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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1

[Docket No. FDA–2018–N–4268]

RIN 0910–AH66

Submission of Food and Drug Administration Import Data in the Automated Commercial Environment for Veterinary Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we), with the Department of the Treasury's concurrence, is amending its regulations to require that certain data elements be submitted for veterinary devices that are being imported or offered for import in the Automated Commercial Environment (ACE) or any other electronic data interchange (EDI) system authorized by U.S. Customs and Border Protection (CBP), in order for CBP to process the filing and to help FDA in determining the admissibility of those veterinary devices. This final rule will make the submission of the general data elements currently required to be submitted in ACE for other FDA-regulated products at the time of entry also required in ACE for veterinary devices being imported or offered for import into the United States. This final rule will increase effective and efficient admissibility review by FDA of those entry lines containing a veterinary device, which will protect public health by allowing the Agency to focus its limited resources on FDA-regulated products that may be associated with a greater public health risk.

DATES: This rule is effective November 17, 2022.

ADDRESSES: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and insert the docket number found in brackets in the heading of this final rule into the ''Search'' box and follow the prompts, and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

With regard to the final rule: Brittani Everson-Riley, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–4490, *brittani.everson-riley@fda.hhs.gov.*

With regard to the information collection: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

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I. Executive Summary

A. Purpose of the Final Rule

For veterinary devices being imported or offered for import into the United States via ACE or any other EDI system authorized by the CBP, this rule requires the submission of certain data elements material to FDA's process of making decisions on admissibility. This action facilitates automated ''May Proceed'' determinations by FDA for those veterinary devices that present a low risk to public health which, in turn, allows the Agency to focus our limited resources on those FDA-regulated products that may be associated with a greater public health risk.

B. Summary of the Major Provisions of the Final Rule

This rule revises subpart D of part 1 of 21 CFR chapter I (21 CFR part 1), added by a final rule issued by the Agency on November 29, 2016 (81 FR 85854), to establish requirements for the electronic filing of certain data elements for FDA-regulated products in ACE or any other EDI system authorized by CBP. That final rule took effect on December 29, 2016.

This rule makes the data elements that are required to be submitted for other FDA-regulated products in § 1.72 (21 CFR 1.72) also mandatory for the electronic filing of entries containing a veterinary device: (1) FDA Country of Production; (2) complete FDA Product Code; (3) full intended use code; (4) and telephone number and email address of the importer of record. Submission of these data elements in ACE helps FDA to more effectively and efficiently make admissibility determinations for veterinary devices by increasing the opportunity for automated ''May Proceed'' of these entries by FDA's import systems. These data elements are currently required to be submitted for the electronic filing of entries containing food contact substances, drugs, biological products, human cells, tissues or cellular or tissue-based products (HCT/Ps), medical devices for human use, radiation-emitting electronic products, cosmetics, and tobacco products.

C. Legal Authority

The legal authority for this final rule includes sections 701 and 801 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 371 and 381).

D. Costs and Benefits

Cost savings result from increased efficiency in, and streamlining of, FDA's imports admissibility process. These cost savings to the industry and FDA cannot be quantified because FDA currently lacks data to do so. Potential benefits to consumers, that we are similarly unable to quantify, will result from a reduction in the number of non-compliant veterinary device imports reaching U.S. consumers and from

compliant imported veterinary devices reaching U.S. consumers faster.

The annualized costs of complying with this regulation are estimated to be between $0.056 million and $0.140 million per year (in 2020 dollars annualized over 20 years using 7 percent discount rate). These costs were already previously inadvertently included and the benefits discussed in the regulatory impact analysis (RIA) for the ''Submission of Food and Drug Administration Import Data in the Automated Commercial Environment'' 2016 final rule. Because we do not want to double count these costs to the industry, we have concluded that this final rule will have no additional costs beyond the costs that were included in that RIA.

