for the lands described below. The land was proclaimed to be the Lower Elwha Reservation for the Lower Elwha Tribal Community, Clallam County and State of Washington.

**Lower Elwha Reservation for the Lower Elwha Tribal Community, 16 Parcels, Willamette Meridian, Clallam County, Washington Legal descriptions containing 559.203 Acres, More or Less**

125-T1003

That portion of Lot 1 of Survey recorded in Volume 10 of Surveys, page 87, under Clallam County recording 563573, being a portion of Government Lot 2, and being a portion of the Southeast Quarter of the Northeast Quarter of Section 33, Township 31 North, Range 7 West, W.M., Clallam County, Washington, described as follows: Commencing at a  $\frac{3}{8}$ " rebar with surveyor's plastic cap stamped "LS 18104" marking the most Northerly corner of said Lot 1 as shown on said survey; thence South 57°38'11" West along the Northerly line of said Lot 1, a distance of 22.05 feet to the Point of Beginning.

Thence South 32°21'49" East parallel with the Easterly line of said Lot 1, a distance of 91.75 feet; thence South 53°28'52" West 137.51 feet; thence South 57°53'14" West 87.57 feet; thence South 52°20'22" West 222.445 feet to the most Westerly line of said Lot 1; thence North 48°26'00" West along said line 22.78 feet to the most Westerly corner of said Lot 1 and the most Southerly corner of the "Cemetery" as shown on said survey; thence North 57°38'11" East

along the common boundary of said Lot 1 and said Cemetery, a distance of 299.73 feet to the most Easterly corner of said Cemetery; thence North 32°21'49" West along the common boundary of said Lot 1 and said Cemetery, a distance of 99.98 feet to the most Northerly corner of said Cemetery; thence North 57°38'11" East along the most Northerly line of said Lot 1, a distance of 152.795 feet to the Point of Beginning.

Containing 0.404 acres, more or less.

125-T1004

That portion of Lot 2 of survey recorded in Volume 10 of Surveys, page 87 under Clallam County Recording No. 563573, being a portion of Government Lot 2 and being a portion of the Southeast Quarter of the Northeast Quarter of Section 33, Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington, except that portion conveyed to the United States of America in trust for the Lower Elwha Klallam Tribe, as disclosed by Clallam County Auditor's File No. 604007.

Beginning at a  $\frac{3}{8}$ " rebar with surveyor's plastic cap stamped "LS 18104" marking the most Northerly corner of said Lot 2 as shown on said survey; thence North 57°38'11" East along the Northerly line of said Lot 2, a distance of 114.11 feet to an existing fence as shown on said survey and described in Volume 811 of Deeds, Page 34 under Clallam County Recording Number 604007; thence South 23°29'03" East along said fence 14.24 feet; thence continuing along said fence South 28°49'51" East 21.95 feet; thence continuing along said fence South 24°03'19" East 36.91 feet; thence continuing along said fence South 23°35'06" east 25.83 feet; thence continuing along said fence South 27°11'20" east 28.61 feet; thence South 50°03'12" West 37.81 feet; thence South 58°37'43" West 58.89 feet to the most Westerly line of said Lot 2; thence North 33°23'31" West along said most Westerly line 130.52 feet to the Point of Beginning, containing 0.314 acre, more or less.

156-THC 4876 E

The Northwest Quarter of the Southeast Quarter of the Northeast Quarter of Section 4, Township 30 North, Range 7 West, Willamette Meridian, Clallam County, Washington, containing 10.16 acres, more or less.

156-T1159

The North Half of the Southeast Quarter of the Northeast Quarter of Section 34, Township 31 North, Range



7 West, Willamette Meridian, Clallam County, Washington, excepting the Westerly 132 feet thereof, and except those portions conveyed to the United States of America in Trust for the Lower Elwha Tribal Community of the Lower Elwha Reservation by instrument recorded September 2, 1988, under Auditor's File No. 607722, containing 18.9 acres, more or less.

156-T1167

The South 1/2 of the Southeast Quarter of the Northeast Quarter and the Southeast Quarter of the Southwest Quarter of the Northeast Quarter all in Section 34, Township 31 North, Range 7 West, W.M., Clallam County, Washington.

Containing 34.052 acres, more or less.

156-T1173

Parcel A

A portion of Government Lot 2 and the Southeast Quarter of the Northeast Quarter of Section 33, Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington, known as the "Indian Cemetery of the Clallam Tribe of Indians", as shown on the Plat of "the Place," recorded in Volume 4 of Plats, page 34, Records of Clallam County, State of Washington. Containing 0.688 acres, more or less.

Parcel B

That portion of Government Lot 2 of Survey recorded in Volume 10 of Surveys, page 87, File No. 563573, lying

Northerly and Easterly of the existing fence as shown on the most Northerly portion of Lots 2 on said Survey. Said property being in Government Lot 2 and the Southeast Quarter of the Northeast Quarter of Section 33, Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington. Containing 0.105 acres, more or less.

Containing a total of 0.793 acres, more or less.

156-T1174

Parcel A

Lots 1 through 44, inclusive of survey, recorded January 13, 1992 in Volume 23 of Surveys, Page 2 under Clallam County Recording No. 662568, being a portion of Sections 2 and 3, Township 30 North, Range 7 West, and a portion of Sections 34 and 35, Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington.

Parcel B

That portion of Government Lot 4 in Section 2, Township 30 North, Range 7 West, Willamette Meridian, Clallam County, Washington; lying Southeasterly of 150 foot wide tract conveyed to the City of Port Angeles by deed recorded under Auditor's File No. 190255; except former Seattle, Port Angeles and Lake Crescent Railroad Right of Way, as conveyed by deed recorded under Auditor's File No. 63188.

Parcel C

Two strips of land lying within the following described parcel:

The Southeast Quarter of the Southeast Quarter; and the South 15 acres of the Northeast Quarter of the Southeast Quarter, Section 34, Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington. One of the aforementioned strips (Levee) is bounded by a line lying at various distances to the right (Riverward) and left (Landward) of a centerline described as follows: Commencing at the Quarter Corner Common to Sections 34 and 35 of Township 31 North, Range 7 West, Willamette Meridian, Clallam County, Washington; thence South 41°51'09" West 1,046.95 feet to Engineer's Station (Sta) 74+68.91 PT on the Centerline of the Elwha Levee; thence South 6°03'10" East, 906.86 feet to Sta 83+75.77 PC and the beginning of a curve concave westerly; thence along said curve having a radius of 320.00 feet for an arc distance of 62.79 feet to Sta 84+38.56 PT; thence South 5°11'26" West, 261.44 feet to Sta 87+00.00, from which Sta the Section corner common to Sections 34 and 35 bears South 50°02'50" East 846.78 feet; thence continuing South 5°11'26" West along the levee centerline 20.00 feet to the terminus at Sta 87+20.00.

The distances in feet of the right and left sideline of said described strip from the foregoing described centerline are as tabulated below:

DISTANCE IN FEET

Station (Sta)	Right (riverward)	Left (landward)
59+95.00	26	33
86+00.00	26	33
86+00.00	26	65
87+20.00	26	65

Also a strip for ramp purposes described as follows:

Commencing at the Southeast Corner of said Section 34; thence North 24°27'03" West, 1,319.07 feet to Sta 81+45.00 on the Elwha Levee Centerline; thence North 83°56'50" East along the Westerly extension of a ramp centerline, 100 feet to the Point of Beginning; thence returning along said centerline, South 83°56'50" West, over and across the Levee, 200 feet to the terminus, except therefrom that portion lying within the Elwha Levee permanent easement, containing 243.02 acres, more or less, in Clallam County, State of Washington.

156-T1181

The West Half of the Southwest Quarter of the Northeast Quarter; and the West 132 feet of the Northwest Quarter of the Southeast Quarter of the Northeast Quarter, except the portion lying within the following described tract:

Beginning at a point in the westerly line of said Southeast Quarter of the Northeast Quarter, a distance of 198 feet South of the Northwest corner thereof, thence East 132 feet; thence South parallel with the Westerly line of said Southeast Quarter of the Northeast Quarter, a distance of 462 feet; thence West 132 feet to the Westerly line of

said Southeast Quarter of the Northeast Quarter; thence North along said Westerly line, a distance of 462 feet to the point of beginning, all being in Section 34, Township 31 North, Range 7 West, W.M., Clallam County, Washington, containing 23.24 acres, more or less.

The Northeast Quarter of the Northwest Quarter of Section 34, Township 31 North, Range 7 West, W.M., Clallam County, Washington, containing 41.48 acres, more or less. Commencing at the Southwest corner of Government Lot 2, Section 27, Township 31 North, Range 7 West, W.M., Clallam County, Washington;



thence running North and parallel with the East line of said Section a distance of 205 feet; thence East at right angles with said Section line a distance of 1,062.5 feet; thence South at a parallel with the East section line a distance of 205 feet; thence running West along the South line of said Government Lot 2 to the point of beginning, containing 5.00 acres, more or less.

and  
That portion of Lot 2 in Section 27, Township 31 North, Range 7 West, W.M., Clallam County, Washington, described as follows:

Beginning at the Southwest corner of said Lot 2; thence North along the West line of said Lot 990 feet; thence East at right angles 1,062.5 feet; thence South at right angles 990 feet to the South line of said Lot 2; thence West along said South line 1,062.5 feet to the point of beginning. Except the South 205 feet thereof. Also except any portion lying within the right-of-way for County Road No. 3131 (Lower Elwha Road), containing 19.12 acres, more or less, after the above exceptions.

Total Tract Acres: 88.84.

157-T1184

Parcel A

That portion of the East Half of the Southeast Quarter of the Northwest Quarter in Section 35, Township 31 North, Range 7 West, W.M., described as follows: Commencing at the Northwest Corner of the East Half of the Southeast Quarter of the Northwest Quarter of Section 35, Township 31 North, Range 7 West, W.M., Clallam County, Washington;

Thence South 02°59'45" West, a distance of 506.44 feet, more or less, to the True Point of Beginning, being the Northwest Corner of the property herein described;

Thence South 87°00'14" East, a distance of 75.00 feet, more or less, to a point being the Northeast Corner of the property herein described;

Thence South 02°59'45" West, a distance of 405.80 feet, more or less, to the Northern right of way line of Lower Elwha Road and the Southeast Corner of the property herein described;

Thence along a curve to the right with a chord bearing North 38°25'04" West, a distance of 113.38 feet (R=542.93', L=113.59' D=11°59'15") to a point being the Southwest Corner of the property herein described;

Thence leaving Elwha Road, North 02°59'45" East, a distance of 320.77 feet, more or less, to the point of beginning; containing 27,471 square feet of .63 acres, more or less, lying and being in the East Half of the Southeast Quarter of

the Northwest Quarter of Section 35, Township 31 North, Range 7 West, Clallam County, Washington, being a parcel out of lands conveyed to American Telephone and Telegraph Company from Elmer Bond, et al, by Statutory Warranty Deed dated the 15th day of June 1955 and recorded in Volume 237, page 84 of the Land Records of Clallam County, Washington.

Parcel B

Lot 1 of P.N.B. Angeles Point Short Plat, recorded December 29, 1983 in Volume 13 of Short Plats, page 74, under Clallam County Recording No. 550528, of Section 35, Township 31 North, Range 7 West, W.M., Clallam County, Washington, more particularly described by Clallam County Auditor's File No. 2001 1061706. Except that portion conveyed to the Lower Elwha Klallam Tribe by instrument recorded under Clallam County Auditor's File No. 686772 and except that portion, if any, lying Southerly of County Road Right of Way.

Situate in Clallam County, State of Washington.

Containing 87.26 acres, more or less.

157-T1187

Lot 1 of Peninsula Timber Short Plat, recorded January 16, 1986 in Volume 16 of Short Plats, Page 10 under Auditor File No. 574157, being a portion of the Southwest Quarter of Section 12 and the Northwest Quarter of Section 13, all in Township 30 North, Range 7 West, W.M., Clallam County, Washington, subject to easement recorded under Recording No. 74700, containing 1.04 acres, more or less.

157-T1190

That Portion of Section 33, Township 31 North, Range 7 West, W.M., Clallam County, Washington described as follows:

Commencing at a point at which the existing Boundary Line between Lots 10 and 11 of Block 2 of the Place, as per plat thereof recorded in Volume 4 of Plats, Page 34, records of Clallam County, when extended and prolonged to the Southeast, intersects the Southerly Boundary Line of the existing traveled road, as the same is now in use and operation, and which point is distant South 40° East of the Southerly corner common to said Lots 10 and 11, 73 feet, more or less;

Thence North 40° East, a distance of 52 feet;

Thence South 35° East, a distance of 209 feet;

Thence South 55° West, a distance of 100 feet;

Thence North 35° West, a distance of 195 feet;

Thence North 50° East, a distance of 50.5 feet, more or less, to the Point of Beginning.

Situate in Clallam County, State of Washington.

Containing 0.46 acre, more or less.

157-T1192

Lot B of Short Plat Alteration No. LDV 2004-00070, recorded June 20, 2005 in Volume 31 of Short Plats, page 34, under Clallam County Recording No. 2005 1158846, being a Short Plat Alteration of Lots 1 and 2 of Peninsula Timber Short Plat, recorded January 16, 1986 in Volume 16 of Short Plats, page 10, under Clallam County Recording No. 574157 in Section 12 and that Portion of the Northwest Quarter of the Northwest Quarter of Section 13, Township 30 North, Range 7 West, W.M., Clallam County, Washington, lying Northerly of the State Highway 101, formerly known as Olympic Highway.

Situate in Clallam County, State of Washington.

Containing 37.68 acres, more or less.

157-T1201

Parcel A

That portion of the North Half of the Southwest Quarter of the Southeast Quarter of Section 12, Township 30 North, Range 7 West, W.M., Clallam County, Washington, lying Westerly of Dry Creek;

Except the North 214.5 feet thereof.

Parcel B

That part of the South Half of the Southwest Quarter of the Southeast Quarter of Section 12, Township 30 North, Range 7 West, W.M., Clallam County, Washington, lying Northerly of Primary State Highway No. 9;

Except the East 220 feet (as measured along the North Boundary of said South Half of the Southwest Quarter of the Southeast Quarter;

And Except the West 30 feet for County Road No. 31870 (Dry Creek) Road.

And Except that portion conveyed to State of Washington under Recording No. 733756. And Except that portion conveyed to State of Washington under Recording No. 1999 1023011.

Also Excepting that portion conveyed to Richard V. Davidson and Beverly Davidson more particularly described as follows:

Beginning at the Northeast Corner of Parcel "C" as described in Special Warranty Deed File under Volume 1084 of Deeds, Page 705, Auditor's File No. 718619, Records of Said County.

Thence North 87°01'33" West along the North line of said Parcel "C" a distance of 66.39 feet to the centerline of Dry Creek.

Thence South 33°45'25" West along said centerline 26.45 feet;

Thence South 32°39'15" West along said centerline 67.92 feet;

Thence South 40°45'16" East along said centerline 49.28 feet;

Thence South 27°31'28" East along said centerline 51.42 feet;

Thence South 26°37'28" West along said centerline 54.41 feet;

Thence South 23°05'30" West along said centerline 23.39 feet;

To the Northerly right of way of Highway 101 per plans entitled "SR 101 Laird's Corner to Port Angeles" dated February 19, 1929 and revised October 13, 1995;

Thence North 83°39'55" East along said right of way 88.515 feet to the Southeast corner of said Parcel "C";

Thence North 01°54'26" east along the East Line of said Parcel "C" 219.17 feet to the Point of Beginning.

Situate in Clallam County, State of Washington.

Containing 15.69 acres, more or less.

157-T1204

Lot B of Lower Elwha Klallam Tribe/Waddell Survey, recorded July 15, 2005 in Volume 58 of Surveys, page 41, under Clallam County Recording No. 2005 1160576, being a portion of the Northwest Quarter of the Northwest Quarter of Section 35, Township 31 North, Range 7 West, W.M., Clallam County, Washington.

All that portion of Stratton Road, County Road No. 31690 lying within the West Half of Section 35 and the East Half of Section 34, all in Township 31 North, Range 7 West, W.M., Clallam County, Washington;

Except any portion thereof lying within the northerly 30 feet of said Sections.

That portion of the Southwest Quarter of the Northwest Quarter of Section 35, Township 31 North, Range 7 West, W.M., Clallam County, Washington, described as follows:

Beginning at the Northwest Corner of the Southwest Quarter of the Northwest Quarter of said Section 35;

Thence East 30 feet;

Thence South 240 feet;

Thence West 30 feet;

Thence North along the West line 240 feet to the Point of Beginning.

Situate in Clallam County, State of Washington.

Containing 2.49 acres, more or less.

157-T1206

Lot 3 of Volume 27 of Short Plats, Page 15;

Together with all of Lot 7 of Volume 12 of Surveys, page 114,

Together with that portion of the Southeast Quarter of the Northwest Quarter of Section 2, Township 30 North, Range 7 West, W.M., Clallam County, Washington, described as follows:

Commencing at the North Quarter corner of said Section 2 from which the center of Section 2 bears South 01°54'20" West, a distance of 2733.58 feet as shown on Volume 40 of Surveys, page 27, Records of Clallam County;

Thence South 01°54'20" West, a distance of 1370.20 feet to the Northeast Corner of said Southeast Quarter;

Thence South 89°04'22" West along the North line of said Southeast Quarter, a distance of 655.30 feet to the True Point of Beginning, said point also being the Southeast corner of Parcel 7 as shown on Volume 12 of Surveys, Page 114;

Thence South 59°52'50" East, a distance of 499.69 feet to the Northerly line of the 100 foot wide former railroad right-of-way;

Thence Northwesterly along said Northerly line to the North line of said Southeast Quarter;

Thence North 89°04'22" East along said North line, a distance of 189.02 feet to the True Point of Beginning, containing 22,905 square feet, more or less.

Situate in Clallam County, State of Washington.

Containing 8.79 acres, more or less.

157-T1227

All that portion of the following described tract lying southerly of the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railway;

Beginning at a point on the East line of the Southeast Quarter of the Northeast Quarter of Section 2, Township 30 North, Range 7 West, W.M., Clallam County, Washington, 792 feet South of the Northeast Corner thereof;

Thence South along said East line 264 feet;

Thence West 660 feet;

Thence North 264 feet;

Thence East 660 feet to the Point of Beginning;

And

All that portion of the East half of the Southwest Quarter of the Southeast Quarter of the Northeast Quarter, and of the South four acres of the Southeast Quarter of the Southeast Quarter of the Northeast Quarter of Section 2, Township 30 North, Range 7 West, W.M., Clallam County, Washington, lying Southerly of the right of way of the

Chicago, Milwaukee, St. Paul and Pacific Railway.

Situate in Clallam County, State of Washington.

The East half of the Northeast Quarter of the Northeast Quarter of the Southeast Quarter of Section 2, Township 30 North, Range 7 West, W.M., Clallam County, Washington.

Situate in Clallam County, State of Washington.

Containing 9.31 acres, more or less.

The above described lands contain a total of 559.203 acres, more or less, which are subject to all valid rights, reservations, rights-of-way, and easements of record.

This proclamation does not affect title to the lands described above, nor does it affect any valid existing easements for public roads, highways, public utilities, railroads and pipelines, or any other valid easements or rights-of-way or reservations of record.

**Bryan Newland,**

*Principal Assistant Secretary—Indian Affairs.*

[FR Doc. 2021-09551 Filed 5-5-21; 8:45 am]

**BILLING CODE 4337-15-P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-149 (Fifth Review)]

### Barium Chloride From China; Scheduling of Expedited Five-Year Review

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 ("the Act") to determine whether revocation of the antidumping duty order on barium chloride from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

**DATES:** January 4, 2021.

**FOR FURTHER INFORMATION CONTACT:** Charles Cummings (202-708-1666), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the

Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:**

*Background.*—On January 4, 2021, the Commission determined that the domestic interested party group response to its notice of institution (85 FR 61984, October 1, 2020) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.<sup>1</sup> Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

*Staff report.*—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on May 4, 2021, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

*Written submissions.*—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,<sup>2</sup> and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before May 7,

2021 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by May 7, 2021. However, should the Department of Commerce ("Commerce") extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures*, available on the Commission's website at [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf), elaborates upon the Commission's procedures with respect to filings.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

*Determination.*—The Commission has determined this review is extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

**Authority:** This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: April 30, 2021.

**Katherine Hiner,**

*Supervisory Attorney.*

[FR Doc. 2021-09529 Filed 5-5-21; 8:45 am]

**BILLING CODE 7020-02-P**

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 337-TA-1207]

**Commission Determination To Review an Initial Determination Granting Summary Determination and on Review To Vacate as Moot; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation in Its Entirety Based on a Withdrawal of the Complaint; Termination of the Investigation; Certain Pre-Filled Syringes for Intravitreal Injection and Components Thereof**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to review an initial determination ("ID") (Order No. 31) granting summary determination of infringement and of domestic industry, and on review, to vacate that ID as moot, and not to review a second ID (Order No. 33) terminating the investigation based on a withdrawal of the complaint. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-5468. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** On July 27, 2020, the Commission instituted this investigation based on a complaint filed by Novartis Pharma AG, Novartis Pharmaceuticals Corporation, and Novartis Technology LLC (collectively, "Novartis"). 85 FR 45227-28. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based on the importation into the United States, sale for importation, or sale in the United States after importation of certain pre-filled syringes for intravitreal injections and components thereof that infringe

<sup>1</sup> A record of the Commissioners' votes is available from the Office of the Secretary and at the Commission's website.

<sup>2</sup> The Commission has found the response to its notice of institution filed on behalf of Chemical Products Corporation, the sole domestic producer of barium chloride, to be individually adequate. Comments from other interested parties will not be accepted (see 19 CFR 207.62(d)(2)).

one or more of claims 1–6 and 11–26 of U.S. Patent No. 9,220,631 (“the ‘631 patent”). *Id.* The complaint also alleges the existence of a domestic industry. *Id.* The notice of investigation names Regeneron Pharmaceuticals Inc. of Tarrytown, New York (“Regeneron”) as the sole respondent and the Office of Unfair Import Investigations (“OUII”) as a party. *Id.* at 45228.

On February 18, 2021, Novartis filed a motion for summary determination that Regeneron directly infringes the ‘631 patent and that Novartis satisfied the domestic industry requirement. On March 1, 2021, OUII filed a response in support of the motion, and Regeneron filed a response opposing Novartis’s argument that it satisfied the economic prong of the domestic industry requirement.

On April 2, 2021, the presiding administrative law judge (“ALJ”) issued the first ID (Order No. 31), granting summary determination of infringement and domestic industry. No petitions for review of the ID were received.

On April 8, 2021, Novartis filed an unopposed motion to terminate the investigation in its entirety based on its withdrawal of the complaint. The motion indicated that Regeneron and OUII did not oppose the motion, and Regeneron did not file a response to the motion. OUII filed a response in support of the motion. The motion to terminate the investigation was filed before the deadline to petition for review of Order No. 31 had passed. *See* 19 CFR 210.43(a).

On April 8, 2021, the ALJ issued the second ID (Order No. 33), granting the motion and terminating the investigation. Order No. 33 was issued before the deadline to petition for review of Order No. 31 had passed. No petitions for review of the second ID were filed.

The Commission has determined to review the first ID, Order No. 31, in its entirety, and on review, to vacate that ID as moot because the summary determination issues became moot in light of Novartis’s motion to withdraw its complaint and terminate the investigation. Vice Chair Stayin and Commissioner Johanson do not join the Commission’s decision to review and vacate Order No. 31. In the absence of a request from any party to review or vacate the Order, or any other grounds for review set forth in 19 CFR 210.44, they would not review Order No. 31.

The Commission has further determined not to review the second ID, Order No. 33, terminating the investigation. The investigation is hereby terminated in its entirety.

The Commission vote for this determination took place on May 3, 2021.

The authority for the Commission’s determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: May 3, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–09576 Filed 5–5–21; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–437 and 731–TA–1060–1061 (Third Review)]

### Carbazole Violet Pigment 23 from China and India; Scheduling of Expedited Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (“the Act”) to determine whether revocation of the countervailing and antidumping duty orders on carbazole violet pigment 23 from China and India would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

**DATES:** January 4, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Kristina Lara (202–205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission’s TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these reviews may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:**

**Background.**—On January 4, 2021, the Commission determined that the domestic interested party group response to its notice of institution (85 FR 61980, October 1, 2020) of the

subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.<sup>1</sup> Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission’s Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Please note the Secretary’s Office will accept only electronic filings at this time. Filings must be made through the Commission’s Electronic Document Information System (EDIS, <https://edis.usitc.gov>). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

**Staff report.**—A staff report containing information concerning the subject matter of the reviews will be placed in the nonpublic record on May 4, 2021, and made available to persons on the Administrative Protective Order service list for these reviews. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission’s rules.

**Written submissions.**—As provided in § 207.62(d) of the Commission’s rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,<sup>2</sup> and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before May 7, 2021 and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by May 7, 2021. However, should the Department of Commerce (“Commerce”) extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new

<sup>1</sup> A record of the Commissioners’ votes is available from the Office of the Secretary and at the Commission’s website.

<sup>2</sup> The Commission has found a response to its notice of institution filed on behalf of Sun Chemical Corp., a domestic producer of carbazole violet pigment 23, to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures*, available on the Commission's website at [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf), elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Determination.**—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

**Authority:** These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: May 3, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–09560 Filed 5–5–21; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Fire Protection Association

Notice is hereby given that, on April 12, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), National Fire Protection Association (“NFPA”) has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, NFPA has provided an updated and current list of its standards development activities, related technical committee and conformity assessment activities. Information concerning NFPA regulations, technical committees, current standards, standards development and conformity assessment activities are publicly available at [nfpa.org](http://nfpa.org).

On September 20, 2004, NFPA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 21, 2004 (69 FR 61869).

The last notification was filed with the Department on September 17, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (84 FR 65426).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

[FR Doc. 2021–09613 Filed 5–5–21; 8:45 am]

**BILLING CODE 4410–11–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research And Production Act of 1993—Pistoia Alliance, Inc.

Notice is hereby given that, on April 5, 2021, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. Section 4301 *et seq.* (the “Act”), Pistoia Alliance, Inc. filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Syneos Health, Morrisville, NC; Results Works LLC, Plymouth Meeting, PA; Nanome, Inc., San Diego, CA; IOS Press, Amsterdam, THE NETHERLANDS; Joseph Rossetto (individual), Cambridge, UNITED KINGDOM; Ian D. Wilson (individual), London, UNITED KINGDOM; Glenn Barney (individual), Northboro, MA; Illumina, San Diego, CA; Genestack, Cambridge, UNITED KINGDOM; Causaly, London, UNITED KINGDOM; BioSymetrics, Huntington, NY; and ATCC, Manassas, VA have been added as parties to this venture.

Also, MarkLogic Corporation, San Carlos, CA; Johnson Matthey Plc, London, UNITED KINGDOM; Quantori

LLC, Cambridge, MA; Innoplexus AG, Eschborn, GERMANY; Arctoris Ltd, Oxford, UNITED KINGDOM; and Monocl Software, Gothenberg, SWEDEN have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Pistoia Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistoia Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on January 11, 2021. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 12, 2021 (86 FR 9372).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

[FR Doc. 2021–09612 Filed 5–5–21; 8:45 am]

**BILLING CODE 4410–11–P**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Office of Governmental Information Services

[NARA–2021–025]

#### Office of Government Information Services Annual Meeting

**AGENCY:** Office of Government Information Services (OGIS), National Archives and Records Administration (NARA).

**ACTION:** Notice of annual open meeting.

**SUMMARY:** We are announcing OGIS's annual meeting, open to the public in accordance with the Freedom of Information Act (FOIA). The purpose of the meeting is to discuss OGIS's reviews and reports and allow interested people to appear and present oral or written statements.

**DATES:** The meeting will be on Wednesday, May 12, 2021, from 10:00 a.m. to 12:00 p.m. EDT. You must register by 11:59 p.m. EDT Monday, May 10, 2021, to attend the meeting.

**Location:** This meeting will be a virtual meeting. We will send instructions on how to access it to those who register according to the instructions below.

**FOR FURTHER INFORMATION CONTACT:**

Kirsten Mitchell by email at [ogisopenmeeting@nara.gov](mailto:ogisopenmeeting@nara.gov) or by telephone at 202.741.5770.

**SUPPLEMENTARY INFORMATION:** This meeting is open to the public in accordance with FOIA provisions at 5 U.S.C. 552(h)(6). We will post all meeting materials at <https://www.archives.gov/ogis/outreach-events/annual-open-meeting>, including OGIS's 2021 Report for Fiscal Year 2020. The report, to be published concurrently with this open meeting, will summarize OGIS's work, in accordance with FOIA provisions at 5 U.S.C. 552(h)(4)(A). You are invited to present oral or written statements at the meeting. You may submit written statements or questions for OGIS to consider before the meeting by emailing [ogisopenmeeting@nara.gov](mailto:ogisopenmeeting@nara.gov). We will not answer questions about specific OGIS cases.

*Procedures:* This virtual meeting is open to the public. You must register in advance through the Eventbrite link <https://ogis-annual-open-meeting-2021.eventbrite.com>, if you wish to attend, and you must include an email address so that we can send you access information. To request accommodations (e.g., a transcript), email [ogis@nara.gov](mailto:ogis@nara.gov) or call 202.741.5770. Members of the media who wish to register, those who are unable to register online, and those who require special accommodations, should contact Kirsten Mitchell (contact information listed above).

**Alina M. Semo,**

*Office of Government Information Services Director.*

[FR Doc. 2021-09541 Filed 5-5-21; 8:45 am]

**BILLING CODE 7515-01-P**

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## NATIONAL SCIENCE FOUNDATION

### Agency Information Collection Activities: Comment Request; National Science Foundation Research Traineeship Program Monitoring System

**AGENCY:** National Science Foundation.

**ACTION:** Notice.

**SUMMARY:** The National Science Foundation (NSF) is announcing plans to establish this collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting Office of Management and Budget

(OMB) clearance of this collection for no longer than 3 years.

**DATES:** Written comments on this notice must be received by July 6, 2021 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

**FOR FURTHER INFORMATION CONTACT:**

Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Suite W18200, Alexandria, Virginia 22314; telephone (703) 292-7556; or send email to [splimpto@nsf.gov](mailto:splimpto@nsf.gov). Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* National Science Foundation Research Traineeship (NRT) Monitoring System.

*OMB Number:* 3145-NEW.

*Expiration Date of Approval:* Not applicable.

*Type of Request:* Intent to seek approval to establish an information collection.

*Proposed Project:* The National Science Foundation's (NSF's) Division of Graduate Education (DGE) in the Directorate for Education and Human Resources (EHR) administers the NSF Research Traineeship (NRT) program. The NRT program is designed to encourage the development and implementation of bold, new, and potentially transformative models for STEM graduate education training. The NRT program seeks to ensure that graduate students in research-based master's and doctoral degree programs develop the skills, knowledge, and competencies needed to pursue a range of STEM careers. NRT is dedicated to effective training of STEM graduate students in high priority interdisciplinary or convergent research areas, through the use of a comprehensive traineeship model that is innovative, evidence-based, and aligned with changing workforce and research needs.

Currently NRT awardees provide NSF with information on their activities through periodic research performance progress reports. The NRT program will now replace these reports with a tailored program monitoring system that will use internet-based information and communication technologies to collect, review, and validate specific data on NRT awards. EHR is committed to ensuring the efficiency and effectiveness with which respondents provide and

NSF staff can access and analyze data on funded projects within the NRT programs.

The NRT monitoring system will include subsets of questions aimed at the different project participants (i.e., Principal Investigators (PIs), and trainees), and will allow for data analysis, and data report generation by authorized NSF staff. The collections will generally include three categories of descriptive data: (1) Staff and project participants (data that are necessary to determine individual-level treatment and control groups for future third-party study or for internal evaluation); (2) project implementation characteristics (also necessary for future use to identify well-matched comparison groups); and (3) project outputs (necessary to measure baseline for pre- and post-NSF-funding-level impacts). NRT awardees will be required to report data on an annual basis for the life of their award.

Use of the Information: NSF will primarily use the data from this collection for program planning, management, and audit purposes to respond to queries from the Congress, the public, NSF's external merit reviewers who serve as advisors, including Committees of Visitors (COVs), the NSF's Office of the Inspector General, and as a basis for either internal or third-party evaluations of individual programs. This information is required for effective administration, communication, program and project monitoring and evaluation, and for measuring attainment of NSF's program, project, and strategic goals, and as identified by the President's Accountability in Government Initiative; GPRA, and the NSF's Strategic Plan. The Foundation's FY 2018-2022 Strategic Plan may be found at: [https://www.nsf.gov/publications/pub\\_summ.jsp?ods\\_key=nsf18045](https://www.nsf.gov/publications/pub_summ.jsp?ods_key=nsf18045).

Since this collection will primarily be used for accountability and evaluation purposes, including responding to queries from COVs and other scientific experts, a census rather than sampling design typically is necessary. At the individual project level funding can be adjusted based on individual project's responses to some of the surveys. Some data collected under this collection will serve as baseline data for separate research and evaluation studies.

NSF-funded contract or grantee researchers and internal or external evaluators in part may identify control, comparison, or treatment groups for NSF's education and training portfolio using some of the descriptive data gathered through this collection to

conduct well-designed, rigorous research and portfolio evaluation studies.

*Burden on the Public:* Estimated at 82 hours per award for 102 awards for a total of 8,364 hours (per year).

*Comments:* Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: April 30, 2021.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2021-09536 Filed 5-5-21; 8:45 am]

**BILLING CODE 7555-01-P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Networking and Information Technology Research and Development Science, Technology, Engineering, and Math (STEM) Portal

**AGENCY:** Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), National Science Foundation.

**ACTION:** Notice.

**SUMMARY:** The Networking and Information Technology Research and Development Program is announcing a Science, Technology, Engineering, and Math (STEM) Portal that provides a one-stop resource for Federal cyberlearning, computational literacy, and information technology training opportunities at all education levels to champion a diverse, inclusive, and well-trained workforce capable of future innovations. The resource provides details on programs targeting all levels of education and experience.

**DATES:** The guidance portal is accessible by the public on May 6, 2021.

**ADDRESSES:** NITRD's STEM Portal is available at <https://www.nitrd.gov/STEM4ALL/>.

### FOR FURTHER INFORMATION CONTACT:

Adrian Baranyuk, [nco@nitrd.gov](mailto:nco@nitrd.gov), or 202-459-9687.

**SUPPLEMENTARY INFORMATION:** Increasing the availability of STEM opportunities is a priority in the Biden-Harris Administration. Computational literacy is critical for America to maintain leadership in science and technology. NITRD and its participating agencies are prioritizing STEM education at all levels, to champion a diverse, inclusive, and well-trained workforce capable of future innovation. This portal was developed to cultivate STEM engagement and training; it provides the entry into an exciting and dynamic career.

This STEM Portal provides programs targeted to all levels of experience so there is something for everyone interested in technology careers and advanced training. It gives in one location a searchable database of opportunities at Federal agencies for internships, scholarships, and other training programs. Each listing includes the description, link, and contact information for the program. The search filters provide flexibility to target the opportunities of interest. The pull-down menu for *Education Level Eligibility* provides opportunities for community college students, undergraduates and graduates, postdoctoral fellows, early career researchers, K-12 Educators, and K-12 students.

Submitted by the National Science Foundation in support of the Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO) on May 3, 2021.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2021-09599 Filed 5-5-21; 8:45 am]

**BILLING CODE 7555-01-P**

## NUCLEAR WASTE TECHNICAL REVIEW BOARD

### Virtual Public Board Meeting To Review the U.S. Department of Energy's Activities To Evaluate Advanced Nuclear Fuels

*Board meeting:* May 12-13, 2021—The U.S. Nuclear Waste Technical Review Board will hold a virtual public meeting to review information on the U.S. Department of Energy's (DOE) activities to evaluate advanced nuclear fuels including accident tolerant fuels for light water reactors and the impact of these fuels on spent nuclear fuel management and disposal.

Pursuant to its authority under section 5051 of Public Law 100-203, Nuclear Waste Policy Amendments Act (NWPAA) of 1987, the U.S. Nuclear Waste Technical Review Board will hold a virtual public meeting on Wednesday, May 12, 2021, and Thursday, May 13, 2021, to review information on the U.S. Department of Energy's (DOE) activities to evaluate advanced nuclear fuels including accident tolerant fuels for light water reactors and the impact of these fuels on spent nuclear fuel (SNF) management and disposal.