II. Table of Abbreviations/Commonly Used Acronyms in This Document

Abbreviation/acronym	What it means
ACE	Automated Commercial Environment or any other CBP-authorized EDI system.
ACE filer	The person who is authorized to submit an electronic import entry for an FDA-regulated product in ACE.
ACS	Automated Commercial System—the predecessor CBP-authorized EDI system to ACE.
Agency	U.S. Food and Drug Administration.
CBP	U.S. Customs and Border Protection.
EDI	Electronic Data Interchange.
FDA	U.S. Food and Drug Administration.
FD&C Act	Federal Food, Drug and Cosmetic Act.
HCT/P	Human cells, tissues, or cellular or tissue-based products.
ITDS	International Trade Data System.
RIA	Regulatory Impact Analysis.
PRA	Paperwork Reduction Act of 1995.
We, Our, Us	U.S. Food and Drug Administration.

III. Background

A. Need for the Regulation/History of This Rulemaking

ACE is a commercial trade processing system operated by CBP that is designed to implement the International Trade Data System (ITDS), automate import and export processing, enhance border security, and foster U.S. economic security through lawful international trade and policy. FDA is a Partner Government Agency for purposes of submission of import data in ACE. As of July 23, 2016 (81 FR 32339), ACE became the sole EDI system authorized by CBP for entry of FDA-regulated articles into the United States.

On November 29, 2016, FDA issued a final rule entitled ''Submission of Food and Drug Administration Import Data in the Automated Commercial Environment'' (the ACE final rule), which added subpart D to part 1 to require that certain data elements material to our import admissibility review be submitted in ACE at the time of entry. This rule adds veterinary devices to the list of other FDA-regulated products being imported or offered for import for which the data elements required under § 1.72 must be submitted in ACE at the time of entry. The data elements in § 1.72 are FDA Country of Production, complete FDA Product Code, full intended use code, and telephone number and email address of the importer of record.

A veterinary device is a ''device'' as defined in section 201(h) of the FD&C Act (21 U.S.C. 321(h)) that is intended for use in animals. Section 201(h) of the FD&C Act defines ''device'' as an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is: (1) recognized in the official National Formulary, or the U.S. Pharmacopeia, or any supplement to them; (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or (3) intended to affect the structure or any function of the body of man or other animals. Further, such device does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and is not dependent upon being metabolized for the achievement of its primary intended purposes.

Manufacturers and distributors of veterinary devices are responsible for ensuring that these devices are safe, effective, and properly labeled. Under section 801(a) of the FD&C Act (21 U.S.C. 381(a)), FDA may refuse admission of veterinary devices being imported or offered for import that appear to be adulterated or misbranded. Devices, including veterinary devices, are subject to the adulteration provisions of section 501 of the FD&C Act (21 U.S.C. 351) and the misbranding provisions of section 502 of the FD&C Act (21 U.S.C. 352). We have determined that the data elements required to be submitted in ACE at the time of entry under § 1.72 are material to our import admissibility review of veterinary devices. Receipt of this information increases the opportunity for automated ''May Proceed'' determinations by us for those veterinary devices that present a low public health risk which, in turn, allows the Agency to focus our limited resources on those FDA-regulated products that may be associated with a greater public health risk.

ACE electronically transmits the entry data submitted by a filer at the time of entry to FDA via an electronic interface. The entry is then initially screened by FDA using FDA's Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting (PREDICT), a risk-based electronic screening tool, to determine if automated or manual review of the entry is appropriate. An automated ''May Proceed'' determination is much faster and less resource intensive for FDA and the importer than a manual ''May Proceed'' determination. An automated ''May Proceed'' does not constitute a determination by FDA about the article's compliance status, and it does not preclude FDA action later. If the initial electronic review indicates that manual review is appropriate, FDA personnel will review the entry information submitted by the entry filer and may request additional information to make an admissibility determination and/or may examine or sample the FDA-regulated article.

ACE also allows importers to submit optional information relevant to FDA's admissibility determination on veterinary devices. We strongly encourage the submission of the optional data elements in ACE at the time of entry if the importer of an FDA-regulated product is interested in an expedited admissibility review on its

products by the Agency (see the FDA Supplemental Guide which includes the optional data elements published at: *https://www.cbp.gov/sites/default/files/assets/documents/2021-Sep/FDASupplementalGuideVersion2.5.5_508c%28003%29%281%29.pdf.* Accurate and complete information submitted by a filer increases the likelihood that an entry line will receive an automated ''May Proceed'' determination from FDA.

B. Summary of Comments to the Proposed Rule

We received four comments on the proposed rule by the close of the comment period, all from individuals. One comment is unintelligible. The remaining three comments from individuals made general remarks supportive of the proposed rule. All suggested extending the beneficial aspects of the proposed electronic submission of the general data elements for veterinary devices to other FDA-regulated products. A requirement for this specific process in the ACE environment for other FDA-regulated products was established under the ACE final rule, which was effective in December 2016. We are finalizing the proposed rule without revision.

C. General Overview of the Final Rule

FDA is amending § 1.72 to make that section applicable to veterinary devices, as defined in proposed § 1.71. In addition, we are amending § 1.75 to include the requirement that the information in § 1.72 must be submitted in ACE at the time of entry for veterinary devices being imported or offered for import into the United States.

As explained in the Notice of Proposed Rulemaking entitled ''Submission of Food and Drug Administration Import Data in the Automated Commercial Environment'' published in the **Federal Register** of July 1, 2016 (81 FR 43155), CBP collected the data elements FDA Country of Production and the complete FDA Product Code, prior to ACE, in the Automated Commercial System (ACS), operated by CBP for the submission of electronic entries, to assist FDA in making admissibility decisions for FDA-regulated products. The FDA Country of Production data element identifies the country where an FDA-regulated article last underwent any manufacturing or processing but only if such manufacturing or processing was of more than a minor, negligible, or insignificant nature. The complete FDA Product Code data element is an alphanumeric code that we use for classification and analysis of regulated products. The FDA Product Code builder application allows ACE filers to locate or build the appropriate FDA Product Code. The complete FDA Product Code must be consistent with the invoice description submitted in ACE at the time of entry (§ 1.72(a)(2)). The FDA Product Code builder application is currently available on FDA's website at *https://www.accessdata.fda.gov/scripts/ora/pcb/.*

A full intended use code consists of a base code that designates the general use intended for the article and a subcode, if applicable, that designates the specific use intended for the article. Filers may submit the intended use code ''UNK,'' representing ''unknown,'' at the time of entry. entry filers need to be aware that submitting ''UNK'' as the intended use code will, in most cases, subject the entry to a manual review for admissibility provided the entry filing is not rejected by FDA (81 FR 85854 at 85859 to 85860).

The email address and telephone number for the importer of record is also being required. This information will enable us to contact that person with any questions about the import entry as well as send notices of FDA actions, such as detention or refusal, electronically to that person (81 FR 43155 at 43161).

Section 1.75 codifies additional information that is required at the time of filing an entry in ACE for animal drugs being imported or offered for import beyond that listed in § 1.72. The final rule amends § 1.75 to include veterinary devices by: (1) revising the section title to ''Animal drugs and veterinary devices''; (2) redesignating current § 1.75(a), (b), (c), and (d) to § 1.75(a)(1), (2), (3), and (4); and (3) adding § 1.75(b) Veterinary devices. Section 1.75(b) states that no additional information is required beyond that listed in § 1.72 for veterinary devices. Current § 1.75(d), redesignated to § 1.75(a)(4) by the final rule, is being amended by adding the word ''file'' where the section refers to the ''investigational new animal drug number'' and by replacing the word ''application'' with ''file'' where the section refers to ''investigational new animal drug application.'' This is a technical amendment for the purpose of using the more appropriate terminology ''investigational new animal drug file number'' and ''investigational new animal drug file'' in that section, which is consistent with the terminology used in other FDA regulations.

IV. Legal Authority

FDA has the legal authority under the FD&C Act to regulate the importation of veterinary devices into the United States (sections 701 and 801 of the FD&C Act). Section 701(a) of the FD&C Act authorizes the Agency to issue regulations for the efficient enforcement of the FD&C Act, while section 701(b) of the FD&C Act authorizes FDA and the Department of the Treasury to jointly prescribe regulations for the efficient enforcement of section 801 of the FD&C Act. This final rule is being jointly prescribed by FDA and the Department of the Treasury.

V. Comments on the Proposed Rule and FDA Response

We received four comments on the proposed rule by the close of the comment period, all from individuals. One comment is unintelligible. The remaining three comments make brief general remarks supportive of the proposed rule; all suggest extending the beneficial aspects of the proposed electronic submission of general data elements for veterinary devices to other FDA-regulated products. A requirement for this specific process in the ACE environment for such other FDA-regulated products was created under the ACE final rule in 2016. Because these comments were outside the scope of this rule, further discussion of them is not included here.