The meeting will begin on both days at 12:00 p.m. Eastern Daylight Time (EDT) and is scheduled to adjourn at 5:00 p.m. EDT on both days. On May 12, speakers representing the DOE Office of Nuclear Energy and the national laboratories conducting the work for DOE will report on DOE's activities to support and evaluate these fuels both prior to, and after, their use in nuclear reactors. Speakers will describe DOE's program, including its purpose, scope, goals, and technical approach for obtaining information that may be needed for managing the advanced nuclear fuels including accident tolerant fuels once removed from the reactors and disposing of the SNF. A representative from the nuclear industry will also discuss efforts to develop new metallic fuel for light water reactors. Speakers from the U.S. Nuclear Regulatory Commission will describe their plans and progress to assess the regulatory implications of accident tolerant fuels and their potential impact on storage, transportation, and disposal. On May 13, speakers from Switzerland, Sweden, and the United Kingdom will describe their respective efforts to address the introduction and use of advanced nuclear fuels including accident tolerant fuels for light water reactors and the impact of these fuels on SNF management and disposal. The meeting will end with a panel discussion of speakers from both days of the meeting. A detailed meeting agenda will be available on the Board's website at [www.nwtrb.gov](http://www.nwtrb.gov) approximately one week before the meeting.

The meeting will be open to the public, and opportunities for public comment will be provided. Details on how to submit public comments during the meeting will be provided on the Board's website along with the details for viewing the meeting. A limit may be set on the time allowed for the presentation of individual remarks. However, written comments of any length may be submitted to the Board staff by mail or electronic mail. All comments received in writing will be



included in the meeting record, which will be posted on the Board's website after the meeting. An archived recording of the meeting will be available on the Board's website following the meeting. The transcript of the meeting will be available on the Board's website by July 12, 2021.

The Board was established in the Nuclear Waste Policy Amendments Act of 1987 as an independent federal agency in the Executive Branch to evaluate the technical and scientific validity of DOE activities related to the management and disposal of SNF and high-level radioactive waste, and to provide objective expert advice to Congress and the Secretary of Energy on these issues. Board members are experts in their fields and are appointed to the Board by the President from a list of candidates submitted by the National Academy of Sciences. The Board reports its findings, conclusions, and recommendations to Congress and the Secretary of Energy. All Board reports, correspondence, congressional testimony, and meeting transcripts and related materials are posted on the Board's website.

For information on the meeting agenda, contact Bret Leslie: [leslie@nwtrb.gov](mailto:leslie@nwtrb.gov) or Jo Jo Lee: [lee@nwtrb.gov](mailto:lee@nwtrb.gov). For information on logistics, or to request copies of the meeting agenda or transcript, contact Davonya Barnes: [barnes@nwtrb.gov](mailto:barnes@nwtrb.gov). All three may be reached by mail at 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201-3367; by telephone at 703-235-4473; or by fax at 703-235-4495.

Dated: April 16, 2021.

**Nigel Mote,**

*Executive Director, U.S. Nuclear Waste Technical Review Board.*

[FR Doc. 2021-08230 Filed 5-5-21; 8:45 am]

**BILLING CODE 6820-AM-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-91736; File No. SR-DTC-2021-007]

**Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Update the DTC Corporate Actions Distributions Service Guide**

April 30, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup>

notice is hereby given that on April 20, 2021, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(4) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change**

The proposed rule change consists of changes to the rules of DTC ("Rules"), as described in greater detail below.<sup>5</sup>

**II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

This proposed rule change would update the DTC Corporate Actions Distributions Service Guide ("Distributions Guide") to (i) direct Participants to use DTC's ClaimConnect™ service instead of DTC's Adjustment Payment Order ("APO") service to make manual, Participant-to-Participant, cash adjustment claims to principle and interest ("P&I") payments on stock loan and repurchase agreement ("repo") positions (hereinafter, "manual adjustments"), and (ii) correct a misspelled word in the Distributions Guide.

Currently, the APO service is used, among other things, to make manual adjustments. A manual adjustment is one that is initiated by one of the parties (*i.e.*, a Participant) to a stock loan or

repo against the other party (*i.e.*, another Participant), as compared to an automated adjustment made directly by DTC. A manual adjustment can be necessary where, for example, there is a transaction discrepancy with the stock loan or repo, or an agreement between the parties provides for an adjustment unknown to DTC. The parties can settle the adjustment away from DTC or one of the parties can submit a manual adjustment via the APO service.

Unfortunately, manual processing of adjustments via the APO service is subject to a number of shortcomings. For example, the adjustments are not subject to DTC's risk controls,<sup>6</sup> which can unexpectedly subject the receiving party to the value of the adjustment;<sup>7</sup> they lack a unique identifier, which can make reconciling claims difficult; there is no automated notification process, so Participants need to actively monitor for manual adjustments; there is no dashboard where Participants can see all of their adjustments, nor is there reporting or search capabilities on adjustments; only one party to the stock loan or repo can submit a manual adjustment at a time; and there is not a validation or matching process, which means the parties often need to submit multiple adjustments between each other before reaching final agreement.

To address these shortcomings and others, DTC proposes to no longer allow Participants to use the APO service to make manual adjustments. Instead, Participants would be directed to use ClaimConnect in order to continue to make manual adjustments through DTC.

ClaimConnect was established in 2020<sup>8</sup> as an optional DTC service that enables Participants to bilaterally match and settle cash claim transactions through DTC.<sup>9</sup> More specifically,

<sup>6</sup> DTC's risk management systems are designed to mitigate credit and market risk by monitoring, in real time, the projected settlement activity of Participants, including intraday application of the Collateral Monitor and Net Debit Cap. These two controls work together to protect the DTC settlement system in the event of a Participant default. The Collateral Monitor requires net debit settlement obligations, as they accrue intraday, to be fully collateralized. Meanwhile, the Net Debit Cap limits the amount of any Participant's net debit settlement obligation to the amount that can be satisfied with DTC liquidity resources (*i.e.*, the Participants Fund and the committed line of credit from a consortium of lenders).

<sup>7</sup> Although manual adjustments are not subject to DTC's risk controls, the potential debit or credit value that a party could be unexpectedly subject to is limited to only the value of the adjustment, which is relatively small compared to Participants' end-of-day net settlement amounts.

<sup>8</sup> See Securities Exchange Act Release No. 90481 (November 23, 2020), 85 FR 76640 (November 30, 2020) (SR-DTC-2020-012).

<sup>9</sup> See ClaimConnect Service Guide available at [https://www.dtcc.com/-/media/Files/Downloads/legal/rules/dtc\\_rules.pdf](https://www.dtcc.com/-/media/Files/Downloads/legal/rules/dtc_rules.pdf).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(4).

<sup>5</sup> Terms not defined herein are defined in the Rules, available at [http://dtcc.com/-/media/Files/Downloads/legal/rules/dtc\\_rules.pdf](http://dtcc.com/-/media/Files/Downloads/legal/rules/dtc_rules.pdf).



ClaimConnect is a validation and matching engine that continually monitors claims throughout their lifecycle in order to settle and close claims through DTC's settlement process.<sup>10</sup> Claims can be matched manually (*i.e.*, Affirmed) by ClaimConnect users or automatically (*i.e.*, Automatched) by the ClaimConnect service when it matches two like claims based on the alignment of certain data elements. Once matched, claims are settled through systematic Securities Payment Orders ("SPOs") generated and submitted by ClaimConnect at set times, intraday, on a settlement date.<sup>11</sup>

There would be several benefits to using ClaimConnect, in lieu of the APO service, to make manual adjustments at DTC. For example, adjustment claims in ClaimConnect would be subject to DTC's risk controls and would have a unique identifier that Participants could track, report on, and query via the Participant's ClaimConnect dashboard. ClaimConnect also permits both parties to an adjustment to submit a claim at the same time, and it would notify the parties when an adjustment was submitted. Moreover, because adjustments would be validated and matched in ClaimConnect, either automatically by the ClaimConnect service or manually by the parties, the parties would not need to submit multiple adjustments to reach agreement.

Additionally, DTC believes that manual adjustments via ClaimConnect would be cheaper than via the APO service. Although ClaimConnect costs \$1.75 per side, per-matched claim (*i.e.*, both parties to a claim are charged \$1.75, for a total of \$3.50, once the claim is confirmed),<sup>12</sup> whereas an APO adjustment only costs \$1.50 per adjustment, not per side (*i.e.*, only the party that submits the adjustment is charged \$1.50),<sup>13</sup> because there is no validation and matching process for

*legal/service-guides/ClaimConnect.pdf*. With respect to ClaimConnect, a cash claim or cash claim transaction is a cash entitlement (*i.e.*, a request for cash) from one Participant to another Participant. Typically, cash claims arise as a result of trading exceptions from a Corporate Action event, where a cash entitlement needs to be delivered from one holder to another. Trading exceptions include, but are not limited to, trades outside of the market's agreed upon settlement cycle, lack of due bill fail tracking, stock loan or repo transaction discrepancy, or tax treaty differences.

<sup>10</sup> See ClaimConnect Service Guide, *supra* note 9.

<sup>11</sup> *Id.*

<sup>12</sup> Fee ID 710, Guide to the DTC Fee Schedule ("Fee Guide"), available at <http://www.dtcc.com/-/media/Files/Downloads/legal/feeguides/dtcfeeguide.pdf>.

<sup>13</sup> Fee ID 709, Fee Guide, *supra* note 8.

APO adjustments, the parties often need to submit multiple APO adjustments between each other before reaching final agreement. Therefore, the total cost for a manual adjustment via the APO service routinely exceeds \$3.50. With ClaimConnect, however, because there would be a validation and matching process for each adjustment claim, only one adjustment would be necessary.

In addition to updating the Distributions Guide regarding the above described changes for manual adjustments, an update would be made to correct a misspelling in the Guide's "Interim Accounting" section. Specifically, the word "include" would be changed to "included" (emphasis added).

To effectuate this proposed rule change, (i) the "Correcting P&I Payments on Stock Loan Positions" and the "Correcting REPO Positions" subsections of the Distributions Guide would be updated to direct Participants to use ClaimConnect instead of the APO service to make manual adjustments, and (ii) the "With DTC's Interim Accounting" subsection of the Guide would be update to correct the misspelling described above.

#### Effective Date

The proposed change to no longer allow Participants to use the APO service to submit manual adjustments but, instead, require Participants to use ClaimConnect for manual adjustments processed through DTC would become effective July 9, 2021. Participants will be notified by Important Notice, posted on DTC's website. Separately, the proposed change to correct the misspelling describe above would be made promptly following Commission approval.

#### 2. Statutory Basis

Section 17A(b)(3)(F) of the Act,<sup>14</sup> requires that the rules of the clearing agency be designed, *inter alia*, to promote the prompt and accurate clearance and settlement of securities transactions. DTC believes that the proposed rule change is consistent with this provision of the Act.

As described above, the proposal would update the Distributions Guide to direct Participants to use ClaimConnect instead of the APO service to make manual adjustments. By no longer allowing manual adjustments via the APO service and, instead, requiring Participants to use ClaimConnect, if they wish to have manual adjustments processed through DTC, the proposal

not only addresses the various shortcomings of using the APO service for such adjustments, as described above, but also continues to provide a means for Participants to process manual adjustments through DTC. Moreover, ClaimConnect is simply a better platform for processing manual adjustments, given its superior functionality, as noted above and described in detail in the ClaimConnect Service Guide.<sup>15</sup> In short, DTC believes this change would improve the processing and settlement of manual adjustments.

The proposal also would correct a misspelled word in the "Interim Accounting" section of the Distributions Guide, as described above. By correcting the misspelling, the proposal would improve the Guide's clarity for Participants regarding DTC's interim accounting process, alleviating any confusion that the error may have caused.

For these reasons, DTC believes that the proposed rule change helps promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17(A)(b)(3)(F) of the Act.<sup>16</sup>

#### (B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed change to update the Distributions Guide to direct Participants to use ClaimConnect instead of the APO service to make manual adjustments will have any impact on competition because Participants would continue to have the option to submit manual adjustments through DTC, albeit via ClaimConnect instead of the APO service. If anything, DTC believes this proposed change may promote competition because, as noted above, ClaimConnect would be a superior platform for processing manual adjustments and, as also noted above, it may prove to be a cheaper option than using the APO service. Any time or resources Participants save by using ClaimConnect instead of the APO service could be directed to other endeavors.

Meanwhile, DTC does not believe the proposed correction to the misspelled word in the Distributions Guide will have any impact on competition because it will simply correct a typographical error.

<sup>15</sup> See ClaimConnect Service Guide, *supra* note 9.

<sup>16</sup> *Id.*

<sup>14</sup> 15 U.S.C. 78q-1(b)(3)(F).

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments relating to this proposed rule change have not been solicited or received. DTC will notify the Commission of any written comments received by DTC.

**III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)<sup>17</sup> of the Act and paragraph (f)<sup>18</sup> of Rule 19b-4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-DTC-2021-007 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.
- All submissions should refer to File Number SR-DTC-2021-007. This file number should be included on the

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-DTC-2021-007 and should be submitted on or before May 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**J. Matthew DeLesDernier**,  
Assistant Secretary.

[FR Doc. 2021-09526 Filed 5-5-21; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 34260]

**Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940**

April 30, 2021.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of April 2021. A copy of each application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name

box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at [Secretarys-Office@sec.gov](mailto:Secretarys-Office@sec.gov) and serving the relevant applicant with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the SEC by 5:30 p.m. on May 25, 2021, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to Rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at [Secretarys-Office@sec.gov](mailto:Secretarys-Office@sec.gov).

**ADDRESSES:** The Commission:  
[Secretarys-Office@sec.gov](mailto:Secretarys-Office@sec.gov).

**FOR FURTHER INFORMATION CONTACT:** Shawn Davis, Assistant Director, at (202) 551-6413 or Chief Counsel's Office at (202) 551-6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE, Washington, DC 20549-8010.

**AllianzGI Institutional Multi-Series Trust [File No. 811-22975]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. On November 12, 2020, and December 9, 2020 applicant made liquidating distributions to its shareholders based on net asset value. Expenses of approximately \$10,700 incurred in connection with the liquidation were paid by the applicant.

*Filing Date:* The application was filed on March 11, 2021.

*Applicant's Address:*  
[Craig.Ruckman@allianzgi.com](mailto:Craig.Ruckman@allianzgi.com).

**BMO LGM Frontier Markets Equity Fund [File No. 811-22882]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On September 30, 2020, December 31, 2020, and February 26, 2021 applicant made liquidating distributions to its shareholders based on net asset value. Expenses of \$15,000 incurred in connection with the liquidation were paid by the applicant's investment adviser.

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

*Filing Date:* The application was filed on March 16, 2021.

*Applicant's Address:*  
michaelj.murphy@bmo.com.

**Duff & Phelps Utility & Corporate Bond Trust Inc. [File No. 811-07358]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to DNP Select Income Fund Inc., and on March 8, 2021 made a final distribution to its shareholders based on net asset value. Expenses of \$594,526 incurred in connection with the reorganization were paid by the applicant.

*Filing Date:* The application was filed on March 19, 2021.

*Applicant's Address:* akanter@mayerbrown.com.

**GMO Series Trust [File No. 811-22564]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to GMO Trust, and on January 22, 2021, made a final distribution to its shareholders based on net asset value. Expenses of \$745,500 incurred in connection with the reorganization were paid by the applicant's investment adviser.

*Filing Dates:* The application was filed on February 10, 2021 and amended on April 14, 2021.

*Applicant's Address:*  
Douglas.charton@gmo.com,  
Sarah.Clinton@ropesgray.com.

**Invesco Floating Rate Corporate Credit Fund [File No. 811-22511]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The application was filed on November 23, 2020 and amended on March 25, 2021.

*Applicant's Address:*  
Taylor.Edwards@invesco.com.

**Invesco Global Financial Services Fund [File No. 811-08887]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

*Filing Dates:* The application was filed on November 23, 2020 and amended on March 25, 2021.

*Applicant's Address:*  
Taylor.Edwards@invesco.com.

**Mellon Optima L/S Strategy Fund, LLC. [811-21694]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On August 27, 2020, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of \$300,000 incurred in connection with the liquidation were paid by the applicant and the applicant's liquidating trust.

*Filing Dates:* The application was filed on December 16, 2020 and amended on April 8, 2021.

*Applicant's Address:* karen.spiegel@srz.com.

**PNC Funds [811-04416]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Federated Hermes Adviser Series, Federated Hermes MDT Series, Federated Hermes Intermediate Municipal Trust, Federated Hermes Short-Intermediate Duration Municipal Trust, Federated Hermes Money Market Obligations Trust, and Federated Hermes Total Return Series, Inc., and on November 15, 2019 made a final distribution to its shareholders based on net asset value. Expenses of \$4,967,072.80 incurred in connection with the liquidation were paid by the applicant's investment advisor, and/or their affiliates.

*Filing Dates:* The application was filed on February 22, 2021 and amended on April 19, 2021.

*Applicant's Address:*  
Kathleen.nichols@ropesgray.com.

**Putnam Europe Equity Fund [File No. 811-05693]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Putnam International Equity Fund, and on June 24, 2019 made a final distribution to its shareholders based on net asset value. Expenses of \$379,570 incurred in connection with the reorganization were paid by the applicant, the acquiring fund, and the applicant's investment adviser.

*Filing Date:* The application was filed on March 3, 2021.

*Applicant's Address:*  
bryan.chegwidden@ropesgray.com.

**Putnam Investors Fund [File No. 811-00159]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Putnam Multi-Cap Core Fund, and on June 25, 2018 made a final distribution to its shareholders based on net asset value. Expenses of \$663,021 incurred in connection with the reorganization were paid by the applicant and the acquiring fund.

*Filing Date:* The application was filed on March 3, 2021.

*Applicant's Address:*  
bryan.chegwidden@ropesgray.com.

**Stone Ridge Trust III [File No. 811-23018]**

*Summary:* Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Stone Ridge All Asset Variance Premium Fund, a series of Stone Ridge Trust and on December 4, 2020, made a final distribution to its shareholders based on net asset value. Expenses of \$238,877 incurred in connection with the reorganization were paid by the applicant.

*Filing Dates:* The application was filed on February 18, 2021 and amended on April 14, 2021.

*Applicant's Address:* legalnotices@stoneridgeam.com.

**USA Mutuals [811-10319]**

*Summary:* Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to USA Mutuals Vitium Global Fund, and USA Mutuals Navigator Fund, each a series of Northern Lights Fund Trust IV, and on January 25, 2021 made a final distribution to its shareholders based on net asset value. Expenses of \$215,417 incurred in connection with the reorganization were paid by the applicant's investment advisor.

*Filing Dates:* The application was filed on February 22, 2021 and amended on April 29, 2021.

*Applicant's Address:* legalnotices@stoneridgeam.com.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2021-09524 Filed 5-5-21; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91735; File No. SR–NASDAQ–2021–026]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Effective Date of the Temporary Amendments Concerning Exchange Rule 1210 From April 30, 2021, to June 30, 2021

April 30, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on April 21, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the expiration date of the temporary amendments initially set forth in SR–NASDAQ–2020–73 and subsequently extended in SR–NASDAQ–2020–091 (collectively, the “Temporary Qualification Examination Relief Filings”) from April 30, 2021 to June 30, 2021. The Exchange does not anticipate providing any further extensions to the temporary amendments identified in this proposed rule change beyond June 30, 2021.<sup>3</sup>

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to extend the expiration date of the temporary amendments initially set forth in the Temporary Qualification Examination Relief Filings from April 30, 2021 to June 30, 2021. This proposed rule change is based on a filing recently submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”)<sup>4</sup> and is intended to harmonize the Exchange’s registration rules with those of FINRA so as to promote uniform standards across the securities industry.

In response to the COVID–19 global pandemic, last year FINRA began providing temporary relief by way of frequently asked questions (“FAQs”)<sup>5</sup> to address disruptions to the administration of FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.<sup>6</sup>

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04<sup>7</sup> prior to February 2, 2020, would be given until May 31, 2020, to

<sup>4</sup> See Exchange Act Release No. 91506 (April 8, 2021), 86 FR 19671 (April 14, 2021) (SR–FINRA–2021–005) (“FINRA Filing”). See also Exchange Act Release Nos. 89732 (September 1, 2020), 85 FR 55535 (September 8, 2020) (SR–FINRA–2020–026); 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043). The Exchange notes that the FINRA Filing also provides temporarily relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing.

<sup>5</sup> See <https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe>.

<sup>6</sup> At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March 2020 Prometric closed alal of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May 2020. Currently, Prometric has resumed testing in many of its United States and Canada test centers, at either full or limited occupancy, based on local and government mandates.

<sup>7</sup> Exchange Rule 1210.04 is the corresponding rule to FINRA Rule 1210.04.

pass the appropriate principal qualification examination.<sup>8</sup> FINRA revised the FAQ to extend the expiration of the temporary relief to pass the appropriate principal examination initially until June 30, 2020, and then until August 31, 2020.

On October 29, 2020, the Exchange filed with the Commission a proposed rule change for immediate effectiveness to adopt temporary Supplementary Material .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under Exchange Rule 1210 of General 4 (Registration Requirements).<sup>9</sup> Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under Exchange Rule 1210.04 had until December 31, 2020, to pass the appropriate qualification examination. The Exchange thereafter filed SR–NASDAQ–2020–091 to extend the expiration date of the temporary amendments set forth in SR–NASDAQ–2020–076 from December 31, 2020, to April 30, 2021.<sup>10</sup>

As mentioned in the Temporary Qualification Examination Relief Filings, the Exchange and FINRA began providing, and then extended, temporary relief to address the interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations caused by the COVID–19 pandemic.<sup>11</sup> The Exchange also noted in the Temporary Qualification Examination Relief Filings that the pandemic could result in members potentially experiencing significant disruptions to their normal business operations that may be exacerbated by being unable to keep principal positions filled. Specifically, the limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19 could result in members having

<sup>8</sup> FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. Exchange Rule 1210.04 provides the same allowance to members.

<sup>9</sup> See Exchange Act Release No. 90359 (November 5, 2020), 85 FR 71979 (November 12, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–073).

<sup>10</sup> See Exchange Act Release No. 90780 (December 22, 2020), 85 FR 86600 (December 30, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–091).

<sup>11</sup> Information about the continued impact of COVID–19 on FINRA-administered examinations is available at <https://www.finra.org/rules-guidance/key-topics/covid-19/exams>.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> If due to unforeseen circumstances a further extension is necessary, the Exchange will submit a separate rule filing to further extend the temporary amendments.

difficulty finding other qualified individuals to transition into those roles or requiring them to reallocate employee time and resources away from other critical responsibilities at the member firm.

While there are signs of improvement, the COVID-19 conditions necessitating the temporary relief persist and the Exchange has determined that there is a continued need for this temporary relief beyond April 30, 2021. Although Prometric has resumed testing in many of its U.S. test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain examinations that have been deemed essential by the local government.<sup>12</sup> In addition, while certain states have started to ease COVID-19 restrictions on businesses and social activities, public health officials continue to emphasize the importance for individuals to keep taking numerous steps to protect themselves and help slow the spread of the disease.<sup>13</sup>

Although the COVID-19 conditions necessitating the temporary relief persist, the Exchange believes that an extension of the relief is necessary only until June 30, 2021, because FINRA recently expanded the availability of online examinations. Prior to this expansion, the ongoing effects of the pandemic made it impracticable for members to ensure that the individuals who they had designated to function in a principal capacity, as set forth in Exchange Rule 1210.04, could successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule.<sup>14</sup> Specifically, if the individual wanted to take a qualifying examination, they were required to accept the health risks associated with taking an in-person examination because the examination was not available online. On February 24, 2021, however, FINRA adopted an interim accommodation request process to allow candidates to take additional FINRA examinations online, including the General Securities Principal ("Series 24") examination.<sup>15</sup> Because the qualifying examination has been made

available online only recently, the Exchange and FINRA are concerned that individuals who have been designated to function in a principal capacity may not have sufficient time to schedule, study for, and take the examination before April 30, 2021, the date the temporary amendments are set to expire. Therefore, the Exchange is proposing to extend the expiration date of the temporary amendments set forth in the Temporary Qualification Examination Relief Filings until June 30, 2021. The proposed rule change would apply only to those individuals who have been designated to function as a principal prior to March 3, 2021. As noted above, the Exchange does not anticipate providing any further extensions to the temporary amendments and any individuals designated to function as a principal on or after March 3, 2021, will need to successfully pass an appropriate qualification examination within 120 days.

The Exchange believes that this proposed continued extension of time is tailored to address the needs and constraints on a member's operations during the COVID-19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID-19 on members by providing continued flexibility so that members can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by a member's continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Exchange rules.

The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>17</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market

system, and, in general to protect investors and the public interest.

The proposed rule change is intended to minimize the impact of COVID-19 on member operations by further extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under Exchange Rule 1210.04 until June 30, 2021. The proposed rule change does not relieve members from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable Exchange rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID-19 pandemic, the Exchange believes that the proposed rule change is a sensible accommodation that will continue to afford members the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

## B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As set forth in the Temporary Qualification Examination Relief Filings, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID-19 outbreak and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change is necessary to temporarily rebalance the attendant benefits and costs of the obligations under Exchange Rule 1210 in response to the impacts of the COVID-19 pandemic that would otherwise result if the temporary amendments were to expire on April 30, 2021.<sup>18</sup>

<sup>12</sup> Information from Prometric about its safety practices and the impact of COVID-19 on its operations is available at <https://www.prometric.com/corona-virus-update>. See also *supra* note 11.

<sup>13</sup> See, e.g., Centers for Disease Control and Prevention, How to Protect Yourself & Others, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>14</sup> See *supra* note 11.

<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> In SR-FINRA-2020-026, FINRA provides an abbreviated economic impact assessment maintaining that changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID-19 pandemic that is equally applicable to the changes the Exchange proposes. See Exchange Act Release No. 89732 (September 1, 2020), 85 FR 55537 (September 8, 2020) (SR-FINRA-2020-026). The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and Rule 19b-4(f)(6) thereunder.<sup>20</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the conditions necessitating the temporary relief continue to exist and the proposed extension of time will help minimize the impact of the COVID-19 outbreak on members' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. Despite signs of improvement, the Exchange further stated that the ongoing extenuating circumstances of the COVID-19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules.

The Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local

government.<sup>21</sup> However, on February 24, 2021, FINRA began providing the General Securities Principal (Series 24) examination online through an interim accommodation request process.<sup>22</sup> Prior to this change, if individuals wanted to take these qualifying examinations, they were required to accept the health risks associated with taking an in-person examination. Even with the expansion of online qualifications examinations, the Exchange stated that extending the expiration date of the relief set forth in SR-NASDAQ-2020-091 until June 30, 2021 is still needed. The Exchange stated that this temporary relief will provide flexibility to allow individuals who have been designated to function in a principal sufficient time to schedule, study for and take the applicable examination before the temporary relief expires. Notably, the Exchange stated that it does not anticipate providing any further extensions to the temporary amendments and that any individuals designated to function as a principal on or after March 3, 2021 will need to successfully pass an appropriate qualification examination within 120 days.

For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>23</sup> Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>24</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

<sup>21</sup> See *supra* notes 11 and 12. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID-19 cases.

<sup>22</sup> See *supra* note 11 (including the February 24, 2021 announcement of the interim accommodation process for candidates to take certain examinations, including the General Securities Principal (Series 24) Examination, online.)

<sup>23</sup> As noted above by the Exchange, this proposal is an extension of temporary relief provided in SR-NASDAQ-2020-073 and SR-NASDAQ-2020-091 where the Exchange also requested and the Commission granted a waiver of the 30-day operative delay. See SR-NASDAQ-2020-073, 85 FR at 71981-82 and SR-NASDAQ-2020-091, 85 FR at 86602.

<sup>24</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-026 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2021-026. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-026 and should be submitted on or before May 27, 2021.

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2021-09527 Filed 5-5-21; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91733; File No. SR-ICC-2021-013]

### Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC End-of-Day Price Discovery Policies and Procedures

April 30, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 23, 2021, ICE Clear Credit LLC (“ICC”) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to make changes to ICC’s End-of-Day Price Discovery Policies and Procedures (“Pricing Policy”). These revisions do not require any changes to the ICC Clearing Rules (the “Rules”).

#### II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

#### (A) Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### (a) Purpose

ICC proposes to revise the Pricing Policy, which sets out ICC’s end-of-day (“EOD”) price discovery process that provides prices for cleared contracts using submissions made by Clearing Participants (“CPs”). ICC believes such revisions will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. ICC proposes to make such changes effective following Commission approval of the proposed rule change. The proposed amendments are described in detail as follows.

ICC proposes updates related to firm trade obligations and other clarifications. Under the Pricing Policy, to encourage CPs to provide the best possible EOD submissions, ICC selects a subset of the potential trades generated and designates them as firm trades, which CPs are entered into as cleared transactions. ICC selects specific dates on which it can require CPs to execute firm trades (“firm trade days”). For each firm trade day, ICC specifies the instruments that may become firm trade eligible, subject to certain specified criteria. Amended Section 2.4.1 incorporates additional criteria that must be met for the generation of firm trades, referred to as the trade price deviation constraint (the “constraint”). The proposed changes reference the constraint throughout Section 2.4.1, specifically in subsections (a), (b), and (c), and describe the constraint in subsection (d). Under the constraint, ICC avoids creating a high number of trades around its EOD levels by not designating potential trades as firm trades if the magnitude of the hypothetical profit/loss is smaller in magnitude than the absolute value of the difference between the EOD level and either the bid price or offer price. ICC would only designate a potential trade as a firm trade if the trade level fell outside the EOD level plus/minus one half the EOD bid-offer width (“BOW”) for the given instrument. Such constraint would not apply when the potential firm trade is formed by crossing two outlying submission trades.

With respect to credit default index swaptions (“Index Options”), ICC proposes additional language on the designation of a potential trade as a firm trade, subject to the CP open interest and ICC open interest requirements in amended Subsection 2.4.1.c. Similar

requirements are currently incorporated in the Pricing Policy for indices and single names. Under the CP open interest requirement, for ICC to designate a potential trade as a firm trade, both parties must have cleared open interest, as of the designated times, in one or more Index Option instrument sharing the same underlying index instrument, expiration date, strike convention, exercise style and transaction type. Under the ICC open interest requirement, ICC only designates a potential trade in a given Index Option instrument as a firm trade if ICC has cleared open interest in that instrument.

ICC proposes additional clarifications to the Pricing Policy. In Section 2.2.2, ICC proposes to abbreviate a term. ICC proposes revisions to Section 2.6 to more clearly set out the circumstances under which a CP may participate in the EOD price discovery process on behalf of another CP. The amendments specify that a CP may allow an affiliated CP to participate in the EOD price discovery process on its behalf. In Section 3, ICC proposes to memorialize that the Pricing Policy is subject to review by the Risk Committee and review and approval by the Board at least annually.

##### (b) Statutory Basis

ICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act<sup>3</sup> and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad-22.<sup>4</sup> In particular, Section 17A(b)(3)(F) of the Act<sup>5</sup> requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest. ICC believes that the proposed amendments promote its ability to maintain the effectiveness and integrity of its EOD price discovery process. Under the proposed constraint, ICC avoids creating a high number of trades around its EOD levels by not designating potential trades as firm trades if the magnitude of the hypothetical profit/loss is smaller in magnitude than the absolute value of the difference between the EOD level and either the bid price or offer price. The purpose of EOD firm trades is to maintain the robustness of the

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78q-1.

<sup>4</sup> 17 CFR 240.17Ad-22.

<sup>5</sup> 15 U.S.C. 78q-1(b)(3)(F).



established price discovery process, and on-market firm trades do not incentivize the correction of outlying submissions. The additional clarifications further ensure that the Pricing Policy remain effective, clear, and up-to-date to support the effectiveness of ICC's EOD price discovery process, including by incorporating language on the designation of a potential trade as a firm trade, subject to the CP open interest and ICC open interest requirements for Index Options; clarifying the circumstances under which a CP may participate in the EOD price discovery process on behalf of another CP; and memorializing the review and approval process for the document. The proposed rule change is therefore consistent with the prompt and accurate clearing and settlement of the contracts cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.<sup>6</sup>

The amendments would also satisfy relevant requirements of Rule 17Ad-22.7 Rule 17Ad-22(e)(2)(i) and (v)<sup>8</sup> requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. The Pricing Policy subjects the ICC EOD price discovery process to a governance and oversight structure that promotes transparency and accountability and clearly assigns and documents responsibility for relevant actions and decisions. The proposed changes strengthen the governance procedures and arrangements detailed in the Pricing Policy by memorializing the review and approval of the document by relevant groups at least annually. As such, in ICC's view, the proposed rule change continues to ensure that ICC maintains policies and procedures that are reasonably designed to provide for clear and transparent governance arrangements and specify clear and direct lines of responsibility, consistent with Rule 17Ad-22(e)(2)(i) and (v).<sup>9</sup>

Rule 17Ad-22(e)(3)(i)<sup>10</sup> requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for

comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes risk management policies, procedures, and systems designed to identify, measure, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, that are subject to review on a specified periodic basis and approved by the board of directors annually. ICC maintains a sound risk management framework that identifies, measures, monitors, and manages the range of risks that it faces. The Pricing Policy is a key aspect of ICC's risk management approach, and the proposed amendments would memorialize that the document is reviewed by the Risk Committee and reviewed and approved by the Board at least annually. As such, the amendments would satisfy the requirements of Rule 17Ad-22(e)(3)(i).<sup>11</sup>

Rule 17Ad-22(e)(6)(iv)<sup>12</sup> requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. ICC believes that the proposed constraint is appropriately designed to support and maintain the effectiveness of ICC's EOD price discovery process that provides reliable prices, which ICC uses for risk management purposes. As described above, under the proposed constraint, ICC would only designate a potential trade as a firm trade if the trade level fell outside the EOD level plus/minus one half the EOD BOW for the given instrument. The purpose of EOD firm trades is to maintain the robustness of the established price discovery process, and on-market firm trades do not incentivize the correction of outlying submissions. The constraint would not apply when the potential firm trade is formed by crossing two outlying submission trades. Moreover, the proposed clarifications ensure that the Pricing Policy remains effective and transparent by adding language on the designation of a potential trade in an Index Option as a firm trade, subject to the CP open interest and ICC open interest requirements, and by clarifying the circumstances under which a CP may participate in the EOD price

discovery process on behalf of another CP. In ICC's view, such changes are appropriately designed to promote and maintain the effectiveness and integrity of the Pricing Policy and the EOD price discovery process that provides reliable prices, consistent with the requirements of Rule 17Ad-22(e)(6)(iv).<sup>13</sup>

#### *(B) Clearing Agency's Statement on Burden on Competition*

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition. The proposed changes to the Pricing Policy will apply uniformly across all market participants. Therefore, ICC does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

#### *(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ICC-2021-013 on the subject line.

<sup>6</sup> *Id.*

<sup>7</sup> 17 CFR 240.17Ad-22.

<sup>8</sup> 17 CFR 240.17Ad-22(e)(2)(i) and (v).

<sup>9</sup> *Id.*

<sup>10</sup> 17 CFR 240.17Ad-22(e)(3)(i).

<sup>11</sup> *Id.*

<sup>12</sup> 17 CFR 240.17Ad-22(e)(6)(iv).

<sup>13</sup> *Id.*



*Paper Comments*

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-ICC-2021-013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at <https://www.theice.com/clear-credit/regulation>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ICC-2021-013 and should be submitted on or before May 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2021-09528 Filed 5-5-21; 8:45 am]

**BILLING CODE 8011-01-P**

**SOCIAL SECURITY ADMINISTRATION**

[Docket No. SSA-2020-0061]

**Interventional Cooperative Agreement Program**

**AGENCY:** Social Security Administration (SSA).

**ACTION:** Announcement of new funding opportunity, the Interventional Cooperative Agreement Program.

**SUMMARY:** We are announcing a new funding opportunity, the Interventional Cooperative Agreement Program (ICAP). The purpose of this new program is to allow us to enter into cooperative agreements to collaborate with States, private foundations, and other non-Federal groups and organizations who have the interest and ability to identify, operate, and partially fund interventional research. The Request for Applications is now open on [Grants.gov](https://www.grants.gov).

**FOR FURTHER INFORMATION CONTACT:** Dionne Mitchell, Grant Officer, Office of Acquisition and Grants, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235-6401, (410) 965-9534, [Grants.Team@ssa.gov](mailto:Grants.Team@ssa.gov) (indicate "ICAP Inquiry" in subject line). For information on eligibility or filing for benefits, call our national toll-free number, 1-800-325-0778, or visit our internet site, Social Security Online, at <http://www.socialsecurity.gov>.