We are finalizing the proposal without revision.

VI. Effective Date

The rule is effective November 17, 2022.

VII. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). We believe that this final rule is not an economically significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. This final rule simply extends to veterinary devices the submission of the data

elements that are currently required for other FDA-regulated imports covered under the ACE final rule (Ref. 1). The RIA for the ACE final rule estimates that: (1) small businesses will be affected by that final rule in the same way as non-small businesses and that (2) small businesses will bear the costs, but will also enjoy most of the benefits (Ref. 2). According to FDA's internal data (Ref. 3), there are no businesses that solely specialize on importing veterinary devices into the United States. Because no additional businesses will be impacted by this final rule, we certify that this final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $158 million, using the most current (2020) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

For veterinary devices being imported or offered for import into the United States, and where entry is electronically filed in ACE or any other EDI system authorized by CBP, this final rule requires the submission of certain data elements material to FDA's process of making decisions on admissibility. This final rule therefore simply extends to veterinary devices the submission of the data elements that are currently required for other FDA-regulated products by § 1.72.

The costs of this final rule were inadvertently included, and the benefits discussed, in the RIA for the ACE final rule (Ref. 2). More specifically, one data category that was used in the RIA of the ACE final rule included both animal drug import lines and veterinary device import lines and should have only included animal drug import lines. As a result of inadvertently including veterinary device import lines in the RIA of the ACE final rule, the costs of the ACE final rule were overestimated by $0.028 million to $0.071 million per year (in 2015 dollars, annualized over 20 years using a 7 percent discount rate). These costs to industry [1] included the costs of preparing the required information for each import entry, checking data quality, and completing and submitting the electronic entry submission. Because we do not want to double count these costs to the industry, we conclude that this final rule has no additional costs beyond the costs that were included in the RIA of the ACE final rule (Ref. 2). Updated to 2020 dollars and using actual import line counts for years since the publication of the ACE final rule (2016 to 2020), the costs of complying with this regulation are between $0.056 million and $0.140 million per year with the best estimate of $0.077 million per year at a 7 percent discount rate and are between $0.059 million and $0.147 million per year with the best estimate of $0.080 million per year at a 3 percent discount rate (table 1).

TABLE 1—SUMMARY OF COSTS, BENEFITS, AND DISTRIBUTIONAL EFFECTS OF THE FINAL RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Benefits:							
Annualized Monetized, $millions/year							
Annualized Quantified							
Qualitative	Potential time reduction for veterinary device import entry processing by FDA; more efficient use of FDA's internal resources; potential increase in predictability of the import process for veterinary devices; potentially fewer veterinary device imports being held; potentially shorter timeframes for imported veterinary devices being held pending a final admissibility decision; potentially fewer recalls of imported veterinary devices; potential reduction in the number of violative veterinary devices entering the United States and reaching U.S. consumers; compliant imported veterinary devices potentially reaching U.S. consumers faster.						
Costs:							
Annualized Monetized, $millions/year	$0.077	$0.056	$0.140	2020	7	20	
Annualized Quantified	0.080	0.059	0.147	2020	3	20	
Qualitative							
Transfers:							
Federal Annualized Monetized, $millions/year							
	From:			To:			

[1] We assume that the importer bears the actual burden of the ACE final rule even if the importer, for example, hires a customs broker to complete some of the tasks in order to comply with this regulation.

TABLE 1—SUMMARY OF COSTS, BENEFITS, AND DISTRIBUTIONAL EFFECTS OF THE FINAL RULE—Continued

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
Other Annualized Monetized $millions/year							
	From:			To:			

Effects:

State, Local or Tribal Government: No significant effect.

Small Business: Small businesses are affected by this final rule in the same way as non-small businesses. Businesses that are affected by this rule are the same businesses as some of the importers affected by the ACE final rule because there are no businesses that solely specialize on importing veterinary devices into the United States. Small businesses that import veterinary devices will bear the costs of this rule, but also will enjoy most of the benefits. We estimate that providing several additional data elements to FDA via ACE in exchange for a potentially more efficient import admissibility review process will not cause a significant impact on a substantial number of small entities. Benefits that we were not able to quantify arise from improved prevention of risks to public health from non-compliant veterinary device imports and increased efficiency and streamlining of the overall import process of veterinary devices; these benefits are presumed to be positive.

Wages: N/A.

Growth: N/A.

Next, we qualitatively discuss the benefits and the costs of this final rule that were previously discussed in the RIA of the ACE final rule (Ref. 2) and will also apply to veterinary devices covered by this final rule. The cost savings to both the industry and FDA that we are unable to quantify arise from the reduced time of import entry processing for veterinary devices, fewer veterinary device imports being held, and a shorter timeframe between the time of veterinary device import entry transmission and a final admissibility decision by FDA. Such time savings will arise as a result of increased efficiency in FDA's imports admissibility process.

Without this final rule, the amount of information provided by veterinary device import entry filers would be suboptimal; the information material to FDA's determination of admissibility on an imported veterinary device would be collected only if and to the extent it is voluntarily provided by filers. In order to operate more efficiently and to make risk-based admissibility decisions potentially faster for all veterinary device import entries, FDA needs certain data elements. A manual review of a veterinary device entry line on average takes about 24 hours (Ref. 3), whereas an automated ''May Proceed'' outcome may take only minutes. Therefore, increasing the number of automated ''May Proceed'' outcomes results in time and cost savings to both FDA and industry. By requiring import entry filers to submit data elements mandated by this final rule into ACE, FDA will further streamline review of import entry declarations for veterinary devices and will facilitate a more efficient use of FDA's internal resources.

Benefits to consumers from this final rule that we are similarly unable to quantify will result from a reduction in the number of non-compliant veterinary device imports reaching U.S. consumers and from compliant imported veterinary devices reaching U.S. consumers faster. There have been recalls of imported veterinary devices in the past. For example, in 2016 there were three recalls of imported veterinary devices (Ref. 3). The potential health risk could be avoided if non-compliant veterinary devices are prevented from entering the U.S. market in the first place. FDA anticipates that requiring the data elements to be submitted in ACE for veterinary devices will reduce the number of violative veterinary devices entering the United States and consequently reaching American consumers. In some, but not in all cases, defects or adulteration of veterinary devices that are being imported or offered for import into the United States will be discovered upon a manual review that will be triggered as a result of information submitted in ACE.

In the RIA of the ACE final rule, we estimate that the costs to both domestic and foreign entities of complying with the rule as based largely on the amount of additional time it will take firms to: (1) have an administrative worker prepare the additional information required for each import line; (2) have the owner or manager in charge confirm the information is correct; and (3) have an administrative worker complete the entry declarations using software that is connected to ACE. We also projected that the annual number of FDA-regulated import lines and the number of lines covered by the ACE final rule and therefore by this final rule would continue to grow at a rate of between 0 and 10 percent per year, with the most likely rate of 2.45 percent per year, resulting in increasing total annual costs to industry. For years since the publication of the ACE final rule (2016 to 2020), we replaced this assumption with actual veterinary device import line counts.

The estimated costs of this final rule are summarized in table 2. The lower and upper estimates are at the 5 and 95 percent confidence interval, respectively. Updated to 2020 dollars, the present value of total costs of this rule is $0.81 million at a 7 percent discount rate and $1.19 million at a 3 percent discount rate.

TABLE 2—SUMMARY OF ESTIMATED COSTS, COST SAVINGS, AND BENEFITS OF THE FINAL RULE

[In thousands of 2020 dollars]

	Discount rate (%)	Lower estimate	Primary estimate	Upper estimate
Year 1 Costs		$29	$49	$73
Year 2 Costs		39	53	97
Year 3 Costs		51	69	127
Year 4 Costs		52	71	130
Year 5 Costs		51	69	127
Year 6 Costs		53	71	131

TABLE 2—SUMMARY OF ESTIMATED COSTS, COST SAVINGS, AND BENEFITS OF THE FINAL RULE—Continued

[In thousands of 2020 dollars]