**SUPPLEMENTARY INFORMATION:** ICAP will provide a process through which we can systematically review proposals from outside organizations (including States, private foundations, and other non-Federal groups and organizations) and enter into cooperative agreements with them for collaboration on interventional research. We hope to tap local, external knowledge about potential interventions relevant to beneficiaries who receive Social Security Disability Insurance (SSDI) benefits or recipients of Supplemental Security Income (SSI). ICAP research topics are as follows:

- Examining the structural barriers in the labor market, including for racial, ethnic, or other underserved communities, including people with disabilities, that increase the likelihood of people receiving or applying for SSDI or SSI benefits;
- Promoting self-sufficiency by helping people enter, stay in, or return to the labor force, including children and youth;
- Coordinating planning between private and human services agencies to improve the administration and effectiveness of the SSDI, SSI, and related programs;
- Assisting claimants in underserved communities apply for or appeal determinations or decisions on claims for SSDI and SSI benefits; and
- Conducting outreach to children with disabilities who are potentially

eligible to receive SSI, and conducting outreach to their parents and guardians.

For more information, please see the Request for Applications for funding opportunity ICAP-ICA-21-001 on [Grants.gov](https://www.grants.gov).

The Commissioner of Social Security, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

**Faye I. Lipsky,**

*Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.*

[FR Doc. 2021-09521 Filed 5-5-21; 8:45 am]

**BILLING CODE 4191-02-P**

**DEPARTMENT OF STATE**

[Public Notice: 11422]

**Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: "Medieval Treasures from Münster Cathedral" Exhibition**

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owner or custodian for temporary display in the exhibition "Medieval Treasures from Münster Cathedral" at the Cleveland Museum of Art, Cleveland, Ohio, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Chi D. Tran, Program Administrator, Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6471; email: [section2459@state.gov](mailto:section2459@state.gov)). The mailing address is U.S. Department of State, L/PD, SA-5, Suite 5H03, Washington, DC 20522-0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999,

<sup>14</sup> 17 CFR 200.30-3(a)(12).

and Delegation of Authority No. 236–3 of August 28, 2000.

**Matthew R. Lussenhop,**

*Acting Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2021–09543 Filed 5–5–21; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Submission Deadline for Schedule Information for Chicago O'Hare International Airport, John F. Kennedy International Airport, Los Angeles International Airport, Newark Liberty International Airport, and San Francisco International Airport for the Northern Winter 2021/2022 Scheduling Season

**AGENCY:** Department of Transportation, Federal Aviation Administration (FAA).  
**ACTION:** Notice of submission deadline.

**SUMMARY:** Under this notice, the FAA announces the submission deadline of May 13, 2021, for Winter 2021/2022 flight schedules at Chicago O'Hare International Airport (ORD), John F. Kennedy International Airport (JFK), Los Angeles International Airport (LAX), Newark Liberty International Airport (EWR), and San Francisco International Airport (SFO).

**DATES:** Schedules should be submitted by May 13, 2021.

**ADDRESSES:** Schedules may be submitted to the Slot Administration Office by email to: [7-AWAslotadmin@faa.gov](mailto:7-AWAslotadmin@faa.gov).

**FOR FURTHER INFORMATION CONTACT:** Al Meilus, Manager, Slot Administration, AJR–G, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–2822; email [Al.Meilus@faa.gov](mailto:Al.Meilus@faa.gov).

**SUPPLEMENTARY INFORMATION:** This document provides routine notice to carriers serving capacity-constrained airports in the United States, including Chicago O'Hare International Airport (ORD), John F. Kennedy International Airport (JFK), Los Angeles International Airport (LAX), Newark Liberty International Airport (EWR), and San Francisco International Airport (SFO). In particular, this notice announces the deadline for carriers to submit schedules for the Northern Winter 2021/2022 scheduling season. The FAA deadline coincides with the schedule submission deadline established in the International Air Transport Association

(IATA) Calendar of Coordination Activities.

#### General Information for All Airports

The FAA has designated EWR, LAX, ORD, and SFO as IATA Level 2 airports<sup>1</sup> subject to a schedule review process premised upon voluntary cooperation. The FAA has designated JFK as an IATA Level 3 airport consistent with the Worldwide Slot Guidelines (WSG), now generally known as the Worldwide Airport Slot Guidelines (WASG).<sup>2</sup> The FAA currently limits scheduled operations at JFK by order that expires on October 29, 2022.<sup>3</sup> The Northern Winter 2021/2022 scheduling season is from October 31, 2021, through March 26, 2022, in recognition of the IATA winter scheduling period. Notwithstanding that carriers may presently face uncertainty about their operations in light of coronavirus disease 2019 (COVID–19), carriers should plan and submit their schedules under the assumption that no further relief will be granted at Level 2 and Level 3 airports during the Winter 2021/2022 scheduling season.<sup>4</sup> The FAA and the Office of the Secretary will continue to monitor industry developments closely and will announce any possible COVID–19-related relief, if it is deemed necessary, in a separate notice. Any possible relief for the Winter 2021/2022 scheduling season and any possible action to alter the established rules and policies for slot management and schedule facilitation in the United States are not within the scope of this notice. The FAA does, however, understand the need for carriers to plan in advance with as much certainty as possible regarding the applicable regulatory and procedural framework. As the industry gradually recovers, new entrant and other carriers have commenced some

<sup>1</sup> These designations remain effective until the FAA announces a change in the **Federal Register**.

<sup>2</sup> The FAA generally applies the WSG to the extent there is no conflict with U.S. law or regulation. The FAA is reviewing recent substantive amendments to the WSG adopted in edition 10. The FAA recognizes the WSG has been replaced by the WASG edition 1 effective June 1, 2020. While the FAA is considering whether to implement certain changes in the United States, it will continue to apply WSG edition 9.

<sup>3</sup> Operating Limitations at John F. Kennedy International Airport, 73 FR 3510 (Jan. 18, 2008), as most recently extended 85 FR 58258 (Sep. 18, 2020). The slot coordination parameters for JFK are set forth in this Order.

<sup>4</sup> For additional information on COVID–19 impacts at designated IATA Level 2 and 3 airports in the United States and actions taken by the FAA to preserve stability through the Summer 2021 scheduling season, see FAA Policy Statement: Limited, Conditional Extension of COVID–19 Related Relief for the Summer 2021 Scheduling Season, Docket No. FAA–2020–0862 (Jan. 14, 2021).

operations using capacity that was not being operated by the carriers having historic precedence to that capacity under the waiver policy. The DOT/FAA seeks to facilitate all segments of the industry's recovery from the pandemic and ensure that the transportation needs of the American people are efficiently met, especially during the economic recovery. Therefore, carriers should not assume further relief will be made available beyond the relief already provided to date through October 30, 2021.

The FAA is primarily concerned about scheduled and other regularly conducted commercial operations during designated hours, but carriers may submit schedule plans for the entire day. The designated hours for the Winter 2021/2022 scheduling season are: at EWR and JFK from 0600 to 2300 Eastern Time (1000 to 0300 UTC), at LAX and SFO from 0600 to 2300 Pacific Time (1300 to 0600 UTC), and at ORD from 0600 to 2100 Central Time (1100 to 0200 UTC). These hours are unchanged from previous scheduling seasons. The FAA understands there may be differences in schedule times due to U.S. daylight saving time dates and will accommodate these differences to the extent possible.

Carriers should submit schedule information in sufficient detail including, at minimum, the marketing or operating carrier, flight number, scheduled time of operation, frequency, aircraft equipment, and effective dates. IATA standard schedule information format and data elements for communications at Level 2 and Level 3 airports in the IATA Standard Schedules Information Manual (SSIM) Chapter 6 may be used. The WSG provides additional information on schedule submissions at Level 2 and Level 3 airports. Some carriers at JFK manage and track slots through FAA-assigned Slot ID numbers corresponding to an arrival or departure slot in a particular half-hour on a particular day of week and date. The FAA has a similar voluntary process for tracking schedules at EWR with Reference IDs, and certain carriers are managing their schedules accordingly. These are primarily U.S. and Canadian carriers that have the highest frequencies and considerable schedule changes throughout the season and can benefit from a simplified exchange of information not dependent on full flight details. Carriers are encouraged to submit schedule requests at those airports using Slot or Reference IDs.

As stated in the WSG, schedule facilitation at a Level 2 airport is based on the following: (1) Schedule

adjustments are mutually agreed upon between the carriers and the facilitator; (2) the intent is to avoid exceeding the airport's coordination parameters; (3) the concepts of historic precedence and series of slots do not apply at Level 2 airports; although WSG recommends giving priority to approved services that plan to operate unchanged from the previous equivalent season at Level 2 airports, and (4) the facilitator should adjust the smallest number of flights by the least amount of time necessary to avoid exceeding the airport's coordination parameters. Consistent with the WSG, the success of Level 2 in the United States depends on the voluntary cooperation of carriers.

The FAA considers several factors and priorities as it reviews schedule and slot requests at Level 2 and Level 3 airports, which are consistent with the WSG, including—historic slots or services from the previous equivalent season over new demand for the same timings, services that are unchanged over services that plan to change time or other capacity relevant parameters, introduction of year-round services, effective period of operation, regularly planned operations over *ad hoc* operations, and other operational factors that may limit a carrier's timing flexibility. In addition to applying these priorities from the WSG, the U.S. Government has adopted a number of measures and procedures to promote competition and new entry at U.S. slot-controlled and schedule-facilitated airports.

At Level 2 airports, the FAA seeks to maintain close communications with carriers and terminal schedule facilitators on potential runway schedule issues or terminal and gate issues that may affect the runway times. As explained in prior notices, the FAA also seeks to reduce the time that carriers consider proposed offers on schedules. To allow the FAA to make informed decisions at airports where operations in some hours are at or near the desired scheduling limits, the FAA expects it will substantially complete the review process on initial submissions each scheduling season within 30 days of the end of the Slot Conference. After this time, the agency confirms the acceptance of proposed offers or informs carriers of available alternative times, as applicable.

Slot management in the United States differs in some respect from procedures in other countries. In the United States, the FAA is responsible for facilitation and coordination of runway access for takeoffs and landings at Level 2 and Level 3 airports; however, the airport authority or its designee is responsible

for facilitation and coordination of terminal/gate/airport facility access. The process with the individual airports for terminal access and other airport services is separate from, and in addition to, the FAA schedule review based on runway capacity.

Generally, the FAA uses average hourly runway capacity throughput for airports and performance metrics in conducting its schedule review at Level 2 airports and determining the scheduling limits at Level 3 airports included in FAA rules or orders.<sup>5</sup> The FAA also considers other factors that can affect operations, such as capacity changes due to runway, taxiway, or other airport construction, air traffic control procedural changes, airport surface operations, and historical or projected flight delays and congestion.

Finally, the FAA notes that the schedule information submitted by carriers to the FAA may be subject to disclosure under the Freedom of Information Act (FOIA). The WSG also provides for release of information at certain stages of slot coordination and schedule facilitation. In general, once it acts on a schedule submission or slot request, the FAA may release information on slot allocation or similar slot transactions or schedule information reviewed as part of the schedule facilitation process. The FAA does not expect that practice to change and most slot and schedule information would not be exempt from release under FOIA. The FAA recognizes that some carriers may submit information on schedule plans that is both customarily and actually treated as private. Carriers that submit such confidential schedule information should clearly mark the information, or any relevant portions thereof, as proprietary information ("PROPIN"). The FAA will take the necessary steps to protect properly designated information to the extent allowable by law.

### Airport-Specific Updates

#### *EWR General Update*

As stated in prior notices, the FAA regularly monitors operations and performance metrics at EWR to identify

<sup>5</sup> The FAA typically determines an airport's average adjusted runway capacity or typical throughput for Level 2 airports by reviewing hourly data on the arrival and departure rates that air traffic control indicates could be accepted for that hour, commonly known as "called" rates. The FAA also reviews the actual number of arrivals and departures that operated in the same hour. Generally, the FAA uses the higher of the two numbers, called or actual, for identifying trends and schedule review purposes. Some dates are excluded from analysis, such as during periods when extended airport closures or construction could affect capacity.

ways to improve operational efficiency and achieve delay reductions in a Level 2 environment. Access to EWR and the New York City area generally remains coveted. Requests for flights at EWR have exceeded the desired scheduling limits in multiple hours. The FAA has regularly indicated that schedule adjustments are advised for requests for new or retimed operations into periods when demand is at or above scheduling limits and worked with carriers to identify alternative times that were available. In some cases, carriers have been able to swap with other carriers for their preferred times if the FAA is unable to offer the requested time. Carriers may continue to seek swaps in order to operate within periods in which operations are at the scheduling limits. However, swaps should be reported to the FAA, as carriers are expected to operate consistent with the runway times on record with the FAA.

For the Winter 2021/2022 season, the desired hourly scheduling limit remains at 79 operations and 43 operations per half-hour.<sup>6</sup> Based on historical demand and an increase in operations in "shoulder" periods adjacent to the busiest hours before the COVID-19 pandemic, most hours are now at the desired scheduling limits. To help with a balance between arrivals and departures, the desired maximum number of scheduled arrivals or departures, respectively, is 43 in an hour and 24 in a half-hour. This would allow some higher levels of operations in certain periods (not to exceed the hourly limits) and some recovery from lower demand in adjacent periods. Consistent with past practice at EWR, the FAA will accept flights above the limits if the flights were operated, or treated as operated, by the same carrier on a regular basis in the previous corresponding season (*i.e.*, Winter 2020/2021). Certain flights were approved and operated on an *ad hoc* basis in Winter 2020/2021 as a result of temporary flight reductions and returns to FAA under the usage policy for that scheduling season. Similar flights, if requested for the Winter 2021/2022 scheduling season would be treated as new requests and reviewed in accordance with usual scheduling limits and policies.

Consistent with the WSG, carriers are asked for their voluntary cooperation to adjust schedules to meet the scheduling limits in order to minimize potential congestion and delay. New operations will be offered alternative times unless the period is below the FAA's desired

<sup>6</sup> 83 FR 21335 (May 1, 2018).

scheduling limits.<sup>7</sup> Consistent with this approach, the FAA intends to offer alternative times in response to any new flights for the Winter 2021/2022 scheduling season if operations are at or above the scheduling limits. However, the FAA notes that there may be availability for *ad hoc* passenger and cargo operations due to temporary COVID-19-related service changes, but such availability will depend on the baseline level of planned operations with priority from the prior corresponding season.

#### *EWR Assessment Status*

As indicated most recently in the EWR schedule submission notice for the Summer 2021 scheduling season, the FAA is assessing the impacts on performance of peak period reductions and other schedule changes, such as Southwest Airlines' cessation of operations at EWR, as well as the impacts on competition, in close coordination with the Office of the Secretary of Transportation.<sup>8</sup> This assessment is ongoing; the FAA intends to publish additional information on the outcome of this assessment in the future. The sudden, drastic disruption caused by COVID-19<sup>9</sup> affects the analysis and the relevant long-term effects of operational, performance, and demand-related changes at EWR. COVID-19 continues to impact operations at EWR in 2021. Pending further study, the FAA does not at this time invite replacing or "backfilling" the peak morning and afternoon/evening operations that Southwest Airlines conducted during Winter 2018/2019 and Summer 2019, to the extent the new operations would exceed the current desired scheduling limits.

#### *Construction Updates*

Construction projects are upcoming or underway at EWR, JFK, LAX, and ORD,

<sup>7</sup> See e.g., Notice of Submission Deadline for the Summer 2021 Scheduling Season, 85 FR 65134 at 65136 (Oct. 14, 2020); Notice of Submission Deadline for the Winter 2020/2021 Scheduling Season, 85 FR 30001 at 30003 (May 19, 2020); Notices of Submission Deadline for Newark Liberty International Airport for the Summer 2020 Scheduling Season, 84 FR 52580 at 52581–52582 (Oct. 2, 2019); Notice of Submission Deadline for the Winter 2019/2020 Scheduling Season, 84 FR 18630 at 18632 (May 1, 2019); Notice of Submission Deadline for the Summer 2019 Scheduling Season, 83 FR 49155 at 49156–49157 (Sep. 28, 2018); Notice of Submission Deadline for the Winter 2018/2019 Scheduling Season, 83 FR 21335 at 21337–21338 (May 9, 2018).

<sup>8</sup> See Notice of Submission Deadline for Newark Liberty International Airport for the Summer 2021 Scheduling Season, 85 FR 65134.

<sup>9</sup> For example, the FAA's Operational Network (OPSNET) data shows total operations for April to September 2020 were 73.7% lower than the same period in 2019.

and SFO. For additional information, see [https://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/service\\_units/systemops/perf\\_analysis/sys\\_cap\\_eval/](https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/sys_cap_eval/).

The construction plans for each of the airports is subject to change. The airport operators regularly meet with the FAA, carriers, and other stakeholders to review construction plans, identify operational or other issues, and develop mitigation strategies. Carriers interested in additional information on construction plans should contact the airport operator to obtain further details or information on stakeholder discussions.

Issued in Washington, DC, on April, 30, 2021.

**Virginia T. Boyle,**

*Vice President, System Operations Services.*

[FR Doc. 2021-09535 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Membership in the National Parks Overflights Advisory Group

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

**ACTION:** Solicitation of applications.

**SUMMARY:** The Federal Aviation Administration (FAA) and the National Park Service (NPS) invite interested persons to apply to fill one current and one upcoming vacancy on the National Parks Overflights Advisory Group (NPOAG). This notice invites interested persons to apply for the openings. The current opening is for a representative of Native American tribes. The upcoming opening is for a representative of air tour operator concerns.

**DATES:** Persons interested in these membership openings will need to apply by June 11, 2021.

**FOR FURTHER INFORMATION CONTACT:** Keith Lusk, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, 777 S Aviation Boulevard, Suite 150, El Segundo, CA 90245, telephone: (424) 405-7017, email: [Keith.Lusk@faa.gov](mailto:Keith.Lusk@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106-181, and subsequently amended in the FAA Modernization and Reform Act of 2012. The Act required the establishment of the advisory group within one year after its enactment. The

NPOAG was established in March 2001. The advisory group is comprised of representatives of general aviation, commercial air tour operators, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

In accordance with the Act, the advisory group provides "advice, information, and recommendations to the Administrator and the Director—

(1) On the implementation of this title [the Act] and the amendments made by this title;

(2) On commonly accepted quiet aircraft technology for use in commercial air tour operations over a national park or tribal lands, which will receive preferential treatment in a given air tour management plan;

(3) On other measures that might be taken to accommodate the interests of visitors to national parks; and

(4) At the request of the Administrator and the Director, safety, environmental, and other issues related to commercial air tour operations over a national park or tribal lands."

#### **Membership**

The current NPOAG is made up of one member representing general aviation, three members representing the commercial air tour industry, four members representing environmental concerns, and two members representing Native American tribes. Members serve three year terms. Current members of the NPOAG are as follows:

Melissa Rudinger representing general aviation; Eric Lincoln, James Viola, and John Becker representing commercial air tour operators; Robert Randall, Dick Hingston, Les Blomberg, and John Eastman representing environmental interests; and Carl Slater representing Native American tribes, with one current opening. The three-year term of Mr. Lincoln expires on July 31, 2021.

#### **Selections**

In order to retain balance within the NPOAG, the FAA and NPS are seeking candidates interested in filling the one current vacant seat representing Native American tribes and the one upcoming seat representing commercial air tour operators. The FAA and NPS invite persons interested in these openings on the NPOAG to contact Mr. Keith Lusk (contact information is written above in **FOR FURTHER INFORMATION CONTACT**). Requests to serve on the NPOAG must be made to Mr. Lusk in writing and

postmarked or emailed on or before June 11, 2021. Any request to fill one of these seats must describe the requestor's affiliation with commercial air tour operators or federally-recognized Native American tribes, as appropriate. The request should also explain what expertise the requestor would bring to the NPOAG as related to issues and concerns with aircraft flights over national parks or tribal lands. The term of service for NPOAG members is 3 years. Members may re-apply for another term.

On August 13, 2014, the Office of Management and Budget issued revised guidance regarding the prohibition against appointing or not reappointing federally registered lobbyists to serve on advisory committees (79 FR 47482).

Therefore, before appointing an applicant to serve on the NPOAG, the FAA and NPS will require the prospective candidate to certify that they are not a federally registered lobbyist.

Issued in El Segundo, CA, on May 3, 2021.

**Keith Lusk,**

*Program Manager, Special Programs Staff,  
Western-Pacific Region.*

[FR Doc. 2021-09561 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Rescinding a Notice of Intent To Prepare an Environmental Impact Statement for a Proposed Bridge Replacement Project, Bronx County, NY

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice to rescind a Notice of Intent to Prepare an Environmental Impact Statement.

**SUMMARY:** The FHWA, in cooperation with the New York State Department of Transportation (NYSDOT) and the New York City Department of Transportation (NYCDOT), is issuing this Notice to advise the public that we are rescinding the 1999 Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) for a previous proposal to rehabilitate, reconstruct, or replace the Shore Road Bridge (a.k.a. Pelham Park bridge) over the Hutchinson River Project (the Project), in Bronx County, New York [New York State Department of Transportation (NYSDOT) Project Identification Number (PIN) X760.75]. We are rescinding the NOI because a substantial amount of time has passed

since its publication and previously identified funding had been reallocated to more urgent projects after September 11, 2001.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Richard J. Marquis, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 11A Clinton Avenue, Suite 719, Albany, New York 12207, Telephone: (518) 431-4127, Email: [Rick.Marquis@dot.gov](mailto:Rick.Marquis@dot.gov). For NYSDOT: Uchenna Madu, NYC Director of Planning & Program Management, New York State Department of Transportation, NYC Region, 47-40 21st Street, Long Island City, New York 11101, Telephone: (718) 482-4559, Email: [Uchenna.Madu@dot.ny.gov](mailto:Uchenna.Madu@dot.ny.gov). For NYCDOT: Naim Rasheed, Assistant Commissioner, New York City Department of Transportation, 55 Water Street, 6th Floor, New York, New York 10041, Telephone: (212) 839-7710, Email: [nrasheed@dot.nyc.gov](mailto:nrasheed@dot.nyc.gov).

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the NYSDOT and the NYCDOT, previously intended to prepare an EIS to rehabilitate, reconstruct, or replace the Shore Road Bridge (a.k.a. Pelham Park bridge) on Shore Road in Bronx, County, New York (the Project). The NOI, which was published in the **Federal Register** on October 21, 1999 (64 FR 56831), indicated that improvements to the bridge were considered necessary to provide for the existing and projected traffic demand, provide for safety improvements (standard shoulders and upgraded sidewalks and bikeways), and because the over 100-year old bridge is suffering structural degradation.

The Shore Road Bridge is an 865-foot-long bridge with seven spans. The main span over the navigation channel is a double-leaf movable bascule span, which is flanked by three concrete arch spans on either side. The bridge and its associated roadway provide access to major interchanges with the Hutchinson River Parkway and Bruckner Expressway west of the bridge and City Island Road east of the bridge. The Project was initiated to improve safety (standard traffic lanes, shoulders, grades, and upgrade bicycle and pedestrian facilities) and to address structural and operational deficiencies of the Shore Road Bridge. As stated in the 1999 NOI, alternatives under consideration included (1) taking no action; (2) using alternate travel modes; (3) rehabilitating the existing bridge, and (4) constructing a new replacement bridge. These potential alternatives, except for taking no action and using alternate travel modes, included the

common elements of improving the crossing of Shore Road over the Hutchinson River.

Initially, the Project was not progressed because the budget allocated for the Project was reprioritized to more urgent projects after September 11, 2001. At that time, a long-term rehabilitation cost was estimated at 44 million dollars and new bridge construction alternatives costs ranged between approximately 62 and 122 million. Given funding constraints at the time, NYCDOT conducted a less costly major interim rehabilitation, completed in 2002, which addressed various imminent structural, safety, mechanical, and electrical issues on the bridge. The interim rehabilitation was progressed to prolong the bridge's service life until the environmental review and design approval process for the Project could be completed.

Since 2002, bridge components have been repaired as needed when deterioration was noted in biennial inspection reports. Interim rehabilitation and occasional repairs prolonged the service life of the Shore Road Bridge but did not negate the eventual need to reassess another rehabilitation or replacement project. Subsequent to the interim rehabilitation, the Great Recession of 2007-2009 resulted in revenue losses that caused city agencies to reprioritize funding for projects. In 2012, Hurricane Sandy caused extensive damage to NYCDOT and other city-owned facilities, which again diverted funding to address emergency repair work required in the aftermath of the storm. For these reasons and because a substantial amount of time has passed since the 1999 NOI was published, the 1999 NOI is being rescinded.

The FHWA, NYSDOT, and NYCDOT will be evaluating a reasonable range of alternatives for the Shore Road Bridge over the Hutchinson River Project as a new proposed action, and an NOI for that action will be issued separately. Comments or questions concerning this rescission should be directed to the FHWA, NYSDOT, and NYCDOT at the addresses provided in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program).

**Authority:** 42 U.S.C. 4321 *et seq.*; 23 CFR part 771.

Issued on: April 30, 2021.

**Richard J. Marquis,**

*Division Administrator, Albany, New York.*

[FR Doc. 2021-09589 Filed 5-5-21; 8:45 am]

BILLING CODE 4910-22-P

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0204]

#### Agency Information Collection Activities; Renewal of a Currently Approved Information Collection Request: Generic Clearance of Customer Satisfaction Surveys

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. The Executive Order, "Setting Customer Service Standards," directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. These principles were reaffirmed in the Executive Order, "Streamlining Service Delivery and Improving Customer Service." In order to work continuously to ensure that our programs are effective and meet our customers' needs, the Federal Motor Carrier Safety Administration (FMCSA) seeks to obtain OMB approval of a currently approved generic clearance to continue collecting feedback on our service delivery. By feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

**DATES:** Please send your comments by June 7, 2021. OMB must receive your comments by this date in order to act quickly on the ICR.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Ms. Roxane Oliver, Management Analyst,

Office of Analysis/MC-RAA, Department of Transportation, Federal Motor Carrier Safety Administration, 6th Floor, West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. Telephone: (202) 385-2324; Email Address: [Roxane.Oliver@dot.gov](mailto:Roxane.Oliver@dot.gov). Office hours are from 9 a.m. to 5 p.m. E.T., Monday through Friday, except Federal Holidays.

#### SUPPLEMENTARY INFORMATION:

*Title:* Generic Clearance of Customer Satisfaction Surveys.

*OMB Control Number:* 2126-0061.

*Type of Request:* Renewal of a currently approved information collection.

*Respondents:* State and local agencies, general public and stakeholders; original equipment manufacturers (OEM) and suppliers to the commercial motor vehicle (CMV) industry; fleets, owner-operators, state CMV safety agencies, research organizations and contractors; news organizations and safety advocacy groups.

*Estimated Number of Respondents:* 5,900 [5,000 customer satisfaction survey respondents + 100 listening sessions/stakeholder feedback forums respondents + 300 focus group respondents + 500 strategic planning customer satisfaction survey respondents].

*Estimated Time per Response:* Range from 10 to 120 minutes.

*Expiration Date:* August 31, 2021.

*Frequency of Response:* Generally, on an annual basis.

*Estimated Total Annual Burden:* 1,758 hours [833 hours for customer satisfaction surveys + 200 hours for listening sessions/stakeholder feedback forums + 600 hours for focus groups + 125 hours for strategic planning customer satisfaction surveys].

#### Background

In accordance with the Paperwork Reduction Act of 1995, FMCSA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. Executive Order 12862 Setting Customer Service Standards, and most recently updated in Executive Order 13571, requires the Federal Government to provide the "highest quality service possible to the American people." Under the order, the "standard of quality for services provided to the public shall be: Customer service equal to the best in business." In order to work continuously to ensure that our programs are effective and meet our customers' needs, FMCSA seeks to obtain OMB approval of a generic clearance to collect qualitative feedback

from our customers on our service delivery. The surveys covered in this generic clearance will provide a means for FMCSA to collect this data directly from our customers. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas of communication, training or changes in operations that might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management. The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable. The Agency will submit a collection for approval under this generic clearance only if it meets the following conditions: That such collections are:

- Voluntary;
- low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- noncontroversial and do not raise issues of concern to other Federal agencies;
- targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- only collecting personally identifiable information (PII) to the extent necessary and not retaining it;
- only collecting information intended to be used only internally for general service improvement and program management, and any release outside the agency must indicate the qualitative nature of the information;
- not to be used for the purpose of substantially informing influential policy decisions; and

- intended to yield only qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalized to the population of study.

This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made; the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size; and the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other mechanisms that are designed to yield quantitative results. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

**Public Comments Invited:** You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87.

**Thomas P. Keane,**

*Associate Administrator, Office of Research and Registration.*

[FR Doc. 2021-09578 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2021-0066]

#### Agency Information Collection Activities; Renewal of an Approved Information Collection: Medical Qualification Requirements

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval, and invites public comment. FMCSA requests approval to renew an ICR, titled "Medical Qualification Requirements," and provides updated information for several of the information collections discussed. This ICR is needed to ensure that drivers, motor carriers, Medical Examiners (ME), and the States are complying with the physical qualification requirements of commercial motor vehicle (CMV) drivers. The information collected is used primarily to determine and certify driver medical fitness and must be collected in order for our highways to be safe.

**DATES:** We must receive your comments on or before July 6, 2021.

**ADDRESSES:** You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA-2021-0066 using any of the following methods:

- Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the online instructions for submitting comments.

- Fax:** 1-202-493-2251.
- Mail:** Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- Hand Delivery or Courier:** U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

**Instructions:** All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public

Participation heading below. Note that all comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

**Docket:** For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>, and follow the online instructions for accessing the dockets, or go to the street address listed above.

**Privacy Act:** DOT posts all comments, without edit, including any personal information the commenter provides, to <https://www.regulations.gov>, as described in the system of records notice DOT/ALL 14-FDMS, which can be reviewed at <https://www.transportation.gov/privacy>.

**Public Participation:** The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the "help" section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard if you submitted your comments by mail or hand delivery, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, [fmcsamedical@dot.gov](mailto:fmcsamedical@dot.gov), FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, telephone (202) 366-9826.

#### SUPPLEMENTARY INFORMATION:

**Background:** CMVs (trucks and buses) are longer, heavier, and more difficult to maneuver than automobiles, making them a threat to highway safety if not operated properly by qualified individuals. The public interest in, and right to have, safe highways requires the assurance that drivers of CMVs can safely perform the increased physical and mental demands of their duties. FMCSA's physical qualification standards provide this assurance by requiring drivers to be examined and medically certified as physically and mentally qualified to drive. Therefore,



information used to determine and certify driver medical fitness must be collected. FMCSA is the Federal government agency authorized to require the collection of this information. FMCSA is required by statute to establish standards for the physical qualifications of drivers who operate CMVs in interstate commerce for non-excepted industries (49 U.S.C. 31136(a)(3) and 31502(b)). The physical qualification regulations relating to this information collection are found in the Federal Motor Carrier Safety Regulations (FMCSRs) at 49 CFR parts 390–399.

Below is a brief description of the included information collection activities and how the information is used.

### Physical Qualification Standards

The FMCSRs at 49 CFR 391.41 set forth the physical qualification standards interstate CMV drivers who are subject to part 391 must meet, with the exception of commercial driver's license/commercial learner's permit (CDL/CLP) drivers transporting migrant workers (who must meet the physical qualification standards set forth in 49 CFR 398.3). The FMCSRs covering driver physical qualification records applicable to all drivers subject to part 391 are found at 49 CFR 391.43, which specifies that a physical qualification examination be performed on CMV drivers subject to part 391 who operate in interstate commerce. The results of examinations must be recorded on the Medical Examination Report (MER) Form, MCSA–5875. If the ME finds a driver is physically qualified to operate a CMV in accordance with 49 CFR 391.41, the ME must complete and furnish to the driver a Medical Examiner's Certificate (MEC), Form MCSA–5876. The provisions of 49 CFR 391.51 require that a motor carrier retain the MEC or, for CDL drivers, the Commercial Driver's License Information System (CDLIS) motor vehicle record, if it contains medical certification status, in the driver's qualification (DQ) file for 3 years. The MEC and CDLIS motor vehicle record affirm that the driver is physically qualified to operate a CMV in interstate commerce. With respect to drivers transporting migrant workers, 49 CFR 398.3 requires a motor carrier to retain in its files a copy of a doctor's certificate that affirms the driver has been examined in accordance with that section and determined to be physically qualified to operate a CMV.

Due to the potential for the onset of new conditions or changes in existing conditions that may adversely affect a

driver's ability to safely operate a CMV and/or cause incapacitation that could be a risk to public safety, FMCSA requires drivers to be medically certified at least every 2 years. However, drivers with certain medical conditions must be certified more frequently than every 2 years. MEs have discretion to certify for shorter time periods on a case-by-case basis for medical conditions that require closer monitoring or that are more likely to change over time.

MEs are required to maintain records of the CMV driver physical qualification examinations they conduct. FMCSA does not require MEs to maintain these records electronically. However, there is nothing to preclude an ME from maintaining electronic records of the medical examinations he or she conducts. FMCSA is continuously evaluating new information technology in an attempt to decrease the burden on motor carriers and MEs.

Less frequent collection of driver data, MER Forms, and MECs would compromise FMCSA's ability to determine ME compliance with FMCSA's requirements for performing CMV driver physical qualification examinations. This could result in MEs being listed on FMCSA's National Registry of Certified Medical Examiners (National Registry) who should be removed and possibly drivers who do not meet the physical qualification standards possessing an MEC. Less frequent data collection would also result in decreased validity of the data (*i.e.*, less frequent data submission may increase the error rate due to unintentional omission of examination information). Therefore, less frequent collection of driver examination results is not an option.

### Resolution of Medical Conflict

If two MEs disagree about the medical certification of a driver, the medical conflict provision provides a mechanism for drivers and motor carriers to request that FMCSA resolve the conflicting medical evaluations when either party does not accept the decision of a medical specialist. The requirements set forth in 49 CFR 391.47 mandate that the applicant (driver or motor carrier) submit a copy of a report including results of all medical testing and the opinion of an impartial medical specialist in the field in which the medical conflict arose. The applicant may choose to submit the information using fax or email. FMCSA uses the information collected from the applicant, including medical information, to determine if the driver should be qualified. Without this provision and its incumbent driver

medical information collection requirements, an unqualified person may be permitted to drive and qualified persons may be prevented from driving.

### Medical Exemptions and the Skill Performance Evaluation (SPE) Certificate Program

FMCSA may, on a case-by-case basis, grant a medical exemption from a physical qualification standard set forth in 49 CFR 391.41. To do so, the Agency must determine the exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with the regulation. Without an exemption, individuals who do not meet the requirements in 49 CFR 391.41 would not be qualified to operate a CMV in interstate commerce. Section 381.300 establishes the procedures that persons must follow to request exemptions from the FMCSRs. The Agency requires all medical exemptions to be renewed every 2 years to ensure that the granting of the exemption does not diminish safety. Exemption holders are required to submit annual medical information for review to ensure the driver continues to meet the criteria for an exemption.

Individuals with loss or impairment of limbs are permitted to operate a CMV if they are otherwise physically qualified and are issued an SPE certificate by FMCSA. The SPE certificate must be renewed every 2 years by submitting a renewal application that includes an MER Form.

The application process for medical exemptions and SPE certificates provides for electronic collection of the application information by FMCSA for those applicants who choose to submit the information electronically. They may fax or scan and email documents to FMCSA. The Vision Exemption Program and the SPE Certificate Program maintain a database of application information. The Medical Programs Division maintains a database of application information for hearing and seizure exemptions.

FMCSA must collect medical information about the driver's medical condition in order to determine eligibility to receive a medical exemption or an SPE certificate. In the interest of highway safety, the medical examination, medical exemption, and SPE certificate renewal should not be performed less frequently.

### The National Registry of Certified Medical Examiners

The *National Registry of Certified Medical Examiners* final rule (77 FR 24104, Apr. 20, 2012) requires MEs who



conduct physical qualification examinations for interstate CMV drivers to complete training concerning FMCSA's physical qualification standards, pass a certification test, and maintain competence through periodic training and testing, all of which require information collection. ME candidates submit demographic and eligibility data in order to register with the National Registry and begin the certification process. This data is used to provide the public with contact information for those healthcare professionals who are certified by FMCSA to conduct interstate CMV driver physical qualification examinations. Less frequent collection of ME candidate identity and eligibility information and test results could mean there are fewer MEs available to perform physical qualification examinations and to meet the needs of the CMV driver and motor carrier population. This could place a burden on drivers and motor carriers. Therefore, less frequent collection of ME candidate identity and eligibility information and test results is not an option.

MEs are required to transmit to FMCSA via the National Registry results of any CMV driver physical qualification examinations completed by midnight (local time) of the next calendar day following the examination. The reporting of results includes all CMV drivers (CDL/CLP and non-CDL/CLP) who are required to be medically certified to operate in interstate commerce and allows, but does not require, MEs to transmit any information about examinations performed in accordance with the FMCSRs with any applicable State variances, which will be valid for intrastate operations only. Less frequent collection of driver data would compromise FMCSA's ability to determine ME compliance with FMCSA requirements for performing CMV driver physical qualification examinations. This could result in MEs being listed on the National Registry who should be removed and possibly drivers who do not meet the physical qualification standards possessing an MEC. Less frequent data collection would also result in decreased validity of the data (*i.e.*, less frequent data submission may increase the error rate due to unintentional omission of examination information). Therefore, less frequent collection of driver examination results is not an option.

The National Registry final rule also requires motor carriers to verify the National Registry number of the MEs who certify their drivers and place a note in the DQ file. Less frequent

verification of the National Registry numbers by motor carriers could mean drivers may not have been examined by an ME listed on the National Registry and may not meet the physical qualifications standards of the FMCSRs.

As a follow-on rule to the National Registry final rule, the *Medical Examiner's Certification Integration* final rule (80 FR 22790, Apr. 23, 2015), modified several of the requirements adopted in the National Registry final rule, some of which had a scheduled compliance date of June 22, 2018. Specifically, it requires (1) FMCSA to electronically transmit from the National Registry to the State Driver's Licensing Agencies (SDLAs) the driver identification information, examination results, and restriction information from examinations performed for holders of CLPs/CDLs (interstate and intrastate); (2) FMCSA to transmit electronically to the SDLAs the medical variance information for all CMV drivers; and (3) SDLAs to post the driver identification, examination results, and restriction information received electronically from FMCSA.

However, as the *Medical Examiner's Certification Integration* final rule compliance date approached, FMCSA concluded that the information technology infrastructure necessary to implement the portions of the final rule that required the electronic transmission of data would not be available on June 22, 2018. Accordingly, on June 21, 2018, FMCSA published a notice extending the compliance date for several of the provisions in the *Medical Examiner's Certification Integration* final rule to June 22, 2021 (83 FR 28774).

As the June 22, 2021, compliance date approaches, FMCSA has concluded that additional time is needed for FMCSA to complete certain information technology system development tasks for its National Registry and to provide the SDLAs sufficient time to make the necessary information technology programming changes after the new National Registry system is available. Accordingly, FMCSA intends to amend its regulations to extend the compliance date from June 22, 2021, to June 23, 2025, for several provisions of its *Medical Examiner's Certification Integration* final rule. Since the compliance date for these provisions will be extended until June 23, 2025, the annual burden hours and costs are not covered as part of this ICR.

#### **Qualifications of Drivers; Diabetes Standard**

As a result of the September 19, 2018, *Qualifications of Drivers; Diabetes Standard* final rule (83 FR 47486), the

FMCSRs were amended to permit drivers with a stable insulin regimen and properly controlled insulin-treated diabetes mellitus (ITDM) to operate CMVs in interstate commerce. An individual with ITDM can obtain an MEC from an ME for up to a maximum of 12 months. To do so, the treating clinician, the healthcare professional who manages, and prescribes insulin for, the treatment of the individual's diabetes must complete the Insulin-Treated Diabetes Mellitus Assessment Form, MCSA-5870, and attest to the ME that the individual maintains a stable insulin regimen and proper control of his or her diabetes. The ME must review the form and determine the individual meets FMCSA's ITDM standard and other physical qualification standards. The information collection is necessary to ensure drivers meet these standards. FMCSA allows treating clinicians to provide the form to MEs, if the treating clinicians choose to do so, using electronic communication such as fax or email.

*Title:* Medical Qualification Requirements.

*OMB Control Number:* 2126-0006.

*Type of Request:* Renewal of a currently approved collection.

*Respondents:* CMV drivers, motor carriers, Medical Examiners, testing centers, treating clinicians.

*Estimated Number of Respondents:* 6,225,262.

*Expiration Date:* November 30, 2021.

*Estimated Total Annual Burden:* 2,707,479 hours.

This information collection is comprised of the following six information collection activities.

*Physical Qualification Standards:* 2,144,680 annual burden hours; 5,444,680 annual respondents.

*Resolution of Medical Conflict:* 11 annual burden hours; 3 annual respondents.

*Medical Exemptions:* 2,529 annual burden hours; 4,749 annual respondents.

*SPE Certificate Program:* 2,808 annual burden hours; 2,567 annual respondents.

*National Registry of Certified Medical Examiners:* 556,797 annual burden hours; 768,357 annual respondents.

*Qualification of Drivers; Diabetes Standard:* 654 annual burden hours; 4,906 annual respondents.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality,

usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87.

**Thomas P. Keane,**

*Associate Administrator, Office of Research and Registration.*

[FR Doc. 2021-09577 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2021-0006]

#### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

**ACTION:** Notice of applications for exemption; request for comments.

**SUMMARY:** FMCSA announces receipt of applications from seven individuals for an exemption from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions will enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

**DATES:** Comments must be received on or before June 7, 2021.

**ADDRESSES:** You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA-2021-0006 using any of the following methods:

- *Federal eRulemaking Portal:* Go to [www.regulations.gov/](http://www.regulations.gov/), insert the docket number, FMCSA-2021-0006, in the keyword box, and click "Search." Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.

- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET,

Monday through Friday, except Federal Holidays.

- *Fax:* (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366-4001, [fmcsamedical@dot.gov](mailto:fmcsamedical@dot.gov), FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9826.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Public Participation**

###### *A. Submitting Comments*

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2021-0006), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to [www.regulations.gov/docket?D=FMCSA-2021-0006](http://www.regulations.gov/docket?D=FMCSA-2021-0006). Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

###### *B. Viewing Comments*

To view comments go to [www.regulations.gov](http://www.regulations.gov). Insert the docket

number, FMCSA-2021-0006, in the keyword box, and click "Search." Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, and click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

###### *C. Privacy Act*

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

##### **II. Background**

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The seven individuals listed in this notice have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals

and devices showing standard red, green, and amber.

On July 16, 1992, the Agency first published the criteria for the Vision Waiver Program, which listed the conditions and reporting standards that CMV drivers approved for participation would need to meet (57 FR 31458). The current Vision Exemption Program was established in 1998, following the enactment of amendments to the statutes governing exemptions made by § 4007 of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 401 (June 9, 1998). Vision exemptions are considered under the procedures established in 49 CFR part 381 subpart C, on a case-by-case basis upon application by CMV drivers who do not meet the vision standards of § 391.41(b)(10).

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely in intrastate commerce with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at [www.regulations.gov/docket?D=FMCSA-1998-3637](http://www.regulations.gov/docket?D=FMCSA-1998-3637).

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's former waiver study program clearly demonstrated the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively.<sup>1</sup> The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time

periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., “Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,” Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used three consecutive years of data, comparing the experiences of drivers in the first two years with their experiences in the final year.

### III. Qualifications of Applicants

#### *Ned Adkins*

Mr. Adkins, 61, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/30, and in his left eye, 20/200. Following an examination in 2021, his ophthalmologist stated, “He was diagnosed with Amblyopia OS many year [sic] ago. It is my professional opinion that he is able to perform the tasks needed to operate a commercial vehicle.” Mr. Adkins reported that he has driven straight trucks for 10 years, accumulating 48,000 miles, and tractor-trailer combinations for 32 years, accumulating 320,000 miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

#### *Troy T. Driscoll*

Mr. Driscoll, 40, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, “He has sufficient vision to perform driving tasks required to operate a commercial vehicle.” Mr. Driscoll reported that he has driven straight trucks for 22 years, accumulating 495,000 miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

#### *William G. Gamble*

Mr. Gamble, 61, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is hand motion, and in his left eye, 20/20. Following an examination in 2021, his optometrist stated, “Mr. Gamble's vision is sufficient for commercial driving.” Mr. Gamble reported that he has driven straight trucks for 4 years, accumulating 800,000 miles, tractor-trailer combinations for 4 years, accumulating 416,000 miles. He holds a Class A CDL Indiana. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV; unsafe lane movement.

#### *Viktor V. Goluda*

Mr. Goluda, 28, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/60, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, “Viktor Goluda has sufficient vision to operate a commercial vehicle” [sic] Mr. Goluda reported that he has driven straight trucks for 10 years, accumulating 300,000 miles. He holds a Class A CDL from South Carolina. His driving record for the last 3 years shows one crash, which he was not cited for, and no convictions for moving violations in a CMV.

#### *Mark Patricola*

Mr. Patricola, 47, has had an iris coloboma in his right eye since birth. The visual acuity in his right eye is hand motion, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, “Based on the results of today's examination, Mr. Patricola has sufficient vision in his left eye to perform the driving tasks required to operate a commercial vehicle.” Mr. Patricola reported that he has driven straight trucks for 10 years, accumulating 52,000 miles. He holds an operator's license from New Jersey. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

#### *William C. Pinson*

Mr. Pinson, 50, has chorioretinal scarring in his left eye due to a traumatic incident in childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/150. Following an examination in 2020, his optometrist stated, “I, Dr. Lance B. Abernathy, certify that Mr. William Pinson has vision sufficient to perform driving tasks required to operate a commercial vehicle.” Mr. Pinson reported that he has driven straight trucks for 3 years, accumulating 124,800 miles. He holds a Class A CDL from Texas. His driving

<sup>1</sup> A thorough discussion of this issue may be found in a FHWA final rule published in the Federal Register on March 26, 1996 and available on the internet at <https://www.govinfo.gov/content/pkg/FR-1996-03-26/pdf/96-7226.pdf>.

record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

#### Faron D. Seaman

Mr. Seaman, 59, has had a prosthetic in his right eye due to a traumatic incident in 1965. The visual acuity in his right eye is 0, and in his left eye, 20/20. Following an examination in 2021, his optometrist stated, "My professional opinion is that there is no condition of eye health or vision that would interfere with Mr. Seaman's ability to operate a commercial vehicle." Mr. Seaman reported that he has driven tractor-trailer combinations for 36 years, accumulating 4,320,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV; he failed to yield for a traffic control device.

#### IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments and material received before the close of business on the closing date indicated under the **DATES** section of the notice.

#### Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021-09586 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Great Lakes St. Lawrence Seaway Development Corporation

#### Advisory Board; Notice of Public Meetings

**AGENCY:** Great Lakes St. Lawrence Seaway Development Corporation (GLS), DOT.

**ACTION:** Notice of public meetings.

**SUMMARY:** This notice announces the public meetings via conference call of the Great Lakes St. Lawrence Seaway Development Corporation Advisory Board.

**DATES:** The public meetings will be held on (all times Eastern):

- Tuesday, June 24, 2021 from 2:00 p.m.–3:30 p.m. EDT
  - Requests to attend the meeting must be received by June 17, 2021.
  - Requests for accommodations to a disability must be received by June 17, 2021.
  - If you wish to speak during the meeting, you must submit a written

copy of your remarks to GLS by June 17, 2021.

- Requests to submit written materials to be reviewed during the meeting must be received no later than June 17, 2021.
- Tuesday, September 28, 2021 from 2:00 p.m.–3:30 p.m. EDT
  - Requests to attend the meeting must be received by September 21, 2021.
  - Requests for accommodations to a disability must be received by September 21, 2021.
  - If you wish to speak during the meeting, you must submit a written copy of your remarks to GLS by September 21, 2021.
  - Requests to submit written materials to be reviewed during the meeting must be received no later than September 21, 2021.

**ADDRESSES:** The meetings will be held via conference call at the GLS's Operations location, 180 Andrews Street, Massena, NY 13662.

**FOR FURTHER INFORMATION CONTACT:** Martin Welles, Executive Officer, Great Lakes St. Lawrence Seaway Development Corporation, 1200 New Jersey Avenue SE, Washington, DC 20590; 315-764-3231.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 2), notice is hereby given of meetings of the GLS Advisory Board. The agenda for each meeting is the same and will be as follows:

**Tuesday, June 24, 2021 from 2:00 p.m.–3:30 p.m. EDT**

**Tuesday, September 28, 2021 from 2:00 p.m.–3:30 p.m. EDT**

1. Opening Remarks
2. Consideration of Minutes of Past Meeting
3. Quarterly Report
4. Old and New Business
5. Closing Discussion
6. Adjournment

#### Public Participation

Attendance at the meeting is open to the interested public. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact the person listed under the heading, **FOR FURTHER INFORMATION CONTACT**. There will be three (3) minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a

request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the GLS conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to GLS Advisory Board members. All prepared remarks submitted will be accepted and considered as part of the meeting's record. Any member of the public may submit a written statement after the meeting deadline, and it will be presented to the committee.

The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC.

#### Carrie Lavigne,

(Approving Official) Chief Counsel, Great Lakes St. Lawrence Seaway Development Corporation.

[FR Doc. 2021-09598 Filed 5-5-21; 8:45 am]

**BILLING CODE 4910-61-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Returns by a U.S. Transferor of Property to a Foreign Corporation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden related to completing a return by a U.S. transferor of property to a foreign corporation.

**DATES:** Written comments should be received on or before July 6, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

**SUPPLEMENTARY INFORMATION:**

*Title:* Return by a U.S. Transferor of Property to a Foreign Corporation.

*OMB Number:* 1545-0026.

*Regulation Project/Form Number:* Forms 926.

*Abstract:* Form 926 is filed by any U.S. person who transfers certain tangible or intangible property to a foreign corporation to report information required by section 6038B.

*Current Actions:* There is no change to the burden previously approved.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, Businesses, and other for-profit organizations.

*Estimated Number of Responses:* 667.

*Estimated Time per Respondent:* 42 hrs., 53 min.

*Estimated Total Annual Burden Hours:* 28,608.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: May 3, 2021.

**Ronald J. Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2021-09615 Filed 5-5-21; 8:45 am]

**BILLING CODE 4830-01-P**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form 5713, International Boycott Report**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden related to completing form 5713, *International Boycott Report* and the associated schedules.

**DATES:** Written comments should be received on or before July 6, 2021 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW, Washington DC 20224, or through the internet, at [RJoseph.Durbala@irs.gov](mailto:RJoseph.Durbala@irs.gov).

**SUPPLEMENTARY INFORMATION:**

*Title:* International Boycott Report.

*OMB Number:* 1545-0216.

*Regulation Project/Form Number:* Forms 5713 and Sch's A, B, & C.

*Abstract:* Persons having operations in or related to countries which require participation in or cooperation with an international boycott may be required to report these operations on Form 5713. Persons use Schedule A with Form 5713 to figure the international boycott factor to use in figuring the loss of tax benefits. Persons use Schedule B with Form 5713 to specifically attribute taxes and income to figure the loss of tax benefits. Filers of Schedule A or B (Form 5713) use Schedule C to compute the loss of tax benefits from participation in or cooperation with an international boycott.

*Current Actions:* There is no change to the burden previously approved.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Businesses, and other for-profit organizations.

*Estimated Number of Responses:* 5,632.

*Estimated Time per Respondent:* 25 hrs., 28 min.

*Estimated Total Annual Burden Hours:* 143,498.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including using

appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: May 3, 2021.

**Ronald J. Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2021-09617 Filed 5-5-21; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0697]

### Agency Information Collection Activity: Application for Approval of a Licensing or Certification Test and Organization or Entity

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before July 6, 2021.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to [nancy.kessinger@va.gov](mailto:nancy.kessinger@va.gov). Please refer to "OMB Control No. 2900-0697" in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Maribel Aponte, Office of Enterprise and Integration, Data Governance

Analytics (008), 1717 H Street NW, Washington, DC 20006, (202) 266-4688 or email [maribel.aponte@va.gov](mailto:maribel.aponte@va.gov). Please refer to "OMB Control No. 2900-0697" in any correspondence.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology. *Authority:* 38 U.S.C. 3689.

*Title:* Application for Approval of a Licensing or Certification Test and Organization or Entity.

*OMB Control Number:* 2900-0697.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* SAAs and VA will use the information to decide whether the licensing and certification tests, and the organizations offering them, should be approved for use under the education programs VA administers.

*Affected Public:* Individuals and Households.

*Estimated Annual Burden:* 1,713 hours.

*Estimated Average Burden per Respondent:* 3 hours.

*Frequency of Response:* Annually.

*Estimated Number of Respondents:* 571.

By direction of the Secretary.

**Maribel Aponte,**

*VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.*

[FR Doc. 2021-09546 Filed 5-5-21; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

### Solicitation of Nominations for Appointment to the Sexual Assault/Sexual Harassment Working Group

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is seeking nominations of qualified candidates to be considered for appointment as members of the VA Sexual Assault/Sexual Harassment Prevention and Response Working Group.

**DATES:** Nominations for membership on the Committee must be received by June 7, 2021, no later than 4:00 p.m., Eastern Standard Time. Packages received after this time will not be considered for the current membership cycle.

**ADDRESSES:** All nomination packages should be emailed to [VASECWorkgroup@va.gov](mailto:VASECWorkgroup@va.gov).

**FOR FURTHER INFORMATION CONTACT:**

Margaret B. Kabat, LCSW-C, CCM, Senior Advisor for Families, Caregivers and Survivors, Office of the Secretary, Department of Veterans Affairs, Washington, DC 20420; [Margaret.Kabat@va.gov](mailto:Margaret.Kabat@va.gov); 202-577-4331. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In carrying out the duties set forth, the Working Group responsibilities include, but are not limited to:

- Development of an action plan for addressing changes at all levels of VA to reduce instances of harassment and sexual assault;
- Development of standardized media for VA, Veterans Service Organizations and other stakeholders to use in print and on the internet to reduce sexual harassment and sexual assault; and
- Development of bystander intervention training for Veterans.

*Authority:* The Working Group was established pursuant to the Johnny Isakson and David P. Roe, M.D., Veterans Health Care and Benefits Improvement Act of 2020, Title V, Eliminating Harassment and Assault, Section 5303, Anti-harassment and anti-sexual assault policy of Department of Veterans Affairs, to advise the Secretary on specific VA policies to eliminate harassment and assault in VA facilities. By statute, this Working Group is not considered a Federal Advisory Committee and therefore is not subject to the rules under the Federal Advisory Committee Act.

*Membership Criteria:* The Working Group is requesting nominations for specific membership. As required by statute, the members of the Committee are appointed by the Secretary, from the general public, including:

- Veterans Service Organizations; and
- State, local and Tribal Veterans agencies.

To the extent possible, the Secretary seeks members who have diverse

professional and personal qualifications who are motivated to advance VA's leadership on issues of sexual harassment and assault prevention and survivor care and support. We ask that nominations include information of this type so that VA can ensure a balanced Committee membership. Individuals appointed to the Working Group by the Secretary shall be invited to serve a 1-year term. The Secretary may reappoint a member for an additional term of service. Committee members will not be compensated for their time or expenses incurred. Self-nominations are acceptable. Any letters of nomination from organizations or other individuals should accompany the package when it is submitted. Members of the public are also eligible for nomination, including Veterans' families, caregivers and survivors.

#### **Requirements for Nomination Submission**

Nominations should be typed (one nomination per nominator). Nomination packages should include:

(1) A letter of nomination (maximum of 2 pages) that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.*, specific attributes which qualify the nominee for service in this capacity, as listed above) and a statement from the nominee indicating that he or she is willing to serve as a member of the Working Group;

(2) the nominee's contact information, including name, mailing address, telephone number and email address;

(3) the nominee's curriculum vitae;

(4) letter(s) of recommendation (optional); and

(5) a statement confirming that he or she is not a federally-registered lobbyist.

The Department makes every effort to ensure that the membership of Working Groups is balanced in terms of points of view represented and the committee's

function. Appointments to this Working Group shall be made without discrimination based on a person's race, color, religion, sex, sexual orientation, gender identity, national origin, age, disability or genetic information.

Nominations must state that the nominee appears to have no conflict of interest that would preclude membership.

#### **Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 30, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

#### **Jeffrey M. Martin,**

*Assistant Director, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.*

[FR Doc. 2021-09540 Filed 5-5-21; 8:45 am]

**BILLING CODE 8320-01-P**





# FEDERAL REGISTER

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Part II

## Environmental Protection Agency

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40 CFR Part 82

Protection of Stratospheric Ozone: Listing of Substitutes Under the Significant New Alternatives Policy Program; Final Rule

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[EPA-HQ-OAR-2019-0698; FRL-10020-41-OAR]

RIN 2060-AU81

### Protection of Stratospheric Ozone: Listing of Substitutes Under the Significant New Alternatives Policy Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the U.S. Environmental Protection Agency's (EPA) Significant New Alternatives Policy program, this action lists certain substances in the refrigeration and air conditioning sector. For the retail food refrigeration—medium-temperature stand-alone units (new) end-use, EPA is listing three substitutes as acceptable subject to narrowed use limits. For the residential and light commercial air conditioning and heat pumps (new) end-use, EPA is listing six substitutes as acceptable subject to use conditions. Through this action, EPA is incorporating by reference the 2019 Underwriters Laboratories (UL) Standard 60335-2-40, 3rd Edition, which establishes requirements for the evaluation of electrical air conditioners, heat pumps, and dehumidifiers, and safe use of flammable refrigerants. This action also removes an acceptable subject to use conditions listing for the fire suppression sector because EPA more recently listed the substitute as acceptable with no use restrictions.

**DATES:** This rule is effective June 7, 2021. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 7, 2021.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2019-0698. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301

Constitution Avenue NW, Washington, DC 20460. EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Christina Thompson, Stratospheric Protection Division, Office of Atmospheric Programs (Mail Code 6205T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202-564-0983; email address: [thompson.christina@epa.gov](mailto:thompson.christina@epa.gov). Notices and rulemakings under EPA's Significant New Alternatives Policy program are available on EPA's Stratospheric Ozone website at <https://www.epa.gov/snap/snap-regulations>.

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#### I. General Information

##### A. Executive Summary and Background

This final rule lists new alternatives for the refrigeration and air conditioning sector and changes an existing listing for the fire suppression sector. Specifically, EPA is:

- Listing R-448A, R-449A and R-449B as acceptable, subject to narrowed use limits, for use in retail food refrigeration—medium-temperature stand-alone units for new equipment;
- Listing R-452B, R-454A, R-454B, R-454C and R-457A as acceptable, subject to use conditions, for use in residential and light commercial air conditioning (AC) and heat pumps for new equipment; and R-32 as acceptable, subject to use conditions, for use in residential and light commercial AC and heat pumps—equipment other than self-contained room air conditioners, for new equipment; and
- Removing Powdered Aerosol E from the list of fire suppression substitutes acceptable subject to use conditions in total flooding applications.

EPA is finalizing these new listings after its evaluation of human health and environmental information for these substitutes under the Significant New Alternatives Policy (SNAP) program. The Agency is taking final action on these new listings in the refrigeration and air conditioning sector and the change to the listings in the fire suppression sector based on consideration of the information that supported the June 12, 2020 Notice of Proposed Rulemaking (“2020 NPRM”) (85 FR 35874), the public comments and publicly-available information that EPA has included in the docket. This action provides additional flexibility for industry by providing new options in specific uses.

EPA is not taking final action at this time on listings for three foam blowing agent blends for extruded polystyrene: Boardstock and billet that were also proposed in the 2020 NPRM. Based on public comments and new information that EPA has received after issuing the proposed rule, the Agency is considering future action on these substitutes. EPA’s consideration of options for these substitutes is not related to and does not affect this final action on the remainder of the proposal.

In this final action, EPA refers to listings made in a final rule issued July 20, 2015, at 80 FR 42870 (“2015 Rule”). The 2015 Rule, among other things, changed the listings for certain hydrofluorocarbons (HFCs) and blends from acceptable to unacceptable in various end-uses in the aerosols, refrigeration and air conditioning, and foam blowing sectors. After a challenge to the 2015 Rule, the United States Court of Appeals for the District of Columbia Circuit (“the court”) issued a partial vacatur of the 2015 Rule “to the extent it requires manufacturers to replace HFCs with a substitute substance”<sup>1</sup> and remanded the rule to the Agency for further proceedings.<sup>2</sup> The court also upheld EPA’s listing changes as being reasonable and not “arbitrary and capricious.”<sup>3</sup> This final rule is not EPA’s response to the court’s decision.

#### SNAP Program Background

The SNAP program implements section 612 of the Clean Air Act (CAA).

<sup>1</sup> *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017).

<sup>2</sup> Later, the court issued a similar decision on portions of a similar final rule issued December 1, 2016 at 81 FR 86778 (“2016 Rule”). See *Mexichem Fluor, Inc. v. EPA*, Judgment, Case No. 17–1024 (D.C. Cir., April 5, 2019), 760 Fed. Appx. 6 (Mem). That rule is not relevant for this action.

<sup>3</sup> *Mexichem Fluor*, 866 F.3d at 462–63.

Several major provisions of section 612 are:

#### 1. Rulemaking

Section 612(c) requires EPA to promulgate rules making it unlawful to replace any class I (chlorofluorocarbon (CFC), halon, carbon tetrachloride, methyl chloroform, methyl bromide, hydrobromofluorocarbon, and chlorobromomethane) or class II (hydrochlorofluorocarbon (HCFC)) ozone-depleting substances (ODS) with any substitute that the Administrator determines may present adverse effects to human health or the environment where the Administrator has identified an alternative that (1) reduces the overall risk to human health and the environment and (2) is currently or potentially available.

#### 2. Listing of Unacceptable/Acceptable Substitutes

Section 612(c) requires EPA to publish a list of the substitutes that it finds to be unacceptable for specific uses and to publish a corresponding list of acceptable substitutes for specific uses.

#### 3. Petition Process

Section 612(d) grants the right to any person to petition EPA to add a substance to, or delete a substance from, the lists published in accordance with section 612(c).

#### 4. 90-Day Notification

Section 612(e) directs EPA to require any person who produces a chemical substitute for a class I substance to notify the Agency not less than 90 days before a new or existing chemical is introduced into interstate commerce for significant new use as a substitute for a class I substance. The producer must also provide the Agency with the producer’s unpublished health and safety studies on such substitutes.

The regulations for the SNAP program are promulgated at 40 CFR part 82, subpart G, and the Agency’s process for reviewing SNAP submissions is described in regulations at 40 CFR 82.180. Under these rules, the Agency has identified five types of listing decisions: Acceptable; acceptable subject to use conditions; acceptable subject to narrowed use limits; unacceptable; and pending (40 CFR 82.180(b)). Use conditions and narrowed use limits are both considered “use restrictions,” as described below. Substitutes that are deemed acceptable with no use restrictions (no use conditions or narrowed use limits) can be used for all applications within the relevant end-uses in the sector. After

reviewing a substitute, the Agency may determine that a substitute is acceptable only if certain conditions in the way that the substitute is used are met to minimize risks to human health and the environment. EPA describes such substitutes as “acceptable subject to use conditions.” (40 CFR 82.180(b)(2)). For some substitutes, the Agency may permit a narrowed range of use within an end-use or sector. For example, the Agency may limit the use of a substitute to certain end-uses or specific applications within an industry sector. EPA describes these substitutes as “acceptable subject to narrowed use limits.” Under the narrowed use limit, users intending to adopt these substitutes “must ascertain that other alternatives are not technically feasible.” (40 CFR 82.180(b)(3)).

In making decisions regarding whether a substitute is acceptable or unacceptable, and whether substitutes present risks that are lower than or comparable to risks from other substitutes that are currently or potentially available in the end-uses under consideration, EPA examines the criteria in 40 CFR 82.180(a)(7): (i) Atmospheric effects and related health and environmental impacts; (ii) general population risks from ambient exposure to compounds with direct toxicity and to increased ground-level ozone; (iii) ecosystem risks; (iv) occupational risks; (v) consumer risks; (vi) flammability; and (vii) cost and availability of the substitute.

Many SNAP listings include “comments” or “further information” to provide additional information on substitutes. Since this additional information is not part of the regulatory decision, these statements are not binding for use of the substitute under the SNAP program. However, regulatory requirements so listed are binding under other regulatory programs (e.g., worker protection regulations promulgated by the U.S. Occupational Safety and Health Administration (OSHA)). The “further information” classification does not necessarily include all other legal obligations pertaining to the use of the substitute. While the items listed are not legally binding under the SNAP program, EPA encourages users of substitutes to apply all statements in the “further information” column in their use of these substitutes. In many instances, the information simply refers to sound operating practices that have already been identified in existing industry and/or building codes or standards. Thus, many of the statements, if adopted, would not require the affected user to make

significant changes in existing operating practices.

For additional information on the SNAP program, visit the SNAP portion of EPA's Ozone Layer Protection website at <https://www.epa.gov/snap>. Copies of the full lists of acceptable substitutes for ODS in all industrial sectors are available at <https://www.epa.gov/snap/snap-substitutes-sector>. For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking published March 18, 1994 (59 FR 13044), codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations found at: <https://www.epa.gov/snap/snap-regulations>. Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions, are also listed in the appendices to 40 CFR part 82, subpart G.

#### B. Does this action apply to me?

The following list identifies regulated entities that may be affected by this rule and their respective North American Industrial Classification System (NAICS) codes:

- All Other Basic Organic Chemical Manufacturing (NAICS 325199)
- Air Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS 333415)
- Refrigeration Equipment and Supplies Merchant Wholesalers (NAICS 423740)
- Supermarkets and Other Grocery (except Convenience) Stores (NAICS 44511 & 445110)
- Convenience Stores (NAICS 445120)
- Limited-Service Restaurants (NAICS 722513)
- Cafeterias, Grill Buffets, and Buffets (NAICS 722514)
- Snack and Nonalcoholic Beverage Bars (NAICS 722515)
- Fire Protection (NAICS 922160)

This list is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. To determine whether your facility, company, business, or organization could be affected by this action, you should carefully examine the regulations at 40 CFR part 82, subpart G and the revisions below. If you have questions regarding the applicability of this action to a

particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### C. What acronyms and abbreviations are used in the preamble?

Below is a list of acronyms and abbreviations used in the preamble of this document:

AC—Air Conditioning  
 ACCA—Air Conditioning Contractors of America  
 ADA—Americans with Disabilities Act  
 AEL—Acceptable Exposure Limit  
 AHIA—American Industrial Hygiene Association  
 AHJ—Authority Having Jurisdiction  
 AHRI—Air-Conditioning, Heating, and Refrigeration Institute  
 AHRTI—Air-Conditioning, Heating, and Refrigeration Technology Institute  
 Alliance—Alliance for Responsible Atmospheric Policy  
 ANSI—American National Standards Institute  
 ASHRAE—American Society of Heating, Refrigerating and Air-Conditioning Engineers  
 CAA—Clean Air Act  
 CARB—California Air Resources Board  
 CAS Reg. No.—Chemical Abstracts Service Registry Identification Number  
 CBI—Confidential Business Information  
 CFC—Chlorofluorocarbon  
 CFR—Code of Federal Regulations  
 CRA—Congressional Review Act  
 CO<sub>2</sub>—Carbon Dioxide  
 DOE—United States Department of Energy  
 EIA—Environmental Investigation Agency  
 EPA—United States Environmental Protection Agency  
 FR—Federal Register  
 GSHP—Ground-Source Heat Pump  
 GWP—Global Warming Potential  
 HARDI—Heating, Air-conditioning, & Refrigeration Distributors International  
 HCFC—Hydrochlorofluorocarbon  
 HFC—Hydrofluorocarbon  
 HFO—Hydrofluoroolefin  
 HVAC—Heating, Ventilation, and Air Conditioning  
 HPPH—Heat Pump Pool Heaters  
 HPWH—Heat Pump Water Heaters  
 ICF—ICF International, Inc.  
 IEC—International Electrotechnical Commission  
 IPCC—Intergovernmental Panel on Climate Change  
 LFL—Lower Flammability Limit  
 NAAQS—National Ambient Air Quality Standards  
 NAFEM—North American Association of Food Equipment Manufacturers  
 NAICS—North American Industrial Classification System  
 NARA—National Archives and Records Administration  
 NATE—North American Technician Excellence  
 NPRM—Notice of Proposed Rulemaking

NRDC—Natural Resources Defense Council  
 ODP—Ozone Depletion Potential  
 ODS—Ozone Depleting Substances  
 OMB—United States Office of Management and Budget  
 OSHA—United States Occupational Safety and Health Administration  
 PFAS—Perfluoroalkyl Substances, Polyfluoroalkyl Substances  
 PPM—Parts Per Million  
 PRA—Paperwork Reduction Act  
 PTAC—Packaged Terminal Air Conditioner  
 PTHP—Packaged Terminal Heat Pump  
 RCL—Refrigerant Concentration Limit  
 RCRA—Resource Conservation and Recovery Act  
 RFA—Regulatory Flexibility Act  
 RSES—Refrigeration Service Engineers Society  
 SDS—Safety Data Sheet  
 SIP—State Implementation Plan  
 SNAP—Significant New Alternatives Policy  
 TLV—TWA—Threshold Limit Value-Time-Weighted Average  
 TFA—Trifluoroacetic Acid  
 TSCA—Toxic Substances Control Act  
 TWA—Time Weighted Average  
 UL—Underwriters Laboratories Inc  
 UMRA—Unfunded Mandates Reform Act  
 VOC—Volatile Organic Compounds  
 VRF—Variable Refrigerant Flow  
 VSLS—Very Short-Lived Substances  
 WEEL—Workplace Environmental Exposure Limit  
 WMO—World Meteorological Organization  
 WSHP—Water-Source Heat Pump

## II. What is EPA finalizing in this action?

### A. Retail Food Refrigeration—Listing of R-448A, R-449A and R-449B as Acceptable, Subject to Narrowed Use Limits, for Retail Food Refrigeration—Medium-Temperature Stand-Alone Units (New)

As proposed, EPA is listing R-448A, R-449A, and R-449B as acceptable, subject to narrowed use limits, in new equipment only for new medium-temperature stand-alone units in retail food refrigeration (hereafter, “new medium-temperature stand-alone units”).<sup>4</sup> As explained below, we have revised the regulatory text from the 2020 NPRM to indicate that failure to comply with the Americans with Disabilities Act (ADA) requirements is not the only reason other alternatives can be deemed infeasible under the narrowed use limit.

<sup>4</sup> EPA previously divided the retail food refrigeration end-use into separate categories, including stand-alone equipment (76 FR 78832, December 20, 2011). The Agency further subdivided stand-alone equipment to distinguish between medium-temperature equipment, which maintains products above 32 °F (0 °C), and low-temperature equipment, which maintains products at or below 32 °F (0 °C) (80 FR 42870, July 20, 2015).

## 1. Background on Retail Food Refrigeration—Medium-Temperature Stand-Alone Units (New)

Retail food refrigeration is characterized by storing and displaying, generally for sale, food and beverages at different temperatures for different products (e.g., chilled and frozen food). Stand-alone units in retail food refrigeration (hereafter, “stand-alone units”) consist of refrigerators, freezers, and reach-in coolers (either open or with doors) where all refrigeration components are integrated and, for the smallest types, the refrigeration circuit is entirely brazed or welded. For purposes of the SNAP program, medium-temperature stand-alone units maintain a temperature above 32 °F (0 °C). For further background on this end-use, see the 2020 NPRM at 85 FR 35877.

In the 2015 Rule, EPA changed the listing of 31 refrigerants<sup>5</sup> from acceptable to unacceptable for new medium temperature stand-alone units. At that time, EPA indicated that it believed that other alternatives that posed lower risk were available for this end use. After the 2015 Rule, as part of a petition from the Air-Conditioning, Heating, and Refrigeration Institute (AHRI),<sup>6</sup> described in section 3 below, EPA received information indicating that manufacturers were unable to design certain types of medium-temperature stand-alone equipment with the available acceptable alternatives, and that certain equipment configurations would require significantly larger refrigeration equipment that could jeopardize compliance with the ADA for those types of equipment.

## 2. What are R-448A, R-449A and R-449B and how do they compare to other refrigerants in the same end-use?

R-448A, marketed under the trade name Solstice® N-40, is a weighted blend of 26 percent HFC-32,<sup>7</sup> which is also known as difluoromethane (Chemical Abstracts Service Registry Number [CAS Reg. No.] 75-10-5); 26 percent HFC-125, which is also known

as 1,1,1,2,2-pentafluoroethane (CAS Reg. No. 354-33-6); 21 percent HFC-134a, which is also known as 1,1,1,2-tetrafluoroethane (CAS Reg. No. 811-97-2); 20 percent HFO-1234yf, which is also known as 2,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 754-12-1); and seven percent HFO-1234ze(E), which is also known as trans-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118-24-9). R-449A, marketed under the trade name Opteon® XP 40, is a weighted blend of 24.3 percent HFC-32, 24.7 percent HFC-125, 25.7 percent HFC-134a, and 25.3 percent HFO-1234yf. R-449B, marketed under the trade name Forane® 449B, is a weighted blend of 25.2 percent HFC-32, 24.3 percent HFC-125, 27.3 percent HFC-134a, and 23.2 percent HFO-1234yf.

EPA previously listed R-448A, R-449A, and R-449B as acceptable refrigerants in a number of other refrigeration and air conditioning end-uses, including other retail food refrigeration end-use categories (e.g., 80 FR 42053, July 16, 2015; 81 FR 70029, October 11, 2016; 82 FR 33809, July 21, 2017; 83 FR 50026, October 4, 2018; 84 FR 64765, November 25, 2019).

Redacted submissions and supporting documentation for R-448A, R-449A, and R-449B are provided in the docket for this rule (EPA-HQ-OAR-2019-0698) at <https://www.regulations.gov>. EPA performed an assessment to examine the health and environmental risks of each of these substitutes, and these assessments are also available in the docket for this rule.<sup>8,9,10</sup>

**Environmental information:** R-448A, R-449A, and R-449B have an ozone depletion potential (ODP) of zero.<sup>11</sup> Their components, HFC-32, HFC-125, HFC-134a, HFO-1234yf, and in the case of R-448A, HFO-1234ze(E), have global warming potentials (GWPs) of 675; 3,500; 1,430;<sup>12</sup> less than one to

four;<sup>13,14,15</sup> and less than one to six;<sup>16,17</sup> respectively. If these values are weighted by mass percentage, then R-448A, R-449A, and R-449B have GWPs of about 1,390, 1,400, and 1,410, respectively. HFC-32 (CAS Reg. No. 75-10-5), HFC-125 (CAS Reg. No. 354-33-6), HFC-134a (CAS Reg. No. 811-97-2), HFO-1234yf (CAS Reg. No. 754-12-1) and HFO-1234ze(E) (CAS Reg. No. 29118-24-9)—the components of R-448A, R-449A, and R-449B—are excluded from the definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of state implementation plans (SIPs) to attain and maintain the national ambient air quality standards (NAAQS).

Knowingly venting or otherwise knowingly releasing or disposing of these refrigerant blends in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration is prohibited as provided in section 608(c)(2) of the CAA and EPA’s regulations at 40 CFR 82.154(a)(1).

**Flammability information:** R-448A, R-449A, and R-449B as formulated, and even considering the worst-case fractionation for flammability, are not flammable.

**Toxicity and exposure data:** Potential health effects of exposure to these substitutes include drowsiness or dizziness. The substitutes may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, the substitutes may cause irregular heartbeat. The substitutes could cause asphyxiation if

<sup>13</sup> Nielsen et al., 2007. Nielsen, O.J., Javadi, M.S., Sulbaek Andersen, M.P., Hurley, M.D., Wallington, T.J., Singh, R. 2007. Atmospheric chemistry of CF<sub>3</sub>CF=CH<sub>2</sub>: Kinetics and mechanisms of gas-phase reactions with Cl atoms, OH radicals, and O<sub>3</sub>. Chemical Physics Letters 439, 18–22. Available online at [http://www.cogci.dk/network/OJN\\_174\\_CF3CF=CH2.pdf](http://www.cogci.dk/network/OJN_174_CF3CF=CH2.pdf).

<sup>14</sup> Hodnebrog Ø. et al., 2013. Hodnebrog Ø., Etminan, M., Fuglestad, J.S., Marston, G., Myhre, G., Nielsen, C.J., Shine, K.P., Wallington, T.J.: Global Warming Potentials and Radiative Efficiencies of Halocarbons and Related Compounds: A Comprehensive Review, Reviews of Geophysics, 51, 300–378, doi:10.1002/rog.20013, 2013.

<sup>15</sup> WMO (World Meteorological Organization), Scientific Assessment of Ozone Depletion: 2018, Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: <https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf>. In this action, the 100-year GWP values are used.

<sup>16</sup> Ibid.

<sup>17</sup> Hodnebrog Ø. et al., 2013 and Javadi et al., 2008. M.S. Javadi, R. Søndergaard, O.J. Nielsen, M.D. Hurley, and T.J. Wallington, 2008. Atmospheric chemistry of trans-CF<sub>3</sub>CH=CHF: Products and mechanisms of hydroxyl radical and chlorine atom-initiated oxidation. Atmospheric Chemistry and Physics Discussions 8, 1069–1088, 2008.

<sup>5</sup> Specifically, FOR12A, FOR12B, HFC-134a, HFC-227ea, KDD6, R125/290/134a/600a (55.0/1.0/42.5/1.5), R-404A, R-407A, R-407B, R-407C, R-407F, R-410A, R-410B, R-417A, R-421A, R-421B, R-422A, R-422B, R-422C, R-422D, R-424A, R-426A, R-428A, R-434A, R-437A, R-438A, R-507A, RS-24 (2002 formulation), RS-44 (2003 formulation), SP34E, and THR-03.

<sup>6</sup> AHRI, 2017. Petition Requesting EPA SNAP Approval of R-448A/449A/449B for Medium Temperature, Stand-Alone Retail Food Refrigeration Equipment. Submitted March 20, 2017.

<sup>7</sup> In this final rule, we refer to this refrigerant with the technical prefix (i.e., R-32) and with the composition designating prefix (i.e., HFC-32) interchangeably.

<sup>8</sup> ICF, 2020a. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R-448A.

<sup>9</sup> ICF, 2020b. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R-449A.

<sup>10</sup> ICF, 2020c. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R-449B.

<sup>11</sup> If a compound contains no chlorine, bromine, or iodine, or if it is a solid under conditions of use, its ODP is generally considered to be zero. Unless otherwise stated, all non-zero ODPs in this document are from EPA’s regulations at appendix A to subpart A of 40 CFR part 82.

<sup>12</sup> Unless otherwise specified, GWP values are from IPCC (2007) Climate Change 2007: *The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.). Cambridge University Press. Cambridge, United Kingdom 996 pp.

air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

The American Industrial Hygiene Association (AIHA) has established workplace environmental exposure limits (WEELs) of 1,000 parts per million (ppm) as an eight hour time-weighted average (8-hr TWA) for HFC-32, HFC-125, and HFC-134a, and 500 ppm as an 8-hr TWA for HFO-1234yf, the components of R-448A, R-449A, and R-449B; and 800 ppm as an 8-hr TWA for HFO-1234ze(E), also a component of R-448A. The manufacturer of R-448A recommends an acceptable exposure limit (AEL) of 890 ppm on an 8-hr TWA for the blend. The manufacturer of R-449A recommends an AEL of 830 ppm on an 8-hr TWA for the blend. The manufacturer of R-449B recommends an AEL of 865 ppm on an 8-hr TWA for the blend. EPA anticipates that users will be able to meet the AIHA WEELs and manufacturers' AELs and address potential health risks by following requirements and recommendations in the manufacturers' safety data sheets (SDS), in American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

*Comparison to other substitutes in this end-use:* R-448A, R-449A, and R-449B have ODPs of zero, comparable to or lower than other acceptable substitutes in this end-use, with ODPs ranging from zero to 0.098.

R-448A's GWP of 1,390, R-449A's GWP of 1,400, and R-449B's GWP of 1,410 are higher than those of other acceptable substitutes for retail food refrigeration—medium-temperature stand-alone units (new), including ammonia absorption, R-744, R-450A, and R-513A with GWPs ranging from zero to 630.

Information regarding the flammability and toxicity of other available alternatives are provided in the listing decisions previously made (see <https://www.epa.gov/snap/substitutes-stand-alone-equipment>). Flammability and toxicity risks for R-448A, R-449A, and R-449B are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with ASHRAE Standard 15 and other industry standards, recommendations in the manufacturers' SDS, and other safety precautions common in the refrigeration and air conditioning industry.

Although R-448A, R-449A, and R-449B present a higher overall risk to human health and the environment than other acceptable alternatives in this end-use category based on significantly higher GWPs than other available alternatives, with GWPs ranging from zero (ammonia in a secondary loop) to 630 (R-513A), as provided below, EPA has determined that other alternatives may not be available for certain uses and users of medium-temperature stand-alone equipment. Thus, EPA is listing these substitutes as acceptable subject to narrowed use limits in this end-use. Under the SNAP program, when using an alternative listed as acceptable with narrowed use limits, users, including manufacturers, of new medium-temperature stand-alone equipment will need to ascertain that the other alternatives are not technically feasible before using R-448A, R-449A, or R-449B in such equipment.<sup>18</sup> Consistent with existing SNAP regulations, they must document the results of their evaluation that showed the other alternatives to be not technically feasible and maintain that documentation in their files. This documentation, which does not need to be submitted to EPA unless requested to demonstrate compliance, "shall include descriptions of substitutes examined and rejected, processes or products in which the substitute is needed, reason for rejection of other alternatives, *e.g.*, performance, technical or safety standards, and the anticipated date other substitutes will be available and projected time for switching to other available substitutes." (40 CFR 82.180(b)(3)).<sup>19</sup>

### 3. AHRI Petition

AHRI petitioned EPA under CAA section 612(d) to add R-448A, R-449A, and R-449B to the list of acceptable substitutes for new and retrofit medium-temperature stand-alone units. See 40 CFR 82.184 for further information regarding petitions under the SNAP program. EPA and AHRI exchanged information related to this petition between March 2017 and November 2018. Information received as part of

<sup>18</sup> As noted in the proposal, under the SNAP regulations the definition of "use" includes "but [is] not limited to use in a manufacturing process or product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses;" hence, this definition includes the manufacture of a product pre-charged with a particular refrigerant. (40 CFR 82.172).

<sup>19</sup> In the regulatory text of the 2020 NPRM, the description of the information to document was included in the "Further information" column. Because this information is required under the existing SNAP regulations at 40 CFR 82.180(b)(3), we have listed this in the "Narrowed use limits" column in this final action.

this petition is relevant to this listing, and EPA's action in this rulemaking may be considered responsive to certain aspects of this petition, although EPA is not taking formal action on the petition in this rulemaking. We describe the contents of the petition, including elements that we are not considering in this action, in detail in the 2020 NPRM, and the petition is available in the docket for this rulemaking.

### 4. What is EPA's final listing decision for R-448A, R-449A and R-449B?

EPA is listing R-448A, R-449A, and R-449B as acceptable, subject to narrowed use limits, for new medium-temperature stand-alone units in this final rule.

EPA understands that to construct certain medium-temperature stand-alone units with the available acceptable refrigerants would require significantly larger components, or the addition of multiple refrigeration systems, which may lead to redesigning the units in such a manner that could be inconsistent with the ADA requirements. AHRI's petition specifically pointed to R-448A, R-449A, and R-449B as refrigerants that would, on the contrary, be feasible in such equipment and requested that those refrigerants be added to the list of acceptable refrigerants for new medium-temperature stand-alone units.

Users under SNAP, including manufacturers, using a substitute listed as acceptable, subject to narrowed use limits, must ascertain that other substitutes or alternatives are not technically feasible. As explained in the initial SNAP rulemaking (59 FR 13063, March 18, 1994), under the narrowed use limit, "[u]sers are expected to undertake a thorough technical investigation of alternatives before implementing the otherwise restricted substitute" (*i.e.*, R-448A, R-449A or R-449B for this rule). Further, "[t]he Agency expects users to contact vendors of alternatives to explore with experts whether or not other acceptable substitutes are technically feasible for the process, product or system in question" (*i.e.*, in new medium-temperature stand-alone units for this rule) to the otherwise restricted substitute. The initial SNAP rule also explained that "[a]lthough users are not required to report the results of their investigations to EPA, companies must document these results, and retain them in company files for the purpose of demonstrating compliance" for up to five years after the date of creation of the records. This information includes descriptions of:

- Process or product in which the substitute is needed;
- Substitutes examined and rejected;
- Reason for rejection of other alternatives, e.g., performance, technical or safety standards; and/or
- Anticipated date other substitutes will be available and projected time for switching.

An example of a viable explanation under a narrowed use limit in this circumstance could include information such as a market analysis of the components for other alternatives that indicate a lack of availability in the required sizes or with required features, or design diagrams that indicate excessive loss of refrigerated volumes or failure to meet ADA requirements. As explained below, we have revised the regulatory text from the 2020 NPRM to indicate that failure to comply with ADA requirements is not the only reason the other alternatives can be deemed infeasible under the narrowed use limit.

#### 5. How is EPA responding to comments on retail food refrigeration—medium-temperature stand-alone units?

EPA received comments from organizations with various interests in retail food refrigeration regarding the proposed listing of R-448A, R-449A and R-449B. Most commenters supported the proposed listings, although some supported listing these refrigerants as acceptable without narrowed use limits and others did not support the listing at all. Other commenters addressed the environmental impacts of the proposed listing of R-448A, R-449A and R-449B and the proposed narrowed use limits. Other comments unrelated to these listings and beyond the scope of this final action are addressed in section III.

Commenters on these proposed listings were AHRI, the Alliance for Responsible Atmospheric Policy (the Alliance), North American Association of Food Equipment Manufacturers (NAFEM), and Heating, Air-conditioning, & Refrigeration Distributors International (HARDI), four industry organizations; Chemours and Honeywell, two chemical producers; Hussmann Corporation, Johnson Controls, Lennox International Inc., Parker Hannifin Corporation, and Rheem Manufacturing Company, five equipment manufacturers; and the Natural Resource Defense Council (NRDC) and the Environmental Investigation Agency (EIA), two environmental organizations.

We have grouped comments together and responded to the issues raised by

the comments in the sections that follow.

#### a. Support Listings

*Comment:* HARDI indicated that it “supports the overall effort to phase down the use of HFC refrigerants” and held that the listing of R-448A, R-449A, and R-449B (and others discussed later in its comments) “is one part of a larger process in the industry’s effort to phase down older refrigerants.” Lennox International Inc. also supported the proposed listing of R-448A, R-449A, and R-449B for use in medium temperature stand-alone refrigeration applications indicating that “[t]hese refrigerants generally replace R404[A] and provide significant environmental benefits while providing the appropriate technology to meet the ongoing regulatory requirements.”

*Response:* The Agency acknowledges HARDI’s and Lennox’s support for this proposed listing. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.A.

*Comment:* Parker Hannifin Corporation’s Sporlan division “agrees with AHRI’s positions and statements concerning this proposed listing, and [they] support it and the narrowed use limits as proposed.”

*Response:* To the extent this comment refers to comments from the AHRI, we have responded separately. To the extent Sporlan is supporting the proposed listing including the narrowed use limits, we acknowledge this support. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.A.

#### b. Support Listings Without Narrowed Use Limits

##### i. Comparison to Other Acceptable SNAP Listings

*Comment:* The Alliance, Chemours, Honeywell and Rheem supported finding R-448A, R-449A, and R-449B acceptable, but they did not support the proposal to make such listings subject to narrowed use limits. NAFEM also supported approval of R-448A, R-449A, and R-449B without use restrictions “so that those refrigerants still can be allowed for critical applications.” Noting that these blends are listed as acceptable for low temperature stand-alone equipment, Rheem commented that “a common platform of low-GWP refrigerants is more beneficial to the installer and service personnel as well as for the manufacturer.”

*Response:* In this final rule, EPA is including the narrowed use limits for

these refrigerants. EPA explained why these alternatives posed higher risk to human health and the environment than other acceptable substitutes in this end-use in the proposal (85 FR 35879–35880, June 12, 2020) and summarized those findings again above. In the proposal, EPA noted that the GWPs of these compounds, ranging from 1,390 to 1,410, “are higher than those of other acceptable substitutes for retail food refrigeration—medium-temperature stand-alone units (new)” (85 FR 35878, June 12, 2020) and pointed to examples of such acceptable substitutes with lower GWPs and otherwise similar overall risk to human health and the environment. For those same reasons, EPA concludes in this final action that these alternatives pose higher risk to human health and the environment than other acceptable substitutes in this end-use. By finding these higher-GWP blends acceptable subject to narrowed use limits, EPA is allowing for these refrigerants to be used under SNAP as long as the requirements for the narrowed use limit have been met. Further, we note that because EPA evaluates the available or potentially available alternatives for different end-use categories separately, given that each intersection of an alternative and end-use category poses unique risk to human health and the environment, as well as unique technical challenges and requirements that must be met in order for a substitute to be available in a particular end-use or application, we would not necessarily list the same refrigerant as acceptable across multiple end-use or end-use categories. For example, in low temperature stand-alone equipment, EPA has listed a number of other refrigerants as acceptable with overall risk, including GWPs, similar to or greater than the overall risk, including GWPs, of R-448A, R-449A, and R-449B, unlike in medium temperature stand-alone equipment. To the extent industry stakeholders see a benefit for a single refrigerant for use across all their equipment, and find that the required analysis to use R-448A, R-449A, or R-449B under a narrowed use limit does not support such across-the-board use, we note that there are already several alternatives that are listed acceptable for both medium and low temperature equipment that they can pursue.

*Comment:* Chemours notes that R-448A, R-449A, and R-449B have been listed as acceptable in several other end-uses. They contend that “EPA fails to provide a rational basis for treating R-448A, R-449A and R-449B differently



in this proposed rule as opposed to past approvals.”

*Response:* Since the inception of the SNAP program, alternatives are evaluated on an end-use by end-use (or in this case, an end-use category) basis. There is no reason to believe whether and how an alternative is listed in one end-use would be the same as a different end-use. In this case, as described above and in the proposal, EPA finds that, with other criteria being comparable, the GWP of R-448A, R-449A, and R-449B, each of which has a GWP of approximately 1,400 that is higher compared to other acceptable alternatives in the medium temperature stand-alone equipment end-use, justifies the need for narrowed use limits. Other acceptable alternatives are available for this end-use which have GWPs of approximately 630 or lower, and some of which have already been implemented in equipment within this end-use category. EPA had not listed R-448A, R-449A, and R-449B as acceptable without restriction in this end-use before this final rule specifically because the higher GWPs indicate they pose a greater overall risk to human health and the environment. After receiving information indicating that manufacturers were unable to design certain types of medium-temperature stand-alone equipment with the available acceptable alternatives, we are finding the use of these high-GWP blends acceptable in this end-use consistent with the narrowed use limit established by this final rule.

*Comment:* Chemours states that R-448A, R-449A, and R-449B have substantially lower GWPs compared with current refrigerants.

*Response:* EPA understands Chemours' comment to refer to substitutes in existing equipment that have higher GWPs, such as HFC-134a, R-404A or R-507A, with GWPs of 1,430, 3,920 and 3,990, respectively. EPA changed the listing for these and certain other high-GWP refrigerants to unacceptable in stand-alone equipment and other end-uses in the 2015 Rule. EPA compared the substitutes under consideration in this action with other available or potentially available substitutes and not with unacceptable substitutes which are prohibited under SNAP. While some acceptable alternatives for new medium temperature stand-alone equipment do have higher GWPs than the three refrigerant blends under consideration in this action, EPA notes that those refrigerants have an ODP being comprised in part of ozone-depleting chemicals, e.g., HCFCs. However,

regulations promulgated under CAA section 605 phasing out the production and import of HCFCs also ban their use in new equipment. All acceptable non-ozone depleting alternatives for this end-use category have GWPs lower than R-448A, R-449A, and R-449B, in some cases significantly so (e.g., GWPs less than 10 compared to GWPs of approximately 1,400 for these three blends).

#### ii. Insufficient Justification for Narrowed Use Limits

*Comment:* The Alliance stated that EPA “does not offer justification why the [narrowed] use limits are necessary.” Chemours says that “EPA fails to provide any independent rationale supporting such [narrowed use limits] conditions” and Honeywell added that “the proposed rule offers no justification for such [narrowed] use limits and indeed they are not necessary.” Honeywell contended that EPA did not explain the specific reasons why narrowed use limits are necessary. Johnson Controls requested EPA to add justification for the narrowed use limits.

*Response:* EPA provided justification for the narrowed use limits in the proposal (85 FR 35879–35880, June 12, 2020). These alternatives pose higher risk to human health and the environment than other acceptable substitutes listed in this end-use. Relying on information submitted by AHRI in its petition to EPA, the proposal explained that while other acceptable alternatives were available for certain types of equipment within this end-use, the thermodynamic properties of other acceptable alternatives would require larger components and potentially lead to designs that would fail to comply with the ADA for certain equipment. For instance, in its comments, the Alliance quoted EPA statements from the proposal to this effect. EPA provided some examples of equipment within the medium-temperature stand-alone equipment category that have been manufactured with other acceptable alternatives that are available and for which there is no known conflict with the ADA requirements. Other commenters such as EIA added to this record. Hence, based on the information from AHRI and the evidence of existing, available equipment using acceptable refrigerants, EPA is concluding in this final action that within this end-use category, while some models can be manufactured using other acceptable alternatives, those alternatives might not be feasible for other models which could be manufactured with R-448A, R-449A, or R-449B. This conclusion

warrants the narrowed use limit for these alternatives and conforms with the instances where listing with a narrowed use limit is justified as discussed in the original SNAP Rule (59 FR 13044, March 18, 1994) and codified in our regulations. Specifically, “[e]ven though the Agency can restrict the use of a substitute based on the potential for adverse effects, it may be necessary to permit a narrowed range of use within a sector end-use because of the lack of alternatives for specialized applications” (40 CFR 82.180(b)(3)). Here we find there may be specialized applications where the other acceptable alternatives are not feasible and use of R-448A, R-449A, or R-449B may be feasible. Thus, although we find R-448A, R-449A, or R-449B have the potential adverse effects due to their higher GWP compared to the other alternatives in this end-use category, we find that their use may be justified in certain equipment under a narrowed use limit.

#### iii. Clarification of Narrowed Use Limits

*Comment:* Johnson Controls requests that EPA provide clarification regarding the narrowed use limits.

*Response:* Because this comment was not specific on what needs to be clarified, no specific response is possible. However, we note that other comments had clearer requests for clarification on the narrowed use limits and we have addressed those in this final rule. These clarifications may also respond to Johnson Controls' request.

*Comment:* Hussmann Corporation asked whether the narrowed use limit requirement to analyze and document that the other alternatives are infeasible before using R-448A, R-449A, or R-449B is to be performed for each model or a family of models. AHRI also asked whether the justification document would be required for each piece of equipment. Similarly, NAFEM stated “EPA is unclear whether documentation may be kept by product number or for a group of similar products or group of alternatives.” NAFEM also quoted the text in the “Further information” column on 85 FR 35893 and stated this was ambiguous in the level of detail being requested. They said that it was important to receive clarification that EPA's expectations of the documentation “will be flexible to recognize the different ways manufacturers may be able to categorize products, document by issue, or perhaps individual products based on a particular manufacturer's operations.”

*Response:* EPA's SNAP regulations do not specify whether the analysis should be performed or documented for models

or families of models or group of alternatives. A manufacturer or other user wishing to avail itself of the flexibility provided by the narrowed use limit under the SNAP program is required to conduct the evaluation described in the SNAP regulations (see 40 CFR 82.180(b)(3)), document that the circumstances described in the those regulations have been met, and retain such documentation as required under those regulations. NAFEM said “[t]here can be great variability in these products, with certain features perhaps customized for particular customers.” Thus, a single analysis might not be able to adequately cover an entire family of models for these products or their customized design. EPA can envision scenarios where an analysis that shows other alternatives are infeasible could cover more than one model, however. For instance, models of similar size that differ in some characteristics—facings, shelf placements, etc.—without affecting the load, the required refrigeration equipment, and the determination that other alternatives are not feasible (e.g., due to ADA concerns) might be grouped together under a single analysis. Another example might include a model that is offered with doors and without. If the analysis addresses both types of equipment and concludes the with-doors version cannot use the other alternatives due to refrigeration equipment sizes leading to noncompliance with ADA, and the open-type version is of higher capacity and requires even larger refrigeration equipment to maintain the refrigeration load that has increased because the case is open to the surrounding air rather than enclosed by the doors, then the analysis could be applied to both models. In any such situation the analysis and any other documentation would need to address the factors listed in 40 CFR 82.180(b)(3), including listing the different products being evaluated, the reasons for rejection of other alternatives, the anticipated date other alternatives will be available, and the projected time for switching to available alternatives. If the analysis relies on a conclusion that the inability of one product to use the other acceptable alternatives also logically means the additional product(s) would not be able to use the other alternatives, the basis for that conclusion should be explained.

*Comment:* Hussmann Corporation asked what would be required to show that other alternatives are not feasible, giving examples of testing results and calculations. Rheem similarly requested that EPA “[c]larify the burden of proof required for Narrowed Use Limits for R-

448A, R-449A, and R-449B” asking “[w]hat type of calculations or test results constitute sufficient proof of design unfeasibility.”

*Response:* EPA does not dictate how a manufacturer or other user must prove that other alternatives are not feasible, as long as the requirements of the regulations regarding narrowed use limits are met. The regulations regarding narrowed use limits likewise give some leeway in how one determines the need for the otherwise restricted substitute. The regulations state that the user must ascertain that other alternatives are not technically feasible and that the documented analysis must include the other substitutes examined and rejected, the products where the alternatives (R-448A, R-449A, or R-449B) are needed, and the reason for rejecting the other alternatives. EPA responds to several comments, summarized below, that address the suitability of certain types of information that could be used and retained as part of the analysis required under the narrowed use limits.

*Comment:* AHRI asked whether “a description of the enabling regulations needed plus a period of time for preparation might be sufficient documentation” to meet the requirements to use R-448A, R-449A, or R-449B under the narrowed use limits. They provided as an example “higher charge limits allowed for A2L refrigerant plus three years to prepare for the transition.”

*Response:* The regulations pertaining to narrowed use limits require manufacturers or other users to include an anticipated time other alternatives might be available and a projected time for switching to other alternatives. Therefore, information such as what AHRI describes could be useful as part of addressing this portion of the analysis that must be performed and documented before relying on the flexibility under SNAP provided by the narrowed use limit that allows use of R-448A, R-449A, or R-449B in appropriate circumstances. As described elsewhere, other information must also be included in this analysis. EPA does not generally believe, however, an open-ended time period (e.g., when “enabling regulations” are completed) would meet the intent of the requirement to address the anticipated time other alternatives might be available and the projected time for transitioning to other substitutes because that kind of general statement does not speak directly to the anticipated timing for availability or the projected timing for making the transition. Instead, EPA anticipates that manufacturers would use their technical expertise to describe the projected

timing for these steps. For example, manufacturers could use their technical expertise to describe the regulations or standards that might need updating and how those items affect the choice of refrigerant, what steps must be taken to update the regulations and how long those steps are expected to take, and ultimately what steps are needed to implement the change in refrigerant in their equipment and whether those steps can commence even before the regulation and standard updates are final. On this last item of implementing the new refrigerant, EPA believes the additional three years in AHRI’s comments could be reasonable for this type of equipment in appropriate circumstances. We note this is similar to the three years and five months found as an achievable transition time in previous regulations specifically for small medium temperature stand-alone equipment (80 FR 42870, July 20, 2015).

#### iv. Grounds for Utilizing the Narrowed Use Limits

*Comment:* The Alliance requested clarification on whether R-448A, R-449A, and R-449B may be used in products that did conform with the ADA requirements but for other reasons the other alternatives are not able to be used. AHRI maintained that ADA compliance “would not be the only reason that would allow for the use of these products” and requested clarification of such.

*Response:* The Alliance did not provide specifics on what these other reasons could be, so EPA is not addressing whether a given reason would or would not justify the use of R-448A, R-449A, or R-449B under the narrowed use limit. In considering this comment, EPA acknowledges that under the existing requirements in the SNAP regulations for utilizing a substitute under a narrowed use limit, it is possible that there are other reasons beside ADA requirements that the other alternatives could not be used and that inclusion of the phrase “due to the inability to meet ADA requirements” in the regulatory text as part of the narrowed use limit could unnecessarily limit users’ ability to meet the requirements for using these substitutes under the narrowed use limit. Accordingly, EPA concludes that it is appropriate to clarify the text as the comment requests and is finalizing the regulatory text without this phrase included in the narrowed use limit. Thus, compared to the regulatory text of the proposed rule (85 FR 35892), under the “Narrowed use limits” column, EPA in this final action is not including the phrase “due to the inability to meet

ADA requirements” but maintains the information in the “Further information” column that mentions ADA requirements as a possible reason for rejection of other alternatives. Under the final action, a manufacturer relying on “other reasons” for the narrowed use limit would need to document their analysis justifying this use, including the required information as described in the existing SNAP regulations, the same as those that found ADA requirements would be violated using the other alternatives must document their analysis.

*Comment:* NAFEM noted the proposed rule pointed to the possible inability to comply with the ADA with the other alternatives as a justification for R-448A, R-449A, and R-449B. NAFEM contended that other reasons may exist that would render the other alternatives not feasible for new medium temperature stand-alone equipment. They listed technical challenges such as “[s]afety standards, user space constraints, energy efficiency requirements, and other performance considerations” as reasons where use of R-448A, R-449A, or R-449B might be justifiable.

*Response:* EPA agrees that there could be other reasons to determine that other alternatives are infeasible under the narrowed use limit. EPA concludes that in reviewing the AHRI petition and similar information such as that supplied in NAFEM’s comments, including the September 1, 2015 letter attached to their comments, requesting R-448A and R-449A be acceptable for this equipment, the Agency considers ADA compliance to be one possible reason for the use of these high-GWP blends. That said, we cannot predict if all the other challenges listed by NAFEM, or any future challenges, might render the other alternatives technically infeasible for certain equipment in this end use, but acknowledge that such situations could arise. In this final rule, we clarify that compliance with the ADA is one example that a manufacturer might find makes the other alternatives technically infeasible, and thereby justify the use of R-448A, R-449A, or R-449B under the narrowed use limit, but that other reasons, if supported by the manufacturer’s analysis under the SNAP regulations, might likewise justify use of these high-GWP blends under the narrowed use limit.

#### v. Narrowed Use Limits Are Burdensome

*Comment:* Chemours was opposed to the narrowed use limits and stated that the narrowed use limits “impose

unnecessary burden on the industry’s transition away from high global warming potential (‘GWP’) refrigerants.” They stated that other alternatives have GWPs up to 65% higher than those of R-448A, R-449A, and R-449B and implied that approving these three blends without the narrowed use limit would support industry transition from high GWP refrigerants.

*Response:* EPA disagrees that the narrowed use limits impose unnecessary burden. As described above, EPA finds that the narrowed use limits are necessary in this circumstance and without their inclusion, the Agency would not be able to find these three refrigerants acceptable for this specific end-use. These refrigerants present an overall greater risk to human health and the environment due to their higher GWP but for other factors have similar risks to other acceptable alternatives. All other zero-ODP alternatives that are acceptable within this end-use category have lower GWPs than the three found acceptable subject to narrowed use limits in this action. The listing of these three refrigerants subject to narrowed use limits under the SNAP regulations provides an option to use R-448A, R-449A, or R-449B, despite the higher GWP and higher overall risk to human health and the environment that these refrigerants pose compared to other acceptable refrigerants, when use of the other lower GWP alternatives is determined to be technically infeasible.

*Comment:* Chemours contends that manufacturers should not be required to conduct the technical analysis to justify the use of R-448A, R-449A, and R-449B under the narrowed use limit because AHRI has already completed this effort.

*Response:* EPA disagrees with this comment. While EPA relies on information provided by AHRI to justify the listing of these high GWP blends, AHRI did not provide an analysis on any specific model that manufacturers offer and did not perform such analysis for all types of equipment that fall within this end-use category. Accordingly, the AHRI petition does not satisfy the requirements of 40 CFR 82.180(b)(3) for users who wish to avail themselves of the flexibility provided by the narrowed use limit to use R-448A, R-449A, and R-449B where other alternatives are found to be technically infeasible.

*Comment:* Chemours points out that how a unit is placed within a store could impact aisle widths and compliance with ADA. Chemours says that manufacturers would need to know the layout of any store that would use a medium temperature stand-alone unit

in order to justify the need for R-448A, R-449A, or R-449B as the only available alternatives that would comply with the ADA. They held that knowing the layout of each location where a unit is placed was an unreasonable burden. As such, they concluded that EPA should list these alternatives as acceptable without imposing narrowed use limits.

*Response:* EPA disagrees that manufacturers would necessarily need to know the layout of the store to meet the requirements of the narrowed use limit. For example, information in the AHRI petition contended certain equipment models would not comply with the ADA using other available alternatives due to counter height requirements. If the required analysis shows that other alternatives are technically infeasible in such models due to counter height requirements and the ADA requirements, that could support a manufacturer’s justification for reliance on the narrowed use limit in this equipment without knowledge of store layouts. In addition, as noted above, there may be justifications other than ADA compliance that could be used for relying on the narrowed use limit, as long as the requirements of 40 CFR 82.180(b)(3) are met.

*Comment:* Chemours also states that conducting a pre-manufacture analysis to justify the use of R-448A, R-449A, or R-449B based on ADA issues would not account for situations in which a unit was moved within a store or perhaps transferred to another retail location where a unit manufactured with another alternative would be feasible. They held that this possibility of a user moving a unit would make the narrowed use limit requirement to justify the use of the alternative ineffective and therefore argued for removing those narrowed use limits.

*Response:* EPA understands that equipment may be moved or sold on a secondary market. However, the intent of this action is that for those availing themselves of the narrowed use limits provided in this rule conduct the necessary analysis and maintain the necessary documentation. Such documentation provides the justification to use these refrigerants under SNAP which otherwise would be unacceptable due to the higher risk to human health and the environment that they impose. If a chemical manufacturer or original equipment manufacturer is concerned with downstream users, they could consider options such as including relevant information about the narrowed use limit with their sales documentation. In addition, as noted above, there may be justifications other than ADA compliance that could be

used for relying on the narrowed use limit, as long as the requirements of 40 CFR 82.180(b)(3) are met.

*Comment:* Chemours says the narrowed use limits “unreasonably discourage the use of R-448A, R-449A and R-449B” as compared to finding these refrigerants acceptable without use restrictions. They say that instead approving, without narrowed use limits, these refrigerants with a GWP lower than the currently used refrigerants would meet the Agency’s duty to evaluate when an alternative would reduce overall risk to human health and the environment.

*Response:* Although EPA lists refrigerants under CAA section 612, we do not encourage or discourage the use of any particular refrigerant. There are several alternatives listed as acceptable, some with use conditions, some, as in this final rule, with narrowed use limits, and some without use restrictions. In this final rule, we have evaluated these refrigerants under the SNAP program’s comparative risk framework and concluded the narrowed use limits are appropriate because they present an overall greater risk to human health and the environment due to their higher GWP but for other factors have similar risks to other acceptable alternatives. Given that R-448A, R-449A and R-449B were not listed as acceptable for medium temperature stand-alone equipment prior to this final rule, the listing, even with a narrowed use limit, would not limit the use of these refrigerants. Rather, it could serve to increase the use of these refrigerants should manufacturers choose to adopt them based on their analyses.

*Comment:* Chemours indicated that requirements of a narrowed use limit including the need for a documented transition plan to other alternatives are unworkable, as they require understanding when other substitutes will be available and a timeline for transitioning. They say users would not know what future regulations or requirements may exist, or what new alternatives may be introduced in the future, and would therefore need to speculate on these aspects in their analysis to justify the use of R-448A, R-449A, or R-449B. As such, Chemours says these refrigerants should be found acceptable without narrowed use limits.

*Response:* EPA finalized regulations on narrowed use limits in 1994 and has implemented such narrowed use limits in past decisions with no indication that such listings are unworkable. EPA further notes that the existing regulations, quoted in the proposal, require an “*anticipated* date other substitutes will be available and

*projected* time for switching to other available substitutes.” (emphasis added). Thus, EPA does not view these requirements as requiring manufacturers to provide a precise date of what will be available and when a transition will occur, but rather a reasonable assessment of such dates based on their technical expertise. It would be reasonable to assume chemical producers and suppliers could assist in this evaluation for users that choose to avail themselves of the flexibility offered by listing these refrigerants subject to narrowed use limits. Accordingly, EPA disagrees that it should find these refrigerants acceptable without narrowed use limits based on the uncertainties identified in this comment.

*Comment:* Chemours further argues against including the narrowed use limits by indicating that the requirement to retain any analysis that supports the use of R-448A, R-449A, or R-449B in medium temperature stand-alone equipment is to support potential enforcement actions, and that developing such documentation including a transition plan is unreasonable “when the Agency cannot concurrently provide clarity for this segment.”

*Response:* EPA is not addressing enforcement in this final rule. However, we note that the existing regulations covering narrowed use limits, as quoted in the proposal, require a manufacturer to “retain the results on file for purposes of demonstrating compliance.” (emphasis added). As the requirement to retain the analysis is consistent with the existing SNAP regulations, which are not modified in this action, EPA disagrees with the suggestion that it should not finalize the narrowed use limits based on the points identified in this comment. The comment was unclear on what type of “clarity for this segment” Chemours is seeking; however, we have provided clarity for this end-use category including the listings to date of multiple alternatives as acceptable and the listing in this final rule providing flexibility to use R-448A, R-449A, and R-449B under SNAP subject to narrowed use limits.

#### c. Oppose Listings

##### i. Other Alternatives Available With Lower GWP

*Comment:* The EIA and the NRDC opposed the listing of R-448A, R-449A and R-449B as acceptable subject to narrowed use limits. They indicated that because of these refrigerants’ high GWP, they should not be listed for this type of equipment. EIA claimed that

better alternatives, “R-513C, R-290, and R-600a” exist and pointed to three different manufacturers that offer a wide range of equipment that meets ADA requirements and uses lower-GWP refrigerants. NRDC likewise noted SNAP-acceptable alternatives for this end-use category include lower-GWP options such as “ammonia vapor compression with secondary loop, carbon dioxide, R-290, R-441A, R-450A, R-513A, and isobutane” and stated that “[s]everal companies are already producing and selling compliant products that use already-approved, low-GWP refrigerants” without identifying those companies.

*Response:* EPA agrees there is a variety of equipment using other acceptable alternatives with lower GWPs in medium temperature stand-alone equipment and therefore did not propose to list the three refrigerants as acceptable but instead included a narrowed use limit to address specific circumstances that would render the other refrigerants as technically infeasible in particular applications within this end use. EPA is aware of such equipment using R-290, R-600a (isobutane), and R-744 (carbon dioxide). We also noted in the 2015 Rule that R-450A and R-513A were designed as HFC-134a replacements and therefore were potentially available for medium temperature stand-alone units that previously relied on HFC-134a. (We are not aware of a refrigerant being designated R-513C as noted by EIA and believe it may have been a typographical error for R-513A; regardless R-513C is not listed acceptable for this end-use category.) EPA also pointed to examples of medium temperature stand-alone equipment using lower-GWP refrigerants in our proposed rule. We further note that even manufacturers that do offer such equipment using the available alternatives may find such alternatives technically infeasible for some applications. Other information in the record elaborates on the limitations of the other acceptable alternatives in certain circumstances. For instance, in its comments on the 2020 NPRM, Hussmann Corporation stated “[f]lammable and non-flammable refrigerant options currently approved by SNAP have less capacity and may require the use of multiple condensing units. This in turn creates additional heat rejection into stores, an increase in noise, store infrastructure issues that don’t have the capacity for the electrical loads, increased design feasibility risks for the stand-alone units due to increased piping, and increased

difficulty for servicing. Other refrigerant options may also require redesign due to the larger sizes of the condensing units which will limit the equipment installation due to narrow aisle and doorway openings.” Accordingly, EPA concludes that the fact that other lower GWP refrigerants are listed as acceptable under SNAP for this end use does not mean that it should not list R-448A, R-449A and R-449B as acceptable subject to narrowed use limits.

ii. Adoption of Safety Standard UL 60335-2-89 2nd Ed.

*Comment:* EIA notes that a proposal to modify UL 60335-2-89 is being considered. The proposal would allow up to 500 grams of R-290, or 13 times the lower flammability limit (LFL) of other A3 refrigerants such as R-600a. EIA expects the revision to be complete in March 2021 and urges EPA to adopt it when available. EIA expects that adoption by EPA would further limit any need for R-448A, R-449A, or R-449B as it would allow feasible designs, e.g., requiring a single refrigeration circuit as opposed to a physically larger multi-circuit approach, over a broader range of equipment. With respect to the listing of R-448A, R-449A, and R-449B under narrowed use limits, NRDC agreed that “EPA should revisit this approval upon adoption of safety standard UL 60335-2-89 2nd Ed. which will make it simpler to design compliant products with low-GWP refrigerants.” Further, NRDC maintained that any rulemaking listing R-448A, R-449A or R-449B should only apply “until products can be designed and sold to the specifications of the new UL standard.”

*Response:* EPA acknowledges the ongoing process to update on UL 60335-2-89. We also note that revisions to this standard were released for public comment in December 2020. As EIA notes, if we were to change use conditions that currently exist for R-290, R-600a and R-441A in stand-alone equipment (both medium and low temperature), we would undertake a rulemaking to do so. We cannot predict if or when we would do so before that standard is finalized and we can evaluate it to assess whether a change in use conditions is warranted; therefore, we have not limited the time that the listing of R-448A, R-449A, and R-449B applies as NRDC suggests. That said, manufacturers availing themselves of the flexibilities offered by these SNAP listings subject to narrowed use limits could assess the status of this UL Standard and the possibility of adoption by EPA as part of their analyses that require an anticipated date other

substitutes would be available and a projected time for switching.

d. Narrowed Use Limits Description

i. Narrowed Use Limits Should Be Temporary

*Comment:* AHRI requested that R-448A, R-449A, and R-449B be listed as acceptable without narrowed use limits but felt that was only needed “until additional alternatives become available.”

*Response:* To the extent that this comment suggests that R-448A, R-449A, and R-449B may not be needed in the future, EPA agrees. Even if the current acceptable refrigerants are not currently feasible in this equipment, additional alternatives being investigated, if added to the list of acceptable substitutes, may take the place of these high-GWP blends. As explained above, should additional alternatives become available in the future, or use conditions of existing alternatives change in the future, a manufacturer using R-448A, R-449A, or R-449B under the narrowed use limit may need to consider the implications of such a change for its future use of R-448A, R-449A, or R-449B under the narrowed use limits for new medium temperature stand-alone equipment.

ii. Scope of Narrowed Use Limits

*Comment:* NAFEM stated that the proposal to list R-448A, R-449A, and R-449B as acceptable subject to narrowed use limits “is too narrowly defined and there should be other circumstances under which these refrigerants can be used for medium temperature applications.” NAFEM pointed out that their member companies produce a wide range of equipment types and held that some of these do not fit neatly into EPA’s end-use category of medium temperature stand-alone equipment and requested “EPA to expand the product uses in which R-448A, R-449A, and R-449B may be used.” NRDC however felt that should EPA list these refrigerants acceptable subject to narrowed use limits—which NRDC did not support—EPA should limit the listing “to only specific product subtypes for which no alternatives are currently or potentially available.”

*Response:* EPA has previously listed R-448A, R-449A, and R-449B as acceptable under several end-uses, some of which may operate at medium temperature, including supermarket systems, refrigerated transport, cold storage, refrigerated food processing and dispensing equipment, and others. We expect that some NAFEM members

manufacture equipment under these end-uses; however, the comment is unclear as to whether NAFEM is requesting EPA “to expand the product uses” for these other end-uses where R-448A, R-449A, and R-449B are already listed as acceptable. To the extent NAFEM is referring to a broader list of circumstances in medium-temperature stand-alone equipment only, the specific types of such equipment were not defined, and thus EPA cannot judge whether they fit in the subject end-use category or another end-use or if the end-use category might be further broken down into separate end-use subcategories. Accordingly, EPA is not expanding the product uses in which R-448A, R-449A, and R-449B may be used in this final rule. Likewise, NRDC did not specifically list the product subtypes in their comments, except to mention that more equipment could feasibly use lower GWP refrigerants in the future should EPA adopt revised use conditions for certain acceptable refrigerants based on a UL standard under development. Because information was not presented that would allow EPA to distinguish the product types within the medium-temperature stand-alone equipment end-use category that are and are not feasible with the acceptable alternatives, EPA is not limiting or expanding the narrowed use limits beyond new medium-temperature stand-alone equipment as proposed. As discussed in other responses, should additional alternatives be listed in this end-use category, a manufacturer utilizing R-448A, R-449A, or R-449B under the narrowed use limits may need to consider the implications of such a change for its future use of R-448A, R-449A, or R-449B under the narrowed use limits for new medium temperature stand-alone equipment.

iii. Routinely Submit Narrowed Use Limits Information

*Comment:* Notwithstanding their argument against the listing, NRDC urged that if R-448A, R-449A, and R-449B were listed for this equipment, EPA should “require that users of these three blends actively and periodically submit to EPA the specified required information under the narrowed use limits.”

*Response:* Regulations for listing alternatives subject to narrowed use limits were established in the original SNAP rule (59 FR 13044, March 18, 1994) and were not reopened in the 2020 NPRM. The 1994 final regulations do not require or provide for users to submit their analysis, except when requested to demonstrate compliance.

To the extent the comment is suggesting that EPA should add a separate submission requirement for this particular listing, EPA is not establishing such a requirement because doing so would be inconsistent with the requirements of narrowed use limits that have existed for 27 years and as indicated in this document and the proposal, EPA's intention is to maintain consistency with those existing requirements. If EPA decides in the future that additional reporting may be needed under narrowed use limits, either in general or for specific alternatives so listed, we can consider any relevant changes and if any revisions to this final rule should be proposed.

e. Approve for Retrofits

*Comment:* Chemours requests that the Agency list R-448A, R-449A, and R-449B as acceptable for retrofits of medium temperature stand-alone equipment.

*Response:* EPA has consistently viewed refrigerant listings for new equipment and for retrofitting existing equipment separately, as the overall risk to human health and the environment differs depending on whether equipment is newly manufactured (for this equipment, in a factory environment) compared to retrofitted (e.g., in the field or at a service center). We appreciate Chemours' comments; however, we did not propose the use of R-448A, R-449A, and R-449B in retrofits. There is not enough information in the record to make a determination for retrofits of this equipment in this rule, but we will take the suggestion under advisement for potential future listings.

f. Request for Cost-Benefit Analysis

*Comment:* NAFEM "encourages EPA to consider a benefit-cost analysis before finalizing this rulemaking."

*Response:* The listing of R-448A, R-449A, and R-449B as acceptable subject to narrowed use limits imposes no costs compared to the previous state where such refrigerants were not listed as acceptable for the subject end-use category. Instead, this final rule allows these three refrigerants to be used in instances where they were not allowed before and thus provides additional flexibilities under SNAP that manufacturers may choose to pursue. While there may be costs borne by those pursuing these refrigerants, it is a manufacturer's decision whether to pursue these alternatives and not a requirement that EPA is imposing on the manufacturer.

*B. Residential and Light Commercial Air Conditioning and Heat Pumps—Listing of R-452B, R-454A, R-454B, R-454C, and R-457A as Acceptable, Subject to Use Conditions, for Use in Residential and Light Commercial Air Conditioning and Heat Pumps End-Use for New Equipment; and R-32 as Acceptable, Subject to Use Conditions, for Use in Residential and Light Commercial Air Conditioning and Heat Pumps—Equipment Other Than Self-Contained Room Air Conditioners for New Equipment*

As proposed, EPA is listing R-452B, R-454A, R-454B, R-454C, and R-457A (hereafter called "the five refrigerant blends") as acceptable subject to use conditions as substitutes in residential and light commercial air conditioning and heat pumps for both self-contained and split systems, and R-32 as acceptable subject to use conditions in residential and light commercial air conditioning and heat pumps for split systems and for specific types of self-contained systems that are part of the residential and light commercial air conditioning and heat pump end-use but for which R-32 has not been previously listed.

We note references to hydrocarbons mistakenly included in the "Further information" column of the regulatory text in the 2020 NPRM are not included in this final rule. Also, in the 2020 NPRM we used the term "mildly flammable" in the "Further information" column of the regulatory text. Based on comments received, we have changed that term to "flammable."<sup>20</sup> Finally, we note that where the use requirement for red markings appeared in regulatory text of the 2020 NRPM, we indicated initially that it must be applied to "pipes, hoses, or other devices through which the refrigerant passes." In this final action we are adding "service ports" there to be consistent with the sentence that follows. We offer clarification on this requirement below.

1. What use conditions is EPA finalizing?

EPA is finalizing the use conditions as proposed, except for a revision, explained in subsections II.B.1.b and II.B.5.a below, to what constitutes "new" equipment. The use conditions were proposed and are finalized as a means to reduce the risk that exists when using flammable refrigerants. EPA

<sup>20</sup> In the NPRM, EPA used the term "mildly flammable" to describe A2L refrigerants. Based on comment as explained below, this is not the correct term used in ASHRAE Standard 34 and hence it has been revised throughout this final rule.

has adopted similar use conditions in the past when listing flammable refrigerants acceptable, including the listing of HFC-32 for some of the equipment types that are included in the listing of the five refrigerant blends in this final rule (e.g., 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015). Further discussion of these use conditions is in section 5 below.

Under this listing, use of these refrigerants under the SNAP program requires adhering to all of the following use conditions:

a. UL Standard

These refrigerants may be used only in AC equipment, both self-contained equipment and split-systems, that meet all requirements listed in the 3rd edition, dated November 1, 2019, of UL Standard 60335-2-40, "Standard for Safety for Household And Similar Electrical Appliances—Safety—Part 2-40: Particular Requirements for Electrical Heat Pumps, Air Conditioners and Dehumidifiers" (UL Standard).<sup>21</sup> The UL Standard contains requirements for the types of equipment covered here, including testing, charge sizes, ventilation, usage space requirements, and certain hazard warnings and markings, among other topics. In cases where this final rule includes requirements more stringent than those of UL Standard 60335-2-40, the appliance will need to meet the requirements of this final rule in place of the requirements in the UL Standard. See section II.B.5 below for further discussion on the requirements of this UL Standard that EPA is incorporating by reference.

EPA finds, as in past rules, that it is appropriate to reference consensus standards that set conditions to reduce risk. As in past listings of flammable refrigerants, we find that such standards have already gone through a development phase that incorporates the latest findings and research. Likewise, such standards have gone through a vetting and refinement process that provides the affected parties an opportunity to comment. For the U.S. stationary air conditioning and refrigeration industry, EPA sees UL standards in general as a pervasively used body of work to address risks and these standards are the most applicable and recognized by the U.S. market. Most, and likely nearly all, covered equipment in the U.S. is listed as complying with the appropriate UL standard. In this case, UL 60335-2-40 covers, with modifications, equipment

<sup>21</sup> All references to UL Standard 60335-2-40 are to the third edition unless otherwise noted.

also covered by other UL standards previously finalized and incorporates the works of international standards setting bodies; specifically, the International Electrotechnical Commission (IEC) standard IEC 60335-2-40 was used in the development of UL 60335-2-40.

#### b. New Equipment Only

These refrigerants are being listed under SNAP only for use in new equipment designed specifically and clearly identified for the refrigerant; *i.e.*, none of these substitutes are being listed for use as a conversion or “retrofit” refrigerant for existing equipment. In the 2020 NPRM, we stated in a footnote that we intended “new” equipment to include a new compressor, evaporator, condenser and refrigerant tubing (85 FR 35884). Based on consideration of public comments on the 2020 NPRM, we conclude that existing tubing can be inspected and if suitable re-used and the system would still be considered “new” for the purpose of this final rule.

Given the possible ignition sources that exist in equipment designed for non-flammable refrigerants, EPA finds that retrofitting such equipment to use flammable refrigerants presents additional risks not adequately addressed by this standard. This position is widely supported by the comments as described below.

#### c. Warning Labels

The following markings, or the equivalent, must be provided in letters no less than 6.4 mm ( $\frac{1}{4}$  inch) high and must be permanent:

i. On the outside of the air conditioning equipment: “WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing”

ii. On the outside of the air conditioning equipment: “WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used”

iii. On the inside of the air conditioning equipment near the compressor: “WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner’s Guide Before Attempting to Service This Product. All Safety Precautions Must be Followed”

iv. For any equipment pre-charged at the factory, on the equipment packaging: “WARNING—Risk of Fire

due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations”

v. On the indoor unit<sup>22</sup> near the nameplate:

(a) At the top of the marking: “Minimum Installation height, X m (W ft)”. This marking is only required if the similar marking is required by the UL Standard. The terms “X” and “W” shall be replaced by the numeric height as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the height in Inch-Pound units is placed in parentheses and the word “and” has been replaced by the opening parenthesis.

(b) Immediately below the warning label indicated in (a) above or at the top of the marking if (a) is not required: “Minimum room area (operating or storage), Y m<sup>2</sup> (Z ft<sup>2</sup>)”. The terms “Y” and “Z” shall be replaced by the numeric area as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the area in Inch-Pound units is placed in parentheses and the word “and” has been replaced by the opening parenthesis.

vi. For non-fixed equipment, including portable air conditioners, window air conditioners, packaged terminal air conditioners and packaged terminal heat pumps, on the outside of the product: “WARNING—Risk of Fire or Explosion—Store in a well-ventilated room without continuously operating flames or other potential ignition.”

vii. For fixed equipment, including rooftop units and split air conditioners, “WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions.”

The text of these labels is nearly identical to those in UL 60335-2-40, with slight modifications noted above. We highlight this difference above and repeat those labels whose text we have not changed here to emphasize the importance of including such labels and to provide the labels we are requiring in a single place. We find labels as one of two marking conventions (the other being red markings as explained in section II.B.1.d below) that combined will provide adequate warning of the

presence of a flammable refrigerant to those who may come into contact with it in potentially dangerous quantities and situations (*i.e.*, in concentrations above the LFL and in the presence of an ignition source).

EPA believes that it would be difficult to see warning labels with the minimum lettering height requirement of  $\frac{1}{8}$  inch provided in the UL Standard. Therefore, consistent with the use conditions in our previous rules listing flammable refrigerants, including HFC-32, acceptable subject of use conditions (*e.g.*, 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), the minimum height for lettering must be  $\frac{1}{4}$  inch as opposed to  $\frac{1}{8}$  inch, which will make it easier for technicians, consumers, retail storeowners, and emergency first responders to view the warning labels.

#### d. Markings

Equipment must have distinguishing red (Pantone® Matching System (PMS) #185 or RAL 3020) color-coded hoses and piping to indicate use of a flammable refrigerant. The air conditioning equipment shall have marked service ports, pipes, hoses and other devices through which the equipment’s refrigerant circuit is serviced. Markings shall extend at least 1 inch (25mm) and shall be replaced if removed. As noted in comments below, there were some questions of what this use condition requires; EPA clarifies this requirement as follows. For equipment that contain field-constructed parts (*i.e.*, finished at the site where the installation occurs), the connections to be finished in the field shall be marked red as described. For equipment with service ports, the service ports and/or piping extending therefrom shall be marked red as described. We note equipment might fit both categories above and hence must have both sets of red markings. For self-contained equipment without service ports, the location the manufacturer recommends as the place to access the refrigerant circuit (*e.g.*, process tube) shall be marked red as described.

<sup>22</sup> This labeling is required for split systems and self-contained equipment alike.



The reason to include red markings in combination with warning labels is noted above. EPA finds that when combined with labels, such markings will provide adequate warning of the presence of a flammable refrigerant to those who may come into contact with it in potentially dangerous quantities and situations (*i.e.*, in concentrations above the LFL and in the presence of an ignition source). As in previous rulemakings on flammable refrigerants cited above, we conclude that the red markings will provide an additional warning for technicians, consumers, retail storeowners, first responders, and those disposing the appliance to understand that a flammable refrigerant is used and appropriate caution should be taken. Furthermore, the red markings, as with symbols required by the UL Standard, provide a more universally-understood warning demarcation, which would be useful for those who may not be able to read or understand the English language labels.

The regulatory text of our decisions for the end-uses discussed above appears in tables at the end of this document. This text will be codified in appendix W of 40 CFR part 82 subpart G. EPA notes that there may be other legal obligations pertaining to the manufacture, use, handling, and disposal of the refrigerants that are not included in the information listed in the tables (*e.g.*, the CAA section 608(c)(2) prohibition on knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration, or Department of Transportation requirements for transport of flammable gases). Flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260–270).

## 2. Background on Residential and Light Commercial Air Conditioning and Heat Pumps (New)

The residential and light commercial air conditioning and heat pumps end-use includes equipment for cooling air in individual rooms, in single-family homes, and in small commercial buildings. This end-use includes both self-contained and split systems. For further background on this end-use, see the 2020 NPRM (85 FR 35881–35882).

## 3. What are the ASHRAE classifications for refrigerant flammability?

The six refrigerants that we are listing in this final rule for residential and light commercial AC and heat pumps are all assigned a safety group classification of “A2L” by The American National Standards Institute/American Society of Heating, Refrigerating and Air Conditioning Engineers (ANSI/ASHRAE) Standard 34–2019. ASHRAE classifies Class A refrigerants as refrigerants for which toxicity has not been identified at concentrations less than or equal to 400 ppm by volume, based on data used to determine threshold limit value-time-weighted average (TLV–TWA) or consistent indices. The flammability classification “2L” is given to refrigerants that, when tested, exhibit flame propagation, have a heat of combustion less than 19,000 kJ/kg (8,169 BTU/lb), have an LFL greater than 0.10 kg/m<sup>3</sup>, and have a maximum burning velocity of 10 cm/s or lower when tested in dry air at 73.4 °F (23.0 °C) and 14.7 psia (101.3 kPa). ASHRAE Standard 34–2019 requires testing at that temperature to determine if flame propagation exists and if not, tests at 140 °F (60 °C) are conducted to determine the refrigerant flammability classification. For further information on the ASHRAE safety group classifications, see the 2020 NPRM at 85 FR 35882.

## 4. What are R–32, R–452B, R–454A, R–454B, R–454C and R–457A and how do they compare to other refrigerants in the same end-use?

R–32 is a refrigerant with lower flammability, and the five refrigerant blends are refrigerant blends with lower flammability, all with an ASHRAE safety classification of A2L. The respective CAS Reg. Nos. of R–32 and the components of the five refrigerant blends are listed below.

R–32 is also known as HFC–32 or difluoromethane (CAS Reg. No. 75–10–5). EPA previously listed R–32 as an acceptable refrigerant for some types of residential and light commercial air conditioning and heat pumps end-use categories, specifically self-contained room air conditioners such as window units, packaged terminal air conditioners (PTACs), packaged terminal heat pumps (PTHPs), portable room AC, and wall-mounted AC (80 FR 19454, April 10, 2015). As noted in the 2020 NPRM, this action adds a listing for this substitute to include rooftop units, ground-source heat pump (GSHPs) and water-source heat pump (WSHPs), which are typically self-contained but not sized for a single

room, and various types of split systems.

R–452B, also known by the trade name “Opteon™ XL 55,” and also known as “Solstice® L41y,” is a blend with lower flammability consisting of 67 percent by weight HFC–32; seven percent HFC–125, also known as 1,1,1,2,2-pentafluoroethane (CAS Reg. No. 354–33–6); and 26 percent HFO–1234yf, also known as 2,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 754–12–1). R–454A, also known by the trade name “Opteon™ XL 40,” is a blend with lower flammability consisting of 35 percent HFC–32 and 65 percent HFO–1234yf. R–454B, also known by the trade names “Opteon™ XL 41” and “Puron Advance™,” is a blend with lower flammability consisting of 68.9 percent HFC–32 and 31.1 percent HFO–1234yf. R–454C, also known by the trade name “Opteon™ XL 20,” is a blend with lower flammability consisting of 21.5 percent HFC–32 and 78.5 percent HFO–1234yf. R–457A, also known by the trade name “Forane® 457A,” is a blend with lower flammability consisting of 70 percent HFO–1234yf, 18 percent HFC–32, and 12 percent HFC–152a, which is also known as ethane, 1,1-difluoro (CAS Reg. No. 75–37–6).

Redacted submissions and supporting documentation for R–32 and the five refrigerant blends are provided in the docket for this rule (EPA–HQ–OAR–2019–0698) at <https://www.regulations.gov>. EPA performed an assessment to examine the health and environmental risks of each of these substitutes, and these assessments are also available in the docket for this rule.<sup>23 24 25 26 27 28</sup>

*Environmental information:* R–32, R–452B, R–454A, R–454B, R–454C and R–457A have ODPs of zero.

<sup>23</sup> ICF, 2020d. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: HFC–32.

<sup>24</sup> ICF, 2020e. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–452B.

<sup>25</sup> ICF, 2020f. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454A.

<sup>26</sup> ICF, 2020g. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454B.

<sup>27</sup> ICF, 2020h. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–454C.

<sup>28</sup> ICF, 2020i. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R–457A.

R-32 has a GWP of 675. The five refrigerant blends are made up of the components HFC-32, HFC-125, HFO-1234yf and HFC-152a, which have GWPs of 675, 3,500, less than one to four, and 124, respectively.<sup>29 30 31 32</sup> If these values are weighted by mass percentage, then R-452B, R-454A, R-454B, R-454C and R-457A have GWPs of about 700, 240, 470, 150 and 140 respectively.

HFC-32 (CAS Reg. No. 75-10-5), HFC-125 (CAS Reg. No. 354-33-6), HFC-152a (CAS Reg. No. 75-37-6), and HFO-1234yf (CAS Reg. No. 754-12-1)—the components of the five refrigerant blends—are excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS.

Knowingly venting or otherwise knowingly releasing or disposing of these refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration is prohibited as provided in section 608(c)(2) of the CAA and EPA's regulations at 40 CFR 82.154(a)(1).

**Flammability information:** R-32 and the five refrigerant blends are designated under ASHRAE flammability classification of 2L, which is a classification for refrigerants also referred to as "lower flammability" (*i.e.*, lower than those designated as 2 or 3) in ASHRAE Standard 34-2019. See section 3 above for information on ASHRAE classifications.

**Toxicity and exposure data:** Potential health effects of exposure to these

substitutes include drowsiness or dizziness. The substitutes may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, the substitutes may cause irregular heartbeat. The substitutes could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

ASHRAE Standard 34-2019 classifies HFC-32 and the five refrigerant blends under the toxicity classification A ("lower toxicity"). The AIHA has established WEELs of 1,000 ppm as an 8-hr TWA for HFC-32 and the component refrigerants HFC-125 and HFC-152a; the AIHA has established a WEEL of 500 ppm as an 8-hr TWA for HFO-1234yf. The manufacturer of R-452B, R-454A, R-454B, and R-454C recommends AELs, respectively, of 874, 690, 854, and 615 ppm on an 8-hr TWA for these blends. EPA anticipates that users will be able to meet the AIHA WEEL and manufacturers' AELs and address potential health risks by following requirements and recommendations in the manufacturers' SDS, in ASHRAE Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

**Comparison to other substitutes in this end-use:** R-32 and the five refrigerant blends all have an ODP of zero, the same as other acceptable substitutes in this end-use.

R-32 and the five refrigerant blends' GWPs, ranging from about 140 to about 700, are higher than some of the acceptable substitutes for residential and light commercial air conditioning and heat pumps, including ammonia absorption, R-290, and R-441A with GWPs ranging from zero to three. R-32 and the five refrigerant blends' GWPs are lower than some of the acceptable substitutes for residential and light commercial air conditioning and heat pumps, such as HFC-134a, R-410A, and R-507A with GWPs of 1,430, 2,087.5 and 3,985 respectively.

Information regarding the toxicity of other available alternatives are provided in the listing decisions previously made (see <https://www.epa.gov/snap/substitutes-residential-and-light-commercial-air-conditioning-and-heat-pumps>). Toxicity risks for R-32 and the five refrigerant blends are comparable to or lower than toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with ASHRAE 15 and other industry standards, recommendations in the manufacturers' SDS, and other safety precautions

common in the refrigeration and air conditioning industry.

Although flammability risk may be greater than flammability risks of other available substitutes in the same end-use, this risk can be minimized by use consistent with ASHRAE 15 and other industry standards such as UL 60335-2-40, recommendations in the manufacturers' SDS, and other safety precautions common in the refrigeration and air conditioning industry. The use conditions reduce the potential risk associated with the flammability of these alternatives so that they will not pose significantly greater risk than other acceptable substitutes in this end-use.

5. Why is EPA finalizing these specific use conditions?

As finalized, the use conditions in this SNAP listing include: Use only in new equipment, which can be specifically designed for the refrigerant; use consistent with the UL 60335-2-40 industry standard, including testing, charge sizes, ventilation, usage space requirements, and certain hazard warnings and markings; and warnings and markings on equipment to inform consumers and technicians of potential flammability hazards. Each of these is described in greater detail below. The listings with specific use conditions are intended to allow for the use of these refrigerants with lower flammability in a manner that will ensure they do not pose a greater overall risk to human health and the environment than other substitutes in this end-use.

a. New Equipment Only; Not Intended for Use as a Retrofit Alternative

Under this listing, these refrigerants may be used under the SNAP program only in new equipment<sup>33</sup> designed to address concerns unique to flammable refrigerants—*i.e.*, this listing does not allow these substitutes to be used as a conversion or "retrofit" refrigerant for existing equipment. These flammable refrigerants were not submitted under the SNAP program to be used in retrofitted equipment, and no information was provided on how to address hazards if these flammable refrigerants were to be used in equipment that was designed for non-flammable refrigerants.

b. UL Standard

Under this listing, the flammable refrigerants may be used under the SNAP program only in equipment that meets all requirements in UL Standard

<sup>33</sup> This is intended to mean a completely new refrigeration circuit containing a new compressor, evaporator, and condenser.

<sup>29</sup> Unless otherwise specified, GWP values are from IPCC (2007) Climate Change 2007: *The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.). Cambridge University Press. Cambridge, United Kingdom 996 pp.

<sup>30</sup> Nielsen et al., 2007. Nielsen, O.J., Javadi, M.S., Sulbaek Andersen, M.P., Hurley, M.D., Wallington, T.J., Singh, R. 2007. Atmospheric chemistry of CF<sub>3</sub>CF=CH<sub>2</sub>: Kinetics and mechanisms of gas-phase reactions with Cl atoms, OH radicals, and O<sub>3</sub>. *Chemical Physics Letters* 439, 18-22. Available online at [http://www.cogci.dk/network/OJN\\_174\\_CF3CF=CH2.pdf](http://www.cogci.dk/network/OJN_174_CF3CF=CH2.pdf).

<sup>31</sup> Hodnebrog Ø. et al., 2013. Hodnebrog Ø., Etmann, M., Fuglestad, J.S., Marston, G., Myhre, G., Nielsen, C.J., Shine, K.P., Wallington, T.J.: Global Warming Potentials and Radiative Efficiencies of Halocarbons and Related Compounds: A Comprehensive Review, *Reviews of Geophysics*, 51, 300-378, doi:10.1002/rog.20013, 2013.

<sup>32</sup> WMO (World Meteorological Organization), Scientific Assessment of Ozone Depletion: 2018, Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: <https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf>. In this action, the 100-year GWP values are used.

60335–2–40, Edition 3 for air conditioning equipment. This UL Standard indicates that refrigerant charges greater than a specific amount (called “m<sub>3</sub>” in the UL Standard and based on the refrigerant’s LFL) are beyond its scope and that national standards might apply, such as for instance ANSI/ASHRAE 15–2019.

Those participating in the UL 60335–2–40 consensus standards process (hereafter “UL”) have tested equipment for flammability risk in residential applications and evaluated the relevant scientific studies. Further, UL has developed safety standards including requirements for construction and system design, for markings, and for performance tests concerning refrigerant leakage, ignition of switching components, surface temperature of parts, and component strength after being scratched. Certain aspects of system construction and design, including charge size, ventilation, and installation space, and greater detail on markings, are discussed further below in this section. The UL Standard was developed in an open and consensus-based approach, with the assistance of experts in the air conditioning industry as well as experts involved in assessing the safety of products. While similar standards exist from other bodies, such as the IEC, we are relying on a specific UL standard because it is the most applicable and recognized by the U.S. market. This approach is the same as that in previous rules on flammable refrigerants (e.g. 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015).

A description of the requirements of UL 60335–2–40 as they affect the refrigerants and end-use addressed in this section of our final rule follows. This description is offered for information only and does not provide a complete review of the requirements in this standard.

Under this SNAP listing, the refrigerant charge size for residential and light commercial air conditioning and heat pumps is limited in accordance with the UL Standard. EPA is requiring as a use condition adherence to the standard; hence, charge size limits for each of the refrigerants by equipment type in accordance with the UL Standard apply to this SNAP listing. Annex GG of the standard provides the charge limits, air circulation requirements and requirements for secondary circuits. The standard specifies requirements for installation space of an appliance (i.e., room floor area) and/or air circulation or other requirements which are determined according to the refrigerant charge used in the appliance, the

installation location and the type of air circulation of the location or of the appliance. In some applications the introduction of outdoor air into a space, also known as ventilation, is required. Within Annex GG, Table GG.1 describes how to apply the requirements to allow for safe use of flammable refrigerants. The UL Standard contains provisions for safety mitigation. These mitigation requirements were developed to ensure the safe use of flammable refrigerants over a range of appliances. In general, as larger charge sizes are used, more stringent mitigation requirements are required. In certain applications refrigerant detection systems (as described in Annex LL, *Refrigerant detection systems for A2L refrigerants*) must be factory installed as part of the equipment. Likewise, in some cases refrigerant sensors (as described in Annex MM, *Refrigerant sensor location confirmation tests*) are required. The standard does not require audible alarms in most cases and instead relies on sensors/detectors to initiate a mitigation strategy such as activating “fan operation and air circulation or ventilation” if refrigerant concentrations are found to exceed certain thresholds. Where mechanical ventilation (i.e., fans) is required in accordance with Annex GG or Annex 101.DVG, it must be initiated by a separate refrigerant detection system either as part of the appliance or installed separately. In a room with no mechanical ventilation, Annex GG provides requirements for openings to rooms based on several factors, including the charge size and the room area. The minimum opening is intended to be sufficient so that natural ventilation would reduce the risk of using a flammable refrigerant. The standard also includes specific requirements for split system appliances using A2L refrigerants covering construction, instruction manuals, and allowable charge sizes, mechanical ventilation, safety alarms, and, for variable refrigerant flow (VRF) systems, shut off valves.

In addition to Annex GG and Table GG.1 mentioned above, UL 60335–2–40 has a requirement for the maximum charge for an appliance using an A2L refrigerant. If the appliance is a portable appliance, a non-fixed factory-sealed single package, or a cord-connected appliance which may be periodically or seasonally relocated (excluding servicing) by the end user, there are no additional requirements for room area and air circulation if the charge is sufficiently small—under three times the LFL; however risk mitigation for labeling, ignition source controls and

other features are required. Additional requirements exist for charge sizes exceeding three times the LFL.

#### i. Incorporation by Reference

Through this action, EPA is incorporating by reference the 2019 UL Standard 60335–2–40, 3rd Edition, which establishes requirements for the evaluation of electrical air conditioners, heat pumps, and dehumidifiers, and safe use of flammable refrigerants. The standard is discussed in greater detail elsewhere in this preamble. This approach is the same as that used to incorporate the 8th edition of UL Standard 484 in our previous rule in which we listed R–32 as acceptable, subject to use conditions, for use in self-contained room air conditioners for residential and light commercial AC (80 FR 19454, April 10, 2015).

The 2019 UL Standard 60335–2–40, 3rd Edition, is available at <https://www.shopulstandards.com/ProductDetail.aspx?UniqueKey=36463>, and for purchase by mail at: Comm 2000, 151 Eastern Avenue, Bensenville, IL 60106; Email: [orders@shopulstandards.com](mailto:orders@shopulstandards.com); Telephone: 1–888–853–3503 in the U.S. or Canada (other countries dial 1–415–352–2178); internet address: <https://www.shopulstandards.com>. The cost of the 2019 UL Standard 60335–2–40, 3rd Edition is \$440 for an electronic copy and \$550 for hardcopy. UL also offers a subscription service to the Standards Certification Customer Library that allows unlimited access to their standards and related documents. The cost of obtaining this standard is not a significant financial burden for equipment manufacturers and purchase is not necessary for those selling, installing, and servicing the equipment. Therefore, EPA concludes that the UL standard being incorporated by reference is reasonably available.

#### c. Labeling

As a use condition, EPA is requiring labeling of residential and light commercial air conditioning and heat pump equipment. EPA is requiring the warning labels on the equipment contain letters at least ¼ inch high. The label must be permanently affixed to the equipment. Warning label language requirements are described in section II.B.1.c of this rule as well as in the regulatory text. The warning label language is similar to or exactly the same as that required in UL 60335–2–40.

#### d. Markings

Our understanding of the UL Standard is that red markings, similar to

those EPA has applied as use conditions in past actions for flammable refrigerants (76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), are required by the UL Standard for A2 and A3 refrigerants but not A2L refrigerants. The final use condition requires that such markings apply to these A2L refrigerants as well to establish a common, familiar and standard means of identifying the use of a flammable refrigerant.

These red markings will help technicians immediately identify the use of a flammable refrigerant, thereby potentially reducing the risk of using sparking equipment or otherwise having an ignition source nearby. The AC and refrigeration industry currently uses red-colored hoses and piping as means for identifying the use of a flammable refrigerant based on previous SNAP listings. Likewise, distinguishing coloring has been used elsewhere to indicate an unusual and potentially dangerous situation, for example in the use of orange-insulated wires in hybrid electric vehicles. Currently in SNAP listings, color-coded hoses or pipes must be used for ethane, HFC-32, isobutane, propane, or R-441A in certain types of equipment. All such SNAP listings indicate that the tubing, hoses, etc. must be colored red PMS #185 or RAL 3020 to match the red band displayed on the container of flammable refrigerants under the AHRI Guideline N, "2016 Guideline for Assignment of Refrigerant Container Colors." EPA is requiring red markings in this SNAP final action to ensure that there is adequate notice for technicians and others that a flammable refrigerant is being used within a particular piece of equipment or appliance. These requirements are also intended to provide adequate notification of the presence of flammable refrigerants for personnel disposing of appliances containing flammable refrigerants. Consistent with a previous SNAP rule, one mechanism to distinguish hoses and pipes is to add a colored plastic sleeve or cap to the service tube. (80 FR 19465, April 10, 2015). The colored plastic sleeve or cap would have to be forcibly removed in order to access the service tube. Likewise, red tape adhered to or around the tube would meet the intent of this use condition. These types of red markings would signal to the technician that the refrigeration circuit that she/he was about to access contained a flammable refrigerant, even if all warning labels were somehow removed or were illegible or not understood (e.g., for non-English speakers), and would provide similar notification to

consumers, retail store owners, building owners and operators, first responders, and those disposing the appliance. This sleeve or other marking would be of the same red color (PMS #185 or RAL 3020) and could also be boldly marked with a graphic to indicate the refrigerant was flammable. This could be a cost-effective alternative to painting or dyeing the hose or pipe.

In this SNAP listing, EPA is requiring the use of color-coded service ports, hoses or piping as a way for technicians and others to recognize that a flammable refrigerant is used in the equipment. This will be in addition to the use of warning labels discussed above. EPA believes having two such warning methods is reasonable and consistent with other general industry practices. This approach is the same as that adopted in our previous rules on flammable refrigerants (e.g., 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015).

#### 6. What additional information is EPA including in these listings?

EPA is including recommendations, found in the "Further information" column of the regulatory text at the end of this document, to inform personnel of other practices to protect them from the risks of using flammable refrigerants. Similar to our previous listing of flammable refrigerants for this end-use (80 FR 19454, April 10, 2015), EPA is including information on the OSHA requirements at 29 CFR part 1910, proper ventilation, personal protective equipment, fire extinguishers, use of spark-proof tools and equipment designed for flammable refrigerants, and training.

Since this additional information is not part of the regulatory decision, these statements are not binding for the use of the substitutes under the SNAP program. However, the information so listed may be binding under other regulatory programs (e.g., worker protection regulations promulgated by OSHA). The "Further information" identified in the listing does not necessarily include all other legal obligations pertaining to the use of the substitutes. While the items listed would not be legally binding under the SNAP program, EPA encourages users of substitutes to apply all statements in the "Further information" column in their use of these substitutes. In many instances, the information simply refers to sound operating practices that have already been identified in existing industry and/or building codes or standards. Thus, many of the statements, if adopted, would not result

in the user making significant changes in existing operating practices.

EPA notes that Annex HH of UL 60335-2-40, *Competence of service personnel*, provides guidelines for service personnel to ensure they receive training specifically to address potential risks of servicing equipment using flammable refrigerants. Annex HH provides recommendations that such training cover several aspects relevant to flammable refrigerants including recognition of ignition sources, information about refrigerant detectors, and other safety concepts. The training information recommended in Annex HH would address the proper working procedures for equipment commissioning, maintenance, repair, decommissioning and disposal. The Agency notes that this section of the UL Standard is described as informational, rather than "normative," i.e., it is intended to provide information but not to be an absolute requirement under the UL standard. Because Annex HH is informative, rather than normative, it is not a requirement of the UL Standard and following it is not required under the use conditions finalized in this action. Nonetheless, EPA is providing as "Further information" some information on training, including a recommendation that personnel follow Annex HH.

#### 7. How is EPA responding to comments on residential and light commercial air conditioning and heat pumps?

EPA received several comments from organizations with various interests in residential and light commercial AC. Most commenters supported the proposed listing decision in general. Major topics raised by commenters included the proposed use conditions, industry standards, and training for technicians. Other comments unrelated to these listings and beyond the scope of this final action are addressed in section III below.

Commenters included AHRI, Air Conditioning Contractors of America (ACCA), the Alliance, and HARDI, four industry organizations; Chemours and Honeywell, two chemical producers; Carrier, Daikin, Johnson Controls, Lennox International Inc., the Sporlan division of Parker Hannifin Corporation (Sporlan), Rheem Manufacturing Company, and Trane Technologies (Trane), seven equipment manufacturers; and two environmental organizations, NRDC and EIA.

We have grouped comments together and responded to the issues raised by the comments in the sections that follow.

a. Substitutes and End-Use Proposed

*Comment:* Several commenters voiced general support for the proposed listing of HFC–32, R–452A, R–454A, R–454B, R–454C, and R–457A as acceptable subject to use conditions in residential and light commercial air conditioning and heat pumps. Chemours likewise supported the proposal. Daikin voiced strong support and encouraged EPA to approve HFC–32 quickly, noting that “[o]ver 100 million R–32 split system air conditioners have been sold since 2012” and provided a list showcasing their and other manufactures’ implementation of air conditioning products using A2L refrigerants in other countries. HARDI supported these listings as “one part of a larger process in the industry’s effort to phase down older refrigerants.”

*Response:* EPA acknowledges these commenters’ general support for this proposed listing and appreciates the additional information provided by Daikin on the use of HFC–32. We add to that information that it has been reported that products using HFC–32 are operating in over 90 countries.<sup>34</sup> After considering all the public comments on this proposal, we are finalizing this portion of the rule as proposed with only a few modifications discussed elsewhere in this final rule.

b. Clarifications

*Comment:* AHRI suggested that rather than “mildly flammable refrigerants” EPA use the term “refrigerants with lower flammability” to remain consistent with ASHRAE classifications.

*Response:* EPA acknowledges this correction and has used the “lower flammability” description for the A2L refrigerants in the preamble to this final rule. In the “Further information” column of the regulatory text in this final rule, we have used the term “Flammable” to replace the term “Mildly flammable” that was contained in the 2020 NPRM.

*Comment:* AHRI pointed out that EPA indicated class 2L flammability is determined based on testing at 73.4 °F (23.0 °C). They noted that ASHRAE Standard 34–2019 requires testing at that temperature to determine if flame propagation exists and if not, tests at 140 °F (60 °C) are conducted to determine the refrigerant flammability classification.

*Response:* EPA acknowledges this clarification, which is incorporated in

the description of the ASHRAE standard testing procedures to determine flammability classification in section II.B.3 above.

*Comment:* AHRI provided additional detail on requirements contained in UL 60335–2–40 and stated that some of the summary information EPA provided (85 FR 35884–34885, June 12, 2020) may be taken out of context or be incorrect. For instance, they stated alarms might not be required for most systems and if refrigerant concentrations are found to exceed certain thresholds a mitigation strategy such as “fan operation and air circulation or ventilation” would be activated; shut-off valves are only an option for VRF systems; connected space requirements exist for duct-free equipment but are not required for ducted systems with sensors/detectors; mitigation requirements for labeling, ignition source controls, and other features are required for portable appliances with charge sizes less than three times the LFL; that similar requirements exist for fixed appliances where the charge is less than six times the LFL; that detectors are required to be factory installed, qualified and listed with the product for equipment above a charge size calculated per the standard; outdoor air ventilation is required “[o]nly in a few cases;” and while Annex HH is informative as EPA stated in the proposal, installation and service instructions are required by the UL standard and that these instructions would tailor Annex HH recommendations to the specific product. Carrier pointed out that Annex DD of the standard, while also informative, provides guidance on what information should be included in operation, service and installation manuals.

*Response:* EPA acknowledges these clarifications and we agree with the commenters’ more detailed characterization of certain aspects of UL Standard 60335–2–40. Our description in section II.B.5 above is offered only for informational purposes and is not meant to be an exhaustive summary of the standard. We emphasize that our use conditions are not reliant on that informational description but rather adherence to the actual requirements in the standard, which is incorporated by reference in this rulemaking.

*Comment:* AHRI stated that the proposed rule would require the use of spark-free equipment but states such tools “are not required for A2L refrigerants as these refrigerants have a high minimum ignition energy and sparks from tools and even some electrical devices is not a competent ignition source for an A2L refrigerant

due to their higher minimum ignition energies.”

*Response:* EPA noted in the proposal and reiterates in this final rule that the information on spark-free tools is included in the “Further information” column of the regulatory text and so is not a requirement of the rule. While we believe the use of spark-free tools provides additional risk mitigation for technicians working with flammable refrigerants, it was not proposed as a requirement and in this final rule we maintain the recommendation in the “Further information” column.

c. Use Conditions

i. Standards

*Comment:* Daikin supported EPA’s reliance on UL Standard 60335–2–40 as a basis for listing as acceptable with a use condition requiring adherence to that standard. NRDC, speaking in part about the UL Standard, stated that “EPA’s approach of reviewing, adjusting as needed, and then adopting these standards’ safe use requirements is sound.”

*Response:* EPA acknowledges Daikin’s and NRDC’s support for these aspects of the proposed listing. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.B, including the use conditions related to UL 60335–2–40.

*Comment:* Pointing to ASHRAE 15–2019 and the third edition of UL 60335–2–40, Chemours stated that the “[a]pplication and product standards for the end-uses referenced in the proposed rule are complete.” AHRI stated that industry has proposed requirements to reduce risk with A2L refrigerants in UL Standard 60335–2–40, ASHRAE Standard 15, and ASHRAE Standard 15.2. They provided some examples of these including air circulation as well as control of ignition sources and hot surface temperatures. Trane stated EPA’s use conditions should be linked to the current and future versions of ASHRAE 15 and ASHRAE 15.2, the latter of which they expected to be published in early 2021. They noted that these standards govern the installation, operation and maintenance of heating, ventilation, and air conditioning (HVAC) systems using A2L refrigerants in commercial and residential occupancies.

*Response:* EPA understands that other risk mitigation requirements have been proposed by the standards project committee for ASHRAE 15 and ASHRAE 15.2 and may be used by the HVAC industry, just as mitigation requirements have already been

<sup>34</sup> The Air Conditioning, Heating, and Refrigeration News, *An HVAC Technician’s Guide to R–32*, November 12, 2020. Available at [https://www.achrnews.com/articles/144053-an-hvac-technicians-guide-to-r-32?oly\\_enc\\_id=87311477670116C](https://www.achrnews.com/articles/144053-an-hvac-technicians-guide-to-r-32?oly_enc_id=87311477670116C).

included in the UL Standard that is adopted as a use condition in these final SNAP listings. Nonetheless, we find that these A2L refrigerants can be used safely provided the use conditions in this rule are followed, including compliance with the requirements of the UL Standard. In certain clauses, the UL Standard requires compliance with ASHRAE 15. We also note that other authorities might impose additional requirements, such as adoption of ASHRAE 15 and 15.2 in building codes, that would provide an additional layer of safety above what EPA is requiring. If in the future EPA were to determine that additional requirements are needed after this rulemaking to ensure safe use of the refrigerants in the residential and light commercial AC and heat pumps end-use, EPA could consider any relevant changes and if any revisions to this final rule should be proposed.

*Comment:* The Alliance noted that the standard proposed to be incorporated by reference, UL 60335–2–40, 3rd edition, will likely be updated again. Daikin noted the standard is a “continuous maintenance standard” supporting reference to the current edition. AHRI also pointed out that “new and updated standards will become more important as standards sunset in the coming years.” The Alliance expected the fourth edition “soon,” and forecasted that most products manufactured to this standard with the six A2L refrigerants would likely be certified to that fourth edition. They asked that “the UL 60355–2–40 [sic] standard update to include refrigerants that meet all the requirements listed in the fourth edition as well.” More generally they asked that “references to the standards be updated as new editions become available for the products listed in SNAP Rule 23 and other rules.” Carrier also suggested EPA align with new safety standards “as new editions and future revisions become available” and Chemours offered similar suggestions. Sporlan and Trane suggested the use condition reference the latest edition of the UL Standard, such that the reference remains up to date. Sporlan suggested “this use condition be modified to reference the latest released edition of this same standard, instead of tying Rule 23 exclusively to the 3rd Edition.” Trane noted that future editions of the UL Standard are already underway and predicted the fourth edition would be complete within two years (*i.e.*, by July 27, 2022). Honeywell also supported referencing a 4th edition and indicated that the process for writing such would start in August 2020 and expected completion in 2021. Honeywell asked

EPA to wait until the 4th edition is published before finalizing these listings of the A2L refrigerants and noted that the 3rd edition “does not cover mitigation measures for external fires caused by refrigerant leaks.” AHRI also pointed out that there is an ongoing effort to harmonize the relevant safety standards and recommended that EPA update references to requirements for compliance with product safety standards as new editions and revisions become available. Referencing both the third and fourth edition of UL 60335–2–40 as well as ASHRAE 15–2019 and the proposed ASHRAE 15.2, Johnson Controls called for the acceptability listing of these A2L refrigerants to be “contingent upon the completion and harmonization of the governing UL and ASHRAE standards for the safe design and application of stationary air conditioning.” Honeywell made a similar point, referencing ASHRAE Standards 15 and 15.2, and suggested that these A2L listings be delayed until this harmonization process was complete.

*Response:* EPA acknowledges the information on further developments in the UL 60335–2–40 standard and ASHRAE standards processes. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.B. EPA is incorporating by reference the 3rd edition of the UL standard (the existing version of the standard). As addressed below, we conclude, and several commenters agree, that this version adequately addresses the use of these A2L refrigerants in the equipment proposed.

As we noted above, in certain cases the UL Standard refers to ASHRAE 15–2019 for compliance. We are not, however, providing a use condition based on one or more future editions of this standard, nor do we feel it necessary or appropriate to rely on future standards and harmonization efforts. Not only does EPA not know exactly what these future standards may entail, those commenting on the proposed rule have not had the opportunity to review those updates, as they have not yet been finalized. Similarly, we do not find it necessary or appropriate to wait for such actions to be finalized before taking this action. The third edition of the UL Standard included extensive revisions specifically to address flammability risks of A2L refrigerants and reach industry-wide consensus. We further note that Chemours’ comments on the 2020 NPRM called finalization of this rule “critical” and “timely” and stated that with this final rule, the HVAC

“industry is now well prepared to take this important step forward” in the use of lower-GWP—and lower overall risk to human health and the environment—refrigerants in this end-use. If and when a 4th edition of the UL Standard is released, EPA can consider any relevant changes and if any revisions to this final rule should be proposed.

Further, as mentioned by AHRI and Daikin, the UL standards are under continuous maintenance—as are ASHRAE Standards 15 and 15.2—and hence may change again even after the mentioned editions are published. Nonetheless, most commenters supported moving forward with the rule using the third edition of the UL Standard. Daikin, for instance, “endorses EPA’s determination that this consensus safety standard adequately protects against the reasonably foreseeable risks associated with the use of R–32 in the applications being considered.” Chemours added that “[a]pplication and product standards for the end-uses referenced in the proposed rule are complete” and that “these updated standards sufficiently address the risks associated with the use of A2L solutions.” EPA concludes that reliance on the current UL Standard and our other use conditions allows applicable products to be used safely.

Regarding Honeywell’s comment on external fires, we note that a leak, even of a flammable refrigerant, does not “cause” a fire. It would require an ignition source and a concentration of the refrigerant higher than the lower flammability limit and below the higher flammability limit. Requirements in the UL Standard mitigate the risk of the equipment serving as an ignition source. As noted above, AHRI pointed out that “[f]or almost all applications air circulation will be sufficient to dilute the refrigerant concentration in the event of a catastrophic leak to below 25% of the LFL. Only in [a] rare case will ventilation be used to introduce outside air.” Further, the industry is actively studying the behavior of A2L refrigerants (presuming a leak does occur) in a structural fire. Should the results of this research or other information lead in the future EPA to determine that additional requirements are needed after this rulemaking to ensure safe use of the refrigerants in the residential and light commercial AC and heat pumps end-use, EPA could consider any relevant changes and if any revisions to this final rule should be proposed.

We understand that the Alliance is asking EPA to modify the use condition so that it requires adherence to the fourth edition once the fourth edition

publishes, similar to suggestions from other commenters, and to also consider revising the listing beyond the six refrigerants in this rulemaking to others. If in the future an updated standard is published, or the harmonization with other standards is completed, EPA could consider any relevant changes and if any revisions to this final rule should be proposed. In a similar manner, and through the normal SNAP submission review, we can consider taking future action to list, or propose to list with use conditions, other refrigerants if we were to determine we had enough information to do so.

*Comment:* Honeywell predicted that ASHRAE Standard 15.2 would be published in late 2021 or early 2022 and then adopted into model building codes in 2024. They asked EPA to delay finalization of this rule listing of A2L refrigerants until these actions occurred. They stated that “[c]urrent model mechanical and fire codes prohibit mildly flammable refrigerants to be used in direct HVAC systems.”

*Response:* EPA has not participated in the revisions to the model codes discussed by Honeywell, and we find that these SNAP listings can be finalized before Honeywell’s prediction that a proposed standard would be adopted into such codes, consistent with how we have proceeded with other listings in past SNAP actions that could be affected by anticipated revisions to building codes. As noted both in the proposal and above in this final rule, however, information listed in the “Further information” column of the listings might refer to “sound operating practices that have already been identified in existing industry and/or building codes or standards.” (85 FR 35885, June 12, 2020). The listings in this final rule find certain refrigerants acceptable and establishes EPA’s use conditions, and do not require any particular entity to use these refrigerants. Should other requirements or standards also apply, such as building codes as Honeywell states, other authorities would be responsible for ensuring such requirements are addressed and enforced. We also note that some states are in the process of updating their building code requirements to allow for refrigerants with lower flammability (*e.g.*, 2Ls), which will address Honeywell’s concern that such codes “prohibit mildly flammable refrigerants.” Further, we are aware of the safe use of 2L refrigerants in the end-uses covered by this rule in other countries. While other states’ building codes might currently prohibit use of these refrigerants, the adoption by some states and the safe use

demonstrated gives support to listing these now. Further, we note that regardless of the status of building codes, alternative means and measures exist under which interested parties may present to the Authority Having Jurisdiction (AHJ) evidence to demonstrate a similar level of safety as provided under the existing building codes and receive an exception to use an A2L refrigerant. For these reasons, the Agency determines it is appropriate to finalize this final rule now. If and when building codes are updated as indicated by the comment, EPA can consider any relevant changes and if any revisions to this final rule should be proposed.

*Comment:* Rheem asked EPA to “[p]rovide revised guidance for charge limits for R-32 refrigerant, currently defined in SNAP Notice 25 and based on unit capacity, to be governed by the safety standards.”

*Response:* We believe Rheem is referring to SNAP Rule 19 (80 FR 19454, April 10, 2015) wherein EPA found HFC-32 acceptable, subject to use conditions, for self-contained room air conditioners. One use condition referenced parts of the August 3rd, 2012 version of UL Standard 484, Edition 8 and another set charge size limits based on the type of equipment (window unit, portable room AC, etc.) and cooling capacity. In the proposal for this final rule we noted that we were not proposing to revisit or modify the existing requirements from SNAP Rule 19, and consistent with that proposal, we are not finalizing changes to these requirements. EPA understands that the standard we relied on in Rule 19 might “sunset” in the future. Therefore, we will continue to evaluate the market for the equipment addressed in that rule, including HFC-32 in self-contained room air conditioners, and whether to establish new or revised use conditions that reference UL 60335-2-40. If in the future we wish to revise the existing requirements for HFC-32 self-contained room air conditioners, EPA could consider any relevant changes and if any revisions to this final rule, or SNAP Rule 19, should be proposed.

#### ii. New Equipment

*Comment:* AHRI, Carrier, Daikin, EIA, Honeywell, Johnson Controls and Lennox strongly support the proposed use condition that these A2L refrigerants may only be used in new equipment and not retrofits. AHRI noted that “refrigerants from a higher ASHRAE flammability classification” should not be used to retrofit existing equipment; *i.e.*, these A2L lower flammability refrigerants should not be

used to retrofit systems using A1 (“no flame propagation”) refrigerants, such as R-410A. Carrier added that such a use condition continues EPA’s precedent from similar listings of flammable refrigerants that were only listed for new equipment.

*Response:* EPA acknowledges these commenters’ support of our proposed use condition that finds these refrigerants acceptable for new equipment and not for retrofits. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.B., including that use condition.

*Comment:* AHRI, Carrier, Chemours, Daikin, Johnson Controls, and Rheem sought clarification on footnote 33 in the proposed rule, which sought to distinguish a “new” system from a “retrofitted” system. AHRI noted that since the inception of the International Building Codes in the 1990s, nail strips have been required to be used to support existing piping within 1.5 inches of a wall when a new system is installed. AHRI also indicated that any “[e]xisting external piping must be pressure-tested, leak-checked and vacuum-checked per the safety standards during the installation process,” a point also noted by Johnson Controls. Daikin pointed to provisions in UL Standard 60335-2-40 that address situations where “partial units” (as defined in the Standard) are installed without new refrigerant tubing between indoor and outdoor components. They also noted that clause DD.3.1DV.2 of the UL Standard provides mandatory requirements, including strength test, leak tightness checks, and compliance with national and local codes, for field-installed refrigerant tubing and as such tubing meeting those conditions may be reused. Carrier stated that “[l]ine sets, however, have been safely re-used in the HVACR field for decades” and noted that equipment manufacturer installation instructions and standards, such as UL 60335-2-40 and ASHRAE 15, allow for reuse of line sets provided they meet requirements including “line sizing, as well as pressure and vacuum testing of the line sets to ensure they are free of leaks.” Chemours offered similar observations. Rheem asked that “external field-erected line sets” be excluded from the definition of a new unit, observing that replacement of these should be left to the AHJ such as a building code inspector. Carrier and Chemours offered alternative language for the footnote and suggested providing such guidance in appendix W of the proposed regulatory text where the listing is provided. On the other hand,



Honeywell states that the definition of “new system” should require the installation of new refrigerant piping, tubing or linesets and later stated that “the tubing must be replaced, or at least inspected and reinforced to meet proposed requirements under ASHRAE 15.2.” They said that existing tubing was not likely to meet minimum safety regulations. Trane said “[b]lasing the proposed use conditions on ASHRAE 15 and ASHRAE 15.2 incorporates appropriate piping guidance and avoids the potential of unnecessary and costly restrictions.”

*Response:* After consideration of these comments, EPA concludes that the use of existing piping that is consistent with the use conditions finalized—such as adherence to the UL 60335–2–40 Standard and the inclusion of markings and labels as required—and the safety protocols mentioned should not pose additional risk. We have clarified this in section II.B.5.a and likewise in the text of the corresponding footnote in section II.B.1.b of this final rule by not including “refrigerant tubing” in the description of new equipment in this final action. As such, existing piping does not need to be replaced for the equipment to be considered “new” while a new compressor, evaporator, and condenser are all required to be considered “new.” We believe this preamble text sufficiently indicates our intention and so have not included additional discussion in the regulatory text.

As noted by other comments, discussed elsewhere in this final rule, the UL Standard 60335–2–40, which is incorporated by reference through this rule, addresses the situations where existing tubing might be used when installing a new system using a refrigerant in this rule. Consistent with the use conditions established in this rule, EPA finds that this standard provides appropriate criteria by which an installer would decide when exiting tubing may be used or needs to be replaced. Accordingly, EPA concludes it is not necessary or appropriate to define a “new” system to require installation of new refrigerant piping, tubing or linesets. If the existing tubing and linesets do not meet existing regulations separate from the UL Standard and our other use conditions, *e.g.* applicable building codes, other regulations or other authorities may require installation of new refrigerant piping, tubing or linesets. EPA also does not find it appropriate to adopt “proposed requirements,” including those proposed in October for ASHRAE 15.2, as those have not been finalized and neither commenters nor EPA can know

the future content of a standard for certain until it is finalized.

*Comment:* Carrier brought up the possibility that an outdoor condensing unit using a non-flammable refrigerant (*e.g.*, HCFC–22 or R–410A) might illegally be replaced with one of the six refrigerants in the listings in this final rule. Carrier urged EPA to work with the industry concerning the replacement of all components, *e.g.* including the indoor unit, as these instances will exhibit “inspection and enforcement challenges.”

*Response:* EPA notes that the final listings of these six refrigerants require they be used in a new system, including the replacement of the indoor unit of an existing HCFC–22 or R–410A system when the corresponding outdoor unit is replaced. We support education and training across the industry to improve awareness of and compliance with the requirements of this final rule. EPA intends to continue to work with industry towards these goals.

*Comment:* Carrier and Chemours sought clarification where EPA stated in footnote 33 that the use condition for “new equipment” meant a “completely new circuit.” Chemours noted that a literal translation of that might be to require that an entire system be replaced, even if in the future a repair was being conducted on a system using one of the six A2L refrigerants in this final rule.

*Response:* EPA acknowledges Carrier’s and Chemours’ comments pointing out this potential misinterpretation of the use condition. Under the use conditions finalized in this rule, EPA intends that once systems using these A2L refrigerants are installed, technicians, using proper safety procedures, may service the equipment similarly to servicing current day equipment using A1 refrigerants. This intention to allow servicing and not strand equipment prematurely is consistent with prior SNAP decisions, as well as with approaches that we have taken under other provisions of Title VI of the CAA to achieve a smooth phaseout and transition to safer alternatives. Such service would include replacing components including the condensing unit, and other adjustments. In those cases where one of the heat exchangers needs replacing, EPA recommends that outdoor units and indoor units be properly matched, including for instance replacing a functioning indoor A2L evaporator unit if warranted when the original A2L outdoor unit is replaced with a higher-efficiency outdoor unit using that same A2L refrigerant.

iii. Labels

*Comment:* AHRI, the Alliance, Carrier, Chemours, Daikin, Johnson Controls, Lennox, and Rheem suggested that EPA rely on the labeling requirements found in UL 60335–2–40, including the font size requirement in the standard. Carrier held that the 1/8-inch font size specified in the standard is “easily readable” and further noted that “visual icons and flammability symbols” are required by the standard. Lennox felt this size, which is half the size required in other EPA listings (*e.g.*, 80 FR 19454, April 10, 2015), was justified given the refrigerants proposed have lower flammability (A2L) whereas the referenced listings were for higher flammability refrigerants (A3). Chemours stated that using a larger font “disproportionally emphasizes flammability versus other safety aspects including electrical or pressure requirements.” Rheem said that diverging from the UL Standard “adds unnecessary complexity” and Johnson Controls held that “[t]he introduction of new, unique requirements could lead to confusion in the field and thus increase safety risks.” EIA, on the other hand, “strongly supports the labelling requirements . . . outlined on the proposed rulemaking.”

*Response:* As in other regulations promulgated under CAA section 612, EPA concludes that the proposed labeling requirement to use 1/4-inch fonts provides for an easier-to-read label than the 1/8-inch fonts in the standard; hence, the large font size provides an extra layer of risk mitigation for technicians, consumers, retail store owners, building owners and operators, first responders, and those disposing of the equipment to readily understand the possibility that the equipment contains a flammable refrigerant. Accordingly, EPA is finalizing the larger text size as proposed.

The only differences to the actual text of the label between UL 60335–2–40 and the requirement proposed and finalized in this rule are to the label(s) on the indoor unit, where for instance the minimum installation height in meters (m) and feet (ft) is to be referred to in the format “X m (Y ft)” rather than “X m and Y ft” as in the UL Standard, with X and Y calculated per the standard (85 FR 35881, June 12, 2020). EPA believes the format is appropriate and would help avoid possible confusion if an installer were to interpret the label as called for in the UL Standard to mean X meters *plus* Y feet (*i.e.*, 4.28 times Y feet or 1.305 times X meters). Likewise, we proposed and are finalizing the same change in text

format for the minimum room area label.

*Comment:* AHRI and Daikin indicated EPA could in the future submit a proposed change to UL to modify the labeling requirements. AHRI also pointed out that there is an ongoing effort to harmonize the relevant safety standards and recommended that EPA update references to requirements for compliance with product safety standards as new editions and revisions become available. They also suggested EPA consider incorporating application standards such as ASHRAE 15 when this harmonization process is complete.

*Response:* As explained above, EPA finds that these A2L refrigerants can be used safely provided the use conditions in this final rule are followed, including compliance with the current (3rd edition) UL 60335–2–40. Accordingly, EPA is taking final action on the proposal without waiting for the harmonization process to be completed. EPA understands that it could submit a change proposal to UL and if in the future EPA were to determine that additional use conditions are needed after this rulemaking to ensure safe use of the refrigerants in the residential and light commercial AC and heat pumps end-use, EPA could consider any relevant changes and if any revisions to this final rule should be proposed, for instance by proposing to reference a revised standard and specific application standards. Given the time required to propose, discuss, and finalize any change to the UL Standard, EPA understands that such a revised UL standard would not have been finalized for this final rule, nor did we expect the harmonization effort to be complete. If and when a 4th edition of the UL Standard is released, EPA can consider any relevant changes and if any revisions to this final rule should be proposed.

*Comment:* Carrier stated that “[t]he consensus safety standard CSA/UL 60335–2–89 committee included representatives from fire service which concluded that the proposed label requirements replicated from UL/CSA 60335–2–40 in addition to label requirements for buildings in building codes were sufficient from their perspective.” Lennox made the same point, saying the committee that developed the CSA/UL 60335–2–89 standard “included representatives from fire services which concluded that the UL label requirements were sufficient.”

*Response:* EPA appreciates learning that fire service personnel were part of the consensus process for the 60335–2–89 standard but notes that this is a different UL standard from the one

addressed in this rule. Thus, any conclusions about the adequacy of the label requirements for that standard are not the same as a conclusion that the label requirements for the UL standard addressed in this final rule is sufficient, including the font size. For example, as the 60335–2–89 standard covers commercial refrigeration equipment, it is reasonable to assume that the fire service personnel were only evaluating the label requirements for the types of appliances covered by that standard, and not necessarily agreeing to the adequacy of those requirements for the equipment covered in this final rule, considering that much of the equipment in the residential and light commercial AC and heat pumps end-use has higher refrigerant charge sizes than the appliances covered in the 60335–2–89 standard. As described elsewhere in this action, we are concluding that the larger font size is appropriate under SNAP to reduce risks to technicians, consumers, retail store owners, building owners and operators, first responders, and those disposing the appliance, consistent with EPA’s approach in other prior SNAP rules.

*Comment:* Daikin stated that the UL Standard was drafted under a consensus process and requested that EPA’s proposed use conditions regarding labels be removed, allowing the standard to address any such requirements.

*Response:* EPA understands that this UL standard was drafted following consensus practices, as were standards referenced in past EPA listings of flammable refrigerants (*e.g.*, 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015). In those cases, as in this action, we find that the extra level of safety provided by EPA’s labeling requirement is appropriate under SNAP and that the larger font size will reduce risks to technicians, consumers, retail store owners, building owners and operators, first responders, and those disposing the appliance. Accordingly, EPA is finalizing the use conditions regarding labels as proposed.

#### iv. Red Markings

*Comment:* Chemours indicates that using the same use condition for red markings for these A2L refrigerants as was used for A3 refrigerants previously listed acceptable amounts to a “one size fits all” approach. They disagreed that this should be done and specifically drew attention to the UL 60335–2–40 standard, which provides different requirements for equipment with A2L refrigerants compared to equipment with A3 refrigerants. They indicated that “treating A2 [sic] and A3

refrigerants the same is likely to cause confusion to end-users, especially technicians responsible for installation and maintenance of systems.” Daikin, Lennox, and Rheem commented that the UL Standard was adequate and as such the proposed requirement for red markings was not warranted. EIA, on the other hand, “strongly supports . . . the required red markings on piping and hoses outlined on the proposed rulemaking.”

*Response:* EPA is finalizing the proposed requirement for red markings. Consistent with other rules promulgated under CAA section 612, EPA’s requirements of red markings add an extra layer of safety on top of the labels required under the UL standards, and EPA concludes this extra protection is appropriate for this listing under SNAP. As noted above, these types of red markings would signal to the technician that the refrigeration circuit that she/he was about to access contained a flammable refrigerant, even if all warning labels were somehow removed or were illegible or not understood (*e.g.*, for non-English speakers), and would provide similar notification to consumers, retail store owners, building owners and operators, first responders, and those disposing the appliance. We understand that UL 60335–2–40 treats A2L and A3 refrigerants differently; however, our proposal and this final rule do not cover the A3 refrigerants. EPA relied on different standards when we previously listed A3 refrigerants as acceptable subject to use conditions and hence we are not treating these two classes of refrigerants the same. For this SNAP listing, as in our past listings for A3 (and also A2L) refrigerants, EPA concluded that it is most important to warn technicians that there is a flammable refrigerant present, not whether it is specifically an A2L, A2, or A3 refrigerant. Once warned, we would expect the technician then seek to know which refrigerant is used and to proceed accordingly. While we see that the flammability risk can be considered “lower” when using A2L refrigerants compared to A3 refrigerants, a risk does exist and we find that the red markings will provide an additional warning to technicians, consumers, retail store owners, building owners and operators, first responders, and those disposing the appliance. We also note that the use of red markings is already required for HFC–32 as well as A3 refrigerants in self-contained room air conditioners based on previous regulations (80 FR 19454, April 10, 2015), and we are not aware that the marking requirements have led to any confusion.

*Comment:* AHRI read the proposal to be proposing all tubing be red, but thought the intent was to only require such markings for service ports.

*Response:* EPA did not intend to propose that all tubing in equipment using A2L refrigerants be red and we are not finalizing such a requirement in this final rule. We are finalizing this use condition as proposed and clarifying in section II.B.1.d that where the red markings would be applied depends primarily on the equipment design. The intent in the proposed rule and finalized in this rule is for the red marking to be present at all service ports for equipment that includes such service ports, and for the marking to extend one inch from those ports. Likewise, if connections need to be made in the field as opposed to at a factory, the one-inch red marking is required at those connection points. If, however, equipment is provided without such service ports, the one-inch red marking would be required at the point in the equipment where any service involving the refrigerant, including the evacuation of the refrigerant prior to equipment disposal, would occur. On smaller appliances, we have noted in the past that a process tube is often provided for such service, and that the red marking would be required there. As we have also noted previously, the manufacturer must decide the method of providing the red marking, for instance via paint, plastic sleeve, shrink wrap, tape, etc.

*Comment:* AHRI described the labeling requirements of the UL standard for service ports and indicated that “use of red markings and the use of red hoses may cause some confusion.” The reason the commenter provided was that typical gage sets currently use red housing for the higher-pressure side, a comment echoed by Carrier.

*Response:* EPA does not agree that the similarity of color between the gage set and the servicing port would lead to confusion. Given that connections in the gage set also exist for the low-pressure side, we feel that technicians would understand that a red marking of a service port does not mean that only the red hose of a gage set must be connected there. Other EPA requirements, such as the venting prohibition under section 608(c) of the CAA and technician training requirements, have existed since the early 1990s, and thus EPA believes technicians will be able to use gage sets without confusion. Further, training on flammable refrigerants which several commenters have pointed to would reinforce the understanding of red service ports and the use of gage sets. Finally, EPA notes that a similar red coloring requirement use condition

exists for flammable refrigerants, including HFC-32, in other end-uses, and we are not aware that such coloring has led to any confusion.

*Comment:* Chemours stated that the requirement of red markings would be difficult to implement in certain types of residential and light commercial air conditioning equipment. As an example, they indicated that quick-release Schrader valves “may be impossible to get in red color.”

*Response:* EPA does not see evidence that the construction of red-colored Schrader valves is impossible. In fact, Chemours’ comments may point to the reason why they say such valves are not available. Chemours pointed out that the equipment types where flammable refrigerants are currently acceptable subject to use conditions were self-contained equipment generally using process tubes rather than Schrader valves. Thus, there may have been no reason to develop them in the past. However, that does not mean that such valves will not become available if there is demand for such valves in the future. Although we cannot confirm that such valves do not exist at all, it is important to note that other means of applying the red marking may be used. The regulatory text proposed and finalized in this rule states the red “color must be applied at all service ports;” hence, items such as a red plastic sleeve or shrink wrap at both sides of the port, rather than the entire port itself, would be acceptable means of meeting this use condition.

#### d. SNAP Criteria

##### i. Flammability Risks and Safety

*Comment:* AHRI and Lennox pointed to an approximately \$7 million research effort with the U.S. Department of Energy (DOE), the California Air Resources Board (CARB) and other stakeholders on the behavior and safe use of next generation refrigerants, including the lower toxicity, lower flammability (A2L) refrigerants in the proposed rule. Lennox emphasized that such research was used to develop the safety standards and develop training. Sporlan said this research on 2L refrigerants is “of mature enough nature that they will be able to be safely applied in new systems designed for 2L flammable refrigerants.” AHRI detailed the extensive use of A2L refrigerants in the United States and other countries and noted that “it has yet to find incidents related to A2L refrigerants.”

*Response:* The Agency acknowledges AHRI’s and Lennox’s support for this proposed listing. EPA acknowledges AHRI and Lennox for providing this

information and note Sporlan’s comment, which supports EPA’s finding that the flammability risk of A2L refrigerants can be safely addressed. After considering all the public comments on this proposal, we are finalizing this listing, as described in section II.B.

*Comment:* HARDI indicated that the industry is supporting updates to the building, mechanical, and fire codes as well as transportation regulations to allow new equipment to use new refrigerants, including the A2L ones listed in the proposed rule. HARDI is working with the industry “to ensure a smooth and safe transition takes place.”

*Response:* EPA acknowledges HARDI’s information on their efforts to support the safe use of these refrigerants in residential and light commercial equipment as well as other types of equipment not covered by this final rule.

*Comment:* Honeywell commented that EPA should update the Risk Screens for R-32 and R-454B included in supporting documents for the proposed rule. They suggested that because ASHRAE Standard 15 mandates use of a refrigerant concentration limit (RCL), and ASHRAE Standard 34 sets the RCL to be 25% of the LFL, EPA should use that amount rather than the 100% of LFL.

*Response:* EPA has consistently evaluated alternatives through a risk screen process that begins with a highly conservative worst-case scenario, such as where the entire refrigerant charge of a specific equipment type leaks out rapidly in a specific room size. If a substitute’s concentrations remain below 100% of the LFL and relevant toxicity limits in the worst-case scenario with highly conservative assumptions, we do no further assessment. If the substitute’s concentrations exceed the LFL or a relevant toxicity limit in the worst-case scenario, then we consider more typical scenarios based on less conservative assumptions. EPA’s risk screens indicate that none of the types of equipment in this rule with these refrigerants came close to 100% of the LFL, although they did exceed the 25% mark under the most conservative scenarios analyzed.

To the extent ASHRAE 15 is incorporated into building codes—as Honeywell indicates—that requirement to adhere to the ASHRAE RCL would provide an additional layer of safety above the use conditions set in this final rule. More generally, the use of risk screens was developed in the original SNAP Rule issued in 1994 and was not meant to incorporate every possible risk factor. In fact, in that rule we stated

“[w]henver the initial risk screen indicated a potential risk, the substitute was evaluated further to ascertain whether the potential risk was accurately estimated and if management controls could reduce any risk to acceptable levels.” In this case, in the worst-case scenario where the 25% RCL was exceeded, we concluded that the additional risk mitigation offered by the UL Standard and our other use conditions adequately addressed any such risk.

#### ii. Toxicity and PFAS

*Comment:* EIA indicated there are “concerns regarding potential risks to human health and the environment due to toxicity of trifluoroacetic acid (‘TFA’) and other by-products of breakdown of HFO–1234yf, which is a component of the five refrigerant blends.” They pointed to scientific literature that finds HFO–1234yf has a 100% conversion rate into TFA. They noted that increased use of alternative refrigerants including HFOs has increased ecosystem levels of anthropogenic TFA. EIA advised EPA to lead with caution but did not, however, recommend that additional restrictions be placed on these refrigerant blends based on TFA concerns. NRDC noted that “EPA’s risk analyses do not evaluate the potential human health and environmental impacts of approving additional uses for substances known to degrade into [TFA].” NRDC pointed to the previous analyses EPA performed on TFA and requested that EPA revise those studies to include the potential use of the five blends in the air-conditioning sector.

*Response:* EPA does not agree that increased controls on HFOs or other refrigerants is warranted to address generation of TFA. EPA studied the potential generation of TFA when we first listed neat (*i.e.*, 100%, not in blends) HFO–1234yf as acceptable subject to use conditions in motor vehicle air conditioners. The myriad studies we referenced all concluded that the additional TFA from HFO–1234yf did not pose a significant additional risk, even if it were assumed to be used as the only refrigerant in all refrigeration and air conditioning equipment (76 FR 17492–17493, March 29, 2011). More recently, the World Meteorological Organization (WMO) concluded that “[t]here is increased confidence that [TFA] produced from degradation of HFCs, HCFCs, and HFOs will not harm the environment over the next few decades” while also calling for periodic reevaluation of this conclusion.<sup>35</sup> EPA

likewise finds that the data on TFA is not sufficient to propose or establish additional restrictions under SNAP at this time. We further note that the venting prohibition under section 608(c) of the CAA, codified at 40 CFR 82.154(a), and accompanying refrigerant management requirements reduce emissions of these refrigerants. EPA intends to continue reviewing the research on potential impacts from TFA in the future.

*Comment:* NRDC asked EPA to revise the Agency’s analysis of the substances included in this rulemaking that are polyfluoroalkyl or perfluoroalkyl substances (PFAS), citing two recent papers on the subject.<sup>36 37</sup>

*Response:* EPA acknowledges these references. Upon review of these papers, EPA does not conclude that any revisions to the evaluation of overall risk to human health and the environment of the refrigerants addressed in this final rule is necessary at this time. While the papers NRDC referenced indicate there are potential health effects due to accumulation of PFAS in the environment, they do not provide information concerning the incremental effect that adoption of the five refrigerants listed in this rule for the residential and light commercial air conditioning end-use would have or how those effects would compare to effects from other available substitutes in this end-use.

Both papers reference decision IV/25 by parties to the *Montreal Protocol on Substances that Deplete the Ozone Layer*. That decision concerns applying specific criteria and procedures in assessing an essential use for the purposes of the control measures in Article 2 of the Protocol and therefore is not directly relevant to the SNAP program. Cousins *et al.* reviewed several examples of PFAS uses to assess whether they would consider those uses to be “essential,” and those uses did not include the refrigerants considered in this final rule. Kwiatkowski *et al.* likewise did not provide an overview of refrigerants to indicate any additional

restrictions that they would consider warranted.

EPA intends to continue monitoring the scientific research on PFAS in the future and consider whether this information is relevant for the SNAP program.

#### e. Training

*Comment:* ACCA argues that training and certification of technicians on the handling of A2L refrigerants is necessary for safety and consumer peace of mind. ACCA indicated it and others were developing training and guidelines on A2L refrigerants and provided a list of several aspects that they are addressing. Carrier noted that industry has developed an exam for flammable refrigerants under the North American Technician Excellence (NATE) certification organization. Chemours also pointed to NATE and ACCA training as well as that by the Refrigeration Service Engineers Society (RSES), AHRI, and that provided by refrigerant producers and equipment manufacturers. Daikin also noted that AHRI is developing guidelines for A2L refrigerants and that equipment manufacturers are providing training to their service personnel. Chemours stated that “[t]echnician training, guidelines, informational brochures, and certifications for flammable refrigerants have been or are currently being developed by a number of industry organizations” and that “recovery machines, leak detectors, service cylinders and fittings are also available to the industry.” HARDI indicated the industry is supporting “the development of training to allow contractors to install newly designed equipment.” ACCA asked EPA to work with them and other industry stakeholders “to develop and implement training standards for the handling of flammable refrigerants.” Carrier similarly encouraged industry stakeholder engagement and Chemours stated that given the number of programs that already exist, EPA should collect a wide range of comments and move forward with a separate rule on training that incorporates stakeholder feedback. Rheem agreed that EPA should not undertake the creation of new training requirements in this rule and went further to say they were not in favor of a separate rulemaking, believing industry should create any new training requirements.

*Response:* EPA acknowledges the commenters’ information related to their work to educate and train technicians on the proper and safe use of flammable refrigerants, including the A2L refrigerants in this final rule. In the

Ozone Depletion: 2018, World Meteorological Organization, Global Ozone Research and Monitoring Project—Report No. 58, 67 pp., Geneva, Switzerland, 2018. Available at <https://ozone.unep.org/sites/default/files/2019-04/SAP-2018-Assessment-report-ES-rev%20%281%29.pdf>.

<sup>36</sup> Cousins, Ian T, *et al.* *The concept of essential use for determining when uses of PFASs can be phased out.* Environmental Science: Processes & Impacts. The Royal Society of Chemistry. May 28, 2019. <https://pubs.rsc.org/en/content/articlelanding/2019/em/c9em00163h#divAbstract>.

<sup>37</sup> Kwiatkowski, Carol F. *et al.* *Scientific Basis for Managing PFAS as a Chemical Class.* Environmental Science & Technology Letters. June 30, 2020. <https://pubs.acs.org/doi/10.1021/acs.estlett.0c00255>.

<sup>35</sup> World Meteorological Organization (WMO), Executive Summary: Scientific Assessment of

proposed rule (85 FR 35886, June 12, 2020), EPA indicated it would take advance comments on the possibility of proposing, in a separate rule, training and service requirements, and we thank the industry for their advance comments. We will take these comments into consideration to determine whether we should propose such a rule on training or undertake other future action. We note that certain safety requirements for refrigerant recovery and/or recycling equipment are already included in 40 CFR part 82, subpart F, under EPA's Refrigerant Management Program. We also indicated in our proposal, as we did in previous rules finding flammable refrigerants acceptable subject to use conditions (e.g. 76 FR 78832, December 20, 2011; 80 FR 19454, April 10, 2015), that industry may be better suited than EPA to develop appropriate training, and we see that this development has already started across multiple fronts.

*Comment:* AHRI "strongly supports incorporation of new refrigerant and requirements regarding A2L refrigerants into existing certification requirements." The Alliance likewise supported this position asking EPA to update the training and certification framework. Rheem "encourages EPA to incorporate group A2L and group A3 refrigerants into any requirements for training and certification that currently exist for group A1 refrigerants." (emphasis in original). EIA recommended that "EPA mandate training and servicing requirements for all flammable refrigerants" holding that "[i]n addition to putting consumers at risk, not mandating such training would create confusion for contractors if EPA has different rules and standards for different refrigerants."

*Response:* Although AHRI and Rheem did not indicate which existing training and certification requirements to which they were referring, we believe it would include the existing technician certification required under regulations implementing section 608 of the Clean Air Act. EPA has incorporated information on flammable refrigerants into the question bank for tests for such certification, which is required to service equipment that contains the refrigerants covered by this rulemaking, and has standards in place for refrigerant recovery and/or recycling equipment used with such refrigerants. As we consider these advance comments, we note that EPA's 608 test bank already includes questions concerning A2L refrigerants and the appliances covered by this rule, and EPA continues to review the test bank and can consider adding additional

questions in the future if appropriate. As noted above, EPA will consider these advance comments as we determine what, if any, additional actions we might take, including considering issuing a proposed rulemaking addressing the possibility of mandating certain additional training requirements.

*Comment:* In their support of a separate rulemaking to update training and certification requirements for A2L refrigerants, Carrier suggested that a rulemaking provide "training and service requirements for anyone purchasing A2L refrigerants or servicing equipment containing A2L refrigerants," noting that Australia and Japan have credited such requirements in their successful adoption of such refrigerants. Johnson Controls recommended a licensing system, delivered by trade schools and accredited by established contractor trade organizations, for handling A2L refrigerants. They emphasized the need for hands-on training, including "demonstration of skills as it relates to the brazing, evacuating, charging, handling, storage, transportation, etc. of mildly flammable, A2L refrigerants."

*Response:* EPA acknowledges the suggestion of undertaking a rulemaking to provide training and service requirements for technicians and the suggestion that it cover those purchasing A2L refrigerants and servicing equipment containing them. Likewise, we acknowledge Johnson Controls' recommendations of hands-on training and the topics suggested to be included in a licensing training curriculum. As noted above, EPA is taking these advance comments into consideration for possible future rulemaking or other future action.

*Comment:* EIA commented that industry has "an aging and diminishing workforce that need to be retrained." In addition to flammability, they opined the training needs to cover other safety aspects including health and environmental aspects of venting and accidental release. They also stated that "[t]here is significant confusion and lack of clarity when it comes to applicability of the venting prohibition itself, which still applies to the maintenance, service, repair, and disposal of equipment containing HFCs." They noted that "the workforce needs to be provided basic awareness and education of refrigerant lifecycle and impacts at different stages" while also noting that such education and training already exists. EIA offered suggestions on how the training program they support could be managed, such as allowing "a certain

grace period for servicing companies to bring technicians into compliance before such training becomes mandatory." They noted EPA could partner with the Department of Labor to "support the transition to low-GWP alternatives, particularly to small businesses and women or minority owned companies," possibly complementary to apprenticeship programs under the Workforce Opportunity and Innovation Act.

*Response:* EPA appreciates EIA's concern with respect to technicians' handling of refrigerants. We further note that EPA's current CAA section 608 technician certification test bank includes questions concerning topics such as environmental impacts, laws and regulations (including the venting prohibition and its applicability), safety, flammable refrigerants, and safe disposal. Under the current regulations, EPA can make changes to the test bank.

EPA observes that while our proposed rulemaking took advance comment on the possibility of proposing training and service requirements for certain flammable refrigerants through a separate rulemaking, we neither proposed to create a complementary technician training and certification program in the current rulemaking, nor did we propose to modify our existing CAA 608 technician certification program in the current rulemaking. We appreciate EIA's suggestions and as noted above we will take these comments into consideration in determining whether to propose a rule or undertake other future action on such training or service requirements.

*Comment:* Honeywell stated that "[a]ny transition to A2L refrigerants should also be accompanied by a comprehensive training program" covering the installation and maintenance of equipment containing A2L refrigerants. They held that such a training program should be established, through rulemaking, by EPA before finalization of this rule. Others, including manufacturers intending to use these A2L refrigerants in their equipment, disagreed. For instance, Carrier said they see no reason to delay this rulemaking in order to initiate a separate rulemaking on training and certification for A2L refrigerants. Daikin also supported EPA's approach of not proposing specific training or service practices at this time, stating that manufacturers using A2L refrigerants provide training to their service personnel.

*Response:* After considering these comments, we agree with the comments that it is not necessary to delay this rulemaking to undertake separate action

on training, certification, or service practices for A2L refrigerants. As noted by comments, training is already being provided by some manufacturers and several organizations have developed or are in the process of developing training. In past rulemakings listing flammable refrigerants, we stated our conclusion that training is best left to the industry, and we find no reason to change that conclusion in this action. We are not aware of any safety issues that have arisen with the equipment covered by those rules and our current understanding based on comments to this rule is that action is already being taken to adequately train service technicians. While we will nonetheless consider these advance comments as we determine what, if any, additional actions we might take, including considering issuing a proposed rulemaking addressing the possibility of mandating certain additional training requirements, our current understanding based on comments to this rule is that the industry in general and interested manufacturers in particular are already preparing for an adequate level of training. As noted above, many additional sources are available, and more are under development, to provide training on the A2L refrigerants in this final rule and on flammable refrigerants in general.

### *C. Total Flooding: Removal of Powdered Aerosol E From the List of Substitutes Acceptable Subject to Use Conditions*

Powdered Aerosol E, also marketed under the trade names of FirePro, FirePro Xtinguish, and FireBan, is generated in an automated manufacturing process during which the chemicals, in powder form, are mixed and then supplied to end users as a solid contained within a fire extinguisher. In the presence of heat, the solid converts to an aerosol consisting mainly of potassium salts. EPA listed Powdered Aerosol E as acceptable, subject to use conditions, as a total flooding agent (71 FR 56359, September 27, 2006). The use conditions required that Powdered Aerosol E be used only in areas that are normally unoccupied, because the Agency did not have sufficient information at that time supporting its safe use in areas that are normally occupied. Based on a review of additional information from the submitter to support the safe use of Powdered Aerosol E in normally occupied spaces, EPA subsequently determined that Powdered Aerosol E is also acceptable for use in total flooding systems for normally occupied spaces (83 FR 50026, October 4, 2018). The listing provides that Powdered Aerosol

E is acceptable for total flooding uses, which includes both unoccupied and occupied spaces. In the October 2018 listing action, EPA noted that in a subsequent rulemaking, the Agency would remove the previous listing of Powdered Aerosol E as acceptable, subject to use conditions since the use condition is no longer applicable. We received no comments on the proposal for this listing. Therefore, in this final rule, as proposed, EPA is taking the ministerial action of removing that listing for Powdered Aerosol E.

### **III. How is EPA responding to other public comments?**

EPA received other comments beyond the scope of this final action and addresses them below.

*Comment:* EIA stated “that ODS are still undergoing replacement in the residential and light commercial AC and heat pump end-use and are subject to EPA’s authority under the SNAP Program. EIA urges EPA to promulgate additional SNAP Program regulations listing high-GWP substitutes that pose a considerably higher comparable risk to the five refrigerant blends, as unacceptable for this end-use, including R-410A, R-404A, R-134a, and R-434A.”

*Response:* This final rule lists additional substitutes as acceptable, subject to use conditions, in the residential and light commercial air conditioning end-use. The proposed rule did not discuss finding other substitutes unacceptable in this end-use and such listings are out of scope for this action. Accordingly, this comment requires no further response.

*Comment:* EIA noted EPA’s “Ongoing Responsibility to Protect Global Ozone” as it relates to methylene chloride (CH<sub>2</sub>Cl<sub>2</sub>). The commenter stated that the atmospheric concentrations of very short-lived substances (VSLs) including methylene chloride are increasing and that they are “increasingly seen as a threat to the progress made by the Montreal Protocol . . . to protect the ozone layer.” In order to address this threat, EIA asks that the agency consider listing methylene chloride and other similar VSLs as unacceptable in some end-uses.

*Response:* We appreciate EIA’s comments on VSLs and note that EPA has taken domestic action on methylene chloride under the Toxic Substances Control Act (TSCA) due to its toxicity (84 FR 11420, March 27, 2019). The proposed rule did not discuss listing VSLs as unacceptable and such listings are out of scope for this final action. Accordingly, this comment requires no further response.

*Comment:* Trane commented that HFC-32, R-452B, and R-454B should also be approved for scroll chillers. AHRI requested EPA to find HFC-32 and R-454B acceptable for positive displacement chillers, and Rheem similarly asked that SNAP list group A2L refrigerants in such equipment. Johnson Controls suggested listing HFC-32 and all five blends acceptable for positive displacement chillers, to include reciprocating, screw and scroll chillers. The Alliance, Carrier, and Chemours agreed and encouraged listing HFC-32 and the five A2L blends acceptable in chillers in general. Carrier pointed out that for chillers, requirements for machine rooms would be needed and held that the ASHRAE 15 standard could serve this purpose.

*Response:* EPA notes that five of these six refrigerants (HFC-32, R-452B, R-454A, R-454B, and R-454C) have been submitted to the SNAP program for use in chillers and EPA is evaluating them for the chiller end-use, encompassing both the centrifugal chiller and positive displacement chiller end-uses. The other refrigerant, R-457A, has been submitted but not for the chiller end-uses. The proposed rule addressed listings for certain end-use categories, which did not include the chiller end-use. The proposed rule did not discuss finding these substitutes acceptable in other end uses, and such listings are out of scope for this action. Accordingly, this comment requires no further response.

*Comment:* Rheem sought clarification as to which SNAP end-use Heat Pump Pool Heaters (HPPH) and Heat Pump Water Heaters (HPWH) belong in and for clarification as to whether an end use category currently exists for these types of equipment.

*Response:* The classification of HPPHs and HPWHs is beyond the scope of this final rule. Accordingly, this comment requires no further response. Nonetheless, EPA is now aware of this clarification request and we invite Rheem and other manufacturers of such equipment to further pursue this issue separately with EPA and the SNAP program.

### **IV. Statutory and Executive Order Reviews**

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

### B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060-0226. The approved Information Collection Request includes five types of respondent reporting and recordkeeping activities pursuant to SNAP regulations: Submission of a SNAP petition, filing a TSCA/SNAP Addendum, notification for test marketing activity, recordkeeping for substitutes acceptable subject to use restrictions, and recordkeeping for small volume uses. This rule contains no new requirements for reporting or recordkeeping.

### C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action allows the additional options under SNAP of using R-32, R-448A, R-449A, R-449B, R-452B, R-454A, R-454B, R-454C, and R-457A in the specified end-uses, but does not mandate such use. Users who choose to avail themselves of this flexibility for R-448A, R-449A, and R-449B must make a reasonable effort to ascertain that other substitutes or alternatives are not technically feasible and must document and keep records of the results of such investigations. Because equipment for R-452B, R-454A, R-454B, R-454C, and R-457A is not manufactured yet in the U.S. for the residential and light commercial air conditioning and heat pumps end-use, no change in business practice is required to meet the use conditions, resulting in no adverse impact compared to the absence of this rule. Equipment for R-32 already being manufactured has been subject to similar use conditions, resulting in no adverse impact compared to the absence of this rule. Thus, this final rule would not impose new costs on small entities. We have therefore concluded that this action will not impose a significant adverse regulatory burden for all directly regulated small entities.

### D. Unfunded Mandates Reform Act (UMRA)

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

### E. Executive Order 13132: Federalism

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

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

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

Thus, Executive Order 13175 does not apply to this action. EPA periodically updates tribal officials on air regulations through the monthly meetings of the National Tribal Air Association and will share information on this rulemaking through this and other fora.

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

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866 and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. EPA has not conducted a separate analysis of risks to infants and children associated with this rule. Any risks to children are not different than the risks to the general population. This action's health and risk assessments are contained in the comparisons of toxicity for the various substitutes, as well as in the risk screens for the substitutes that are listed in this final rule. The risk screens are in the docket for this rulemaking.

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

This action is not subject to Executive Order 13211, because it is not a

significant regulatory action under Executive Order 12866.

### I. National Technology Transfer and Advancement Act

This action involves technical standards. EPA uses and incorporates by reference portions of the 2019 UL Standard 60335-2-40, which establishes requirements for the evaluation of residential air conditioning equipment and safe use of flammable refrigerants, among other things. The standard is discussed in greater detail in section II.B.5 of this preamble.

The 2019 UL Standard 60335-2-40 is available at <https://www.shopulstandards.com/ProductDetail.aspx?UniqueKey=36463>, and may be purchased by mail at: Comm 2000, 151 Eastern Avenue, Bensenville, IL 60106; Email: [orders@shopulstandards.com](mailto:orders@shopulstandards.com); Telephone: 1-888-853-3503 in the U.S. or Canada (other countries dial 1-415-352-2178); internet address: <https://www.shopulstandards.com>. The cost of the 2019 UL Standard 60335-2-40 is \$440 for an electronic copy and \$550 for hardcopy. UL also offers a subscription service to the Standards Certification Customer Library that allows unlimited access to their standards and related documents. The cost of obtaining this standard is not a significant financial burden for equipment manufacturers and purchase is not necessary for those selling, installing, and servicing the equipment. Therefore, EPA concludes that the UL standard incorporated by reference is reasonably available.

### J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

EPA believes that it is not feasible to quantify any disproportionately high and adverse human health or environmental effects from this action on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994) because for all affected populations there is no requirement to use any of the alternatives listed in this action.

### K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).



## V. References

Unless specified otherwise, all documents are available electronically through the Federal Docket Management System, Docket number EPA-HQ-OAR-2019-0698.

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- ICF, 2020b. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R-449A.
- ICF, 2020c. Risk Screen on Substitutes in Retail Food Refrigeration (Medium-temperature Stand-alone Units) (New Equipment); Substitute: R-449B.
- ICF, 2020d. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: HFC-32.
- ICF, 2020e. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R-452B.
- ICF, 2020f. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R-454A.
- ICF, 2020g. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R-454B.
- ICF, 2020h. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R-454C.
- ICF, 2020i. Risk Screen on Substitutes in Residential and Light Commercial Air-Conditioning and Heat Pumps (New Equipment); Substitute: R-457A.
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- The Air Conditioning, Heating, and Refrigeration News, 2020. “An HVAC Technician’s Guide to R-32,” November 12, 2020. Available online at: [https://www.achrnews.com/articles/144053-an-hvac-technicians-guide-to-r-32?oly\\_enc\\_id=8731J4776701J6C](https://www.achrnews.com/articles/144053-an-hvac-technicians-guide-to-r-32?oly_enc_id=8731J4776701J6C)
- UL 60335-2-40, 2019. Standard for Safety for Household And Similar Electrical Appliances—Safety—Part 2-40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers. Third Edition. November 1, 2019.

### List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Stratospheric ozone layer.

**Michael S. Regan,**  
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 82 as follows:

### PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7601, 7671–7671q.

### Subpart G—Significant New Alternatives Policy Program

#### Appendix O to Subpart G of Part 82 [Amended]

■ 2. Appendix O to subpart G of part 82 is amended by removing the entry “Total flooding; Powdered Aerosol E (FirePro®)”.

■ 3. Add appendix W to subpart G of part 82 to read as follows:

**Appendix W to Subpart G of Part 82—  
Substitutes Listed in the May 6, 2021  
Final Rule—Effective June 7, 2021**

**REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO NARROWED USE LIMITS**

End-use	Substitute	Decision	Narrowed use limits	Further information
Retail food refrigeration— medium-temperature stand-alone units (new only).	R-448A, R-449A, R-449B.	Acceptable Subject to Narrowed Use Limits.	Acceptable only for use in new medium-temperature stand-alone units where reasonable efforts have been made to ascertain that other alternatives are not technically feasible. Users are required to document and retain the results of their technical investigation of alternatives for the purpose of demonstrating compliance. Information shall include descriptions of: <ul style="list-style-type: none"> <li>• Process or product in which the substitute is needed;</li> <li>• Substitutes examined and rejected;</li> <li>• Reason for rejection of other alternatives, e.g., performance, technical or safety standards; and</li> <li>• Anticipated date other substitutes will be available and projected time for switching.</li> </ul>	A possible reason for rejection of one or more other alternative(s) could be based on ADA requirements.

**REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS**

End-use	Substitute	Decision	Use conditions	Further information
Residential and light commercial air conditioning and heat pumps (new only).	R-452B, R-454A, R-454B, R-454C and R-457A.	Acceptable Subject to Use Conditions.	These refrigerants may be used only in new equipment specifically designed and clearly identified for the refrigerants (i.e., none of these substitutes may be used as a conversion or “retrofit” refrigerant for existing equipment designed for other refrigerants). These substitutes may only be used in air conditioning equipment that meets all requirements in the 3rd edition of UL 60335-2-40. <sup>1,2,3</sup> In cases where this appendix includes requirements more stringent than those of UL 60335-2-40, the appliance must meet the requirements of this appendix in place of the requirements in the UL Standard. The charge size for the equipment must not exceed the maximum refrigerant mass determined according to UL 60335-2-40 for the room size where the air conditioner is used. The following markings must be attached at the locations provided and must be permanent: <ol style="list-style-type: none"> <li>On the outside of the air conditioning equipment: “WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing.”</li> <li>On the outside of the air conditioning equipment: “WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used.”</li> <li>On the inside of the air conditioning equipment near the compressor: “WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner’s Guide Before Attempting To Service This Product. All Safety Precautions Must be Followed.”</li> <li>For any equipment pre-charged at the factory, on the equipment packaging: “WARNING—Risk of Fire due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations.”</li> <li>On the indoor unit near the nameplate:                             <ol style="list-style-type: none"> <li>At the top of the marking: “Minimum Installation height, X m (W ft)”. This marking is only required if required by UL 60335-2-40. The terms “X” and “W” shall be replaced by the numeric height as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the height in Inch-Pound units is placed in parentheses and the word “and” has been replaced by the opening parenthesis.</li> <li>Immediately below (a) above or at the top of the marking if (a) is not required: “Minimum room area (operating or storage), Y m<sup>2</sup> (Z ft<sup>2</sup>)”. The terms “Y” and “Z” shall be replaced by the numeric area as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the area in Inch-Pound units is placed in parentheses and the word “and” has been replaced by the opening parenthesis.</li> </ol> </li> </ol>	Applicable OSHA requirements at 29 CFR part 1910 must be followed, including those at 29 CFR 1910.94 (ventilation) and 1910.106 (flammable and combustible liquids), 1910.110 (storage and handling of liquefied petroleum gases), and 1910.1000 (toxic and hazardous substances). Proper ventilation should be maintained at all times during the manufacture and storage of equipment containing flammable refrigerants through adherence to good manufacturing practices as per 29 CFR 1910.106. If refrigerant levels in the air surrounding the equipment rise above one-fourth of the lower flammability limit, the space should be evacuated and reentry should occur only after the space has been properly ventilated. Technicians and equipment manufacturers should wear appropriate personal protective equipment, including chemical goggles and protective gloves, when handling flammable refrigerants. Special care should be taken to avoid contact with the skin which, like many refrigerants, can cause freeze burns on the skin. A class B dry powder type fire extinguisher should be kept nearby. Technicians should only use spark-proof tools when working on air conditioning equipment with flammable refrigerants. Any recovery equipment used should be designed for flammable refrigerants. Only technicians specifically trained in handling flammable refrigerants should service refrigeration equipment containing these refrigerants. Technicians should gain an understanding of minimizing the risk of fire and the steps to use flammable refrigerants safely. Room occupants should evacuate the space immediately following the accidental release of this refrigerant. Personnel commissioning, maintaining, repairing, decommissioning and disposing of appliances with these refrigerants should obtain training and follow practices consistent with Annex HH of UL 60335-2-40, 3rd edition. <sup>1,2,3</sup> CAA section 608(c)(2) prohibits knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration. Department of Transportation requirements for transport of flammable gases must be followed. Flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260-270).

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

End-use	Substitute	Decision	Use conditions	Further information
Residential and light commercial air conditioning and heat pumps (new only), excluding self-contained room air conditioners.	R-32 .....	Acceptable Subject to Use Conditions.	<p>(f) For non-fixed equipment, including portable air conditioners, window air conditioners, packaged terminal air conditioners and packaged terminal heat pumps, on the outside of the product: "WARNING—Risk of Fire or Explosion—Store in a well ventilated room without continuously operating flames or other potential ignition."</p> <p>(g) For fixed equipment, including rooftop units and split air conditioners, "WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions."</p> <p>(h) All of these markings must be in letters no less than 6.4 mm (¼ inch) high.</p> <p>The equipment must have red Pantone Matching System (PMS) #185 or RAL 3020 marked service ports, pipes, hoses, or other devices through which the refrigerant passes, to indicate the use of a flammable refrigerant. This color must be applied at all service ports and other parts of the system where service puncturing or other actions creating an opening from the refrigerant circuit to the atmosphere might be expected and must extend a minimum of one (1) inch (25mm) in both directions from such locations and shall be replaced if removed.</p> <p>These refrigerants may be used only in new equipment specifically designed and clearly identified for the refrigerants (<i>i.e.</i>, none of these substitutes may be used as a conversion or "retrofit" refrigerant for existing equipment designed for other refrigerants).</p> <p>These substitutes may only be used in air conditioning equipment that meets all requirements in the 3rd edition of UL 60335–2–40.<sup>1,2,3</sup> In cases where this appendix includes requirements more stringent than those of UL 60335–2–40, the appliance must meet the requirements of this appendix in place of the requirements in the UL Standard.</p> <p>The charge size for the equipment must not exceed the maximum refrigerant mass determined according to UL 60335–2–40 for the room size where the air conditioner is used.</p> <p>The following markings must be attached at the locations provided and must be permanent:</p> <p>(a) On the outside of the air conditioning equipment: "WARNING—Risk of Fire. Flammable Refrigerant Used. To Be Repaired Only By Trained Service Personnel. Do Not Puncture Refrigerant Tubing."</p> <p>(b) On the outside of the air conditioning equipment: "WARNING—Risk of Fire. Dispose of Properly In Accordance With Federal Or Local Regulations. Flammable Refrigerant Used."</p> <p>(c) On the inside of the air conditioning equipment near the compressor: "WARNING—Risk of Fire. Flammable Refrigerant Used. Consult Repair Manual/Owner's Guide Before Attempting To Service This Product. All Safety Precautions Must be Followed."</p> <p>(d) For any equipment pre-charged at the factory, on the equipment packaging: "WARNING—Risk of Fire due to Flammable Refrigerant Used. Follow Handling Instructions Carefully in Compliance with National Regulations"</p> <p>(e) On the indoor unit near the nameplate:</p> <p>a. At the top of the marking: "Minimum Installation height, X m (W ft)". This marking is only required if required by UL 60335–2–40. The terms "X" and "W" shall be replaced by the numeric height as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the height in Inch-Pound units is placed in parentheses and the word "and" has been replaced by the opening parenthesis.</p> <p>b. Immediately below (a) above or at the top of the marking if (a) is not required: "Minimum room area (operating or storage), Y m<sup>2</sup> (Z ft<sup>2</sup>)". The terms "Y" and "Z" shall be replaced by the numeric area as calculated per the UL Standard. Note that the formatting here is slightly different than the UL Standard; specifically, the area in Inch-Pound units is placed in parentheses and the word "and" has been replaced by the opening parenthesis.</p> <p>(f) For fixed equipment, including rooftop units and split air conditioners, "WARNING—Risk of Fire—Auxiliary devices which may be ignition sources shall not be installed in the ductwork, other than auxiliary devices listed for use with the specific appliance. See instructions."</p> <p>(g) All of these markings must be in letters no less than 6.4 mm (¼ inch) high.</p>	<p>Applicable OSHA requirements at 29 CFR part 1910 must be followed, including those at 29 CFR 1910.94 (ventilation) and 1910.106 (flammable and combustible liquids), 1910.110 (storage and handling of liquefied petroleum gases), and 1910.1000 (toxic and hazardous substances).</p> <p>Proper ventilation should be maintained at all times during the manufacture and storage of equipment containing flammable refrigerants through adherence to good manufacturing practices as per 29 CFR 1910.106. If refrigerant levels in the air surrounding the equipment rise above one-fourth of the lower flammability limit, the space should be evacuated and reentry should occur only after the space has been properly ventilated.</p> <p>Technicians and equipment manufacturers should wear appropriate personal protective equipment, including chemical goggles and protective gloves, when handling flammable refrigerants. Special care should be taken to avoid contact with the skin which, like many refrigerants, can cause freeze burns on the skin. A class B dry powder type fire extinguisher should be kept nearby.</p> <p>Technicians should only use spark-proof tools when working on air conditioning equipment with flammable refrigerants.</p> <p>Any recovery equipment used should be designed for flammable refrigerants. Only technicians specifically trained in handling flammable refrigerants should service refrigeration equipment containing this refrigerant. Technicians should gain an understanding of minimizing the risk of fire and the steps to use flammable refrigerants safely.</p> <p>Room occupants should evacuate the space immediately following the accidental release of this refrigerant.</p> <p>Personnel commissioning, maintaining, repairing, decommissioning and disposing of appliances with this refrigerant should obtain training and follow practices consistent with Annex HH of UL 60335–2–40, 3rd edition.<sup>1,2,3</sup></p> <p>CAA section 608(c)(2) prohibits knowingly venting or otherwise knowingly releasing or disposing of substitute refrigerants in the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration.</p> <p>Department of Transportation requirements for transport of flammable gases must be followed.</p> <p>Flammable refrigerants being recovered or otherwise disposed of from residential and light commercial air conditioning appliances are likely to be hazardous waste under the Resource Conservation and Recovery Act (RCRA) (see 40 CFR parts 260–270).</p>

REFRIGERANTS—SUBSTITUTES ACCEPTABLE SUBJECT TO USE CONDITIONS—Continued

End-use	Substitute	Decision	Use conditions	Further information
			The equipment must have red Pantone Matching System (PMS) #185 or RAL 3020 marked service ports, pipes, hoses, or other devices through which the refrigerant passes, to indicate the use of a flammable refrigerant. This color must be applied at all service ports and other parts of the system where service puncturing or other actions creating an opening from the refrigerant circuit to the atmosphere might be expected and must extend a minimum of one (1) inch (25mm) in both directions from such locations and shall be replaced if removed.	

<sup>1</sup> UL 60335-2-40, Standard for Safety for Household And Similar Electrical Appliances—Safety—Part 2-40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers, Third edition, Dated November 1, 2019.

<sup>2</sup> You may purchase the material from UL by mail: Comm 2000; 151 Eastern Avenue, Bensenville, IL 60106; email: [orders@shopulstandards.com](mailto:orders@shopulstandards.com); phone: 1-888-853-3503 in the U.S. or Canada (other countries dial +1-415-352-2168); or web: [www.shopulstandards.com](http://www.shopulstandards.com).

<sup>3</sup> The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at U.S. EPA's Air and Radiation Docket; EPA West Building, Room 3334, 1301 Constitution Ave. NW, Washington, DC, 202-566-1742 and is available from Underwriters Laboratories Inc. (UL), 333 Pfingsten Road, Northbrook, IL 60062, 877.854.3577, [www.ul.com](http://www.ul.com). It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov), or go to: [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html).

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