	Discount rate (%)	Lower estimate	Primary estimate	Upper estimate
Year 7 Costs		54	74	136
Year 8 Costs		56	76	140
Year 9 Costs		58	78	145
Year 10 Costs		60	81	149
Year 11 Costs		62	84	154
Year 12 Costs		64	86	159
Year 13 Costs		66	89	165
Year 14 Costs		68	92	170
Year 15 Costs		71	95	176
Year 16 Costs		73	98	182
Year 17 Costs		75	102	188
Year 18 Costs		78	105	194
Year 19 Costs		80	109	200
Year 20 Costs		83	112	207
Total Costs		1,225	1,663	3,048
Present Value of Costs	7	596	813	1,483
Present Value of Costs	3	878	1,194	2,185
Annualized Costs	7	56	77	140
Annualized Costs	3	59	80	147
Total Benefits		Not Quantified		
Present Value of Benefits		Not Quantified		
Annualized Benefits		Not Quantified		

Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Veterinary device importers that are impacted by this final rule are included in the Final Regulatory Flexibility Analysis for the ACE final rule (Ref. 2). As such, the impacts on these small businesses are already discussed in the Regulatory Flexibility Analysis for the ACE final rule (Ref. 2). This analysis serves as the Final Regulatory Flexibility Analysis for this rule, as required under the Regulatory Flexibility Act. Because no additional business will be impacted by this final rule (Ref. 3), we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

VIII. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Paperwork Reduction Act of 1995

This final rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). A description of these provisions is given in the *Description* section of this document with an estimate of the one-time and recurring reporting burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

Title: Importer's Entry Notice—OMB Control Number 0910–0046—Revision.

Description: We are issuing a regulation that requires ACE filers to submit certain data elements material to our import admissibility review of veterinary devices in ACE, or any other CBP-authorized EDI system, at the time of entry. This action facilitates automated ''May Proceed'' determinations by us for those veterinary devices that present a low risk to public health which, in turn, allows the Agency to focus our limited resources on those FDA-regulated products that may be associated with a greater public health risk.

Description of Respondents: Respondents to the information collection provisions of this final rule are those domestic and foreign importers of medical devices that import or offer to import veterinary devices into the United States and ACE filers.

Reporting: As of July 23, 2016, ACE became the sole EDI system authorized by CBP for the electronic filing of entries of FDA-regulated articles into the United States. FDA has revised subpart D of part 1 of chapter I, which was recently added by the ACE final rule, to establish requirements for the electronic filing of entries of FDA-regulated products in ACE or any other EDI system authorized by CBP. That final rule took effect on December 29, 2016.

Currently, importers of certain FDA-regulated products must submit the general data elements in § 1.72 at the time of entry in ACE. We use the information collected to initially screen and review FDA-regulated products being imported or offered for import into the United States for admissibility in order to prevent violative FDA-regulated products from entering the United States. This final rule makes the data elements that are required to be submitted for FDA-regulated products pursuant to § 1.72 also mandatory for the electronic filing of entries containing a veterinary device: FDA Country of Production; complete FDA Product Code; full intended use code; and telephone number and email address of the importer of record. Submission of these data elements in ACE would help us to more effectively and efficiently make admissibility determinations for veterinary devices by increasing the opportunity for an

automated ''May Proceed'' of these entries by FDA.

Although veterinary devices were not included in the ACE final rule, veterinary devices were included in its RIA, as aggregate data for both animal drugs and devices was included in the analysis. As a result of inadvertently including veterinary device import lines in the RIA of the ACE final rule, the information collection burden estimates of the ACE final rule likewise incorporated the importation of veterinary devices.

As stated above, the analysis of the collection of information and its related burden on respondents for the ACE final rule incorporated the one-time and recurring burden related to importation of veterinary devices by medical devices importers; thus, for this final rule there is no additional estimated burden beyond the burden hours that were included in the PRA section of the ACE final rule. We are, however, revising the information collection approved under OMB control number 0910–0046 to identify the subset of burden specific to the import entries for veterinary devices by importers of medical devices for the purpose of allowing stakeholders to comment on this subset.

The portion of the annual recurring reporting burden of this collection of information specific to importers of medical devices that import veterinary devices is estimated as follows:

TABLE 3—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent (approximate)	Total annual responses	Average burden per response	Total hours
Preparing the required information (applies to unique lines only)	944	0.51	484	0.03889 (2.333 minutes)	19
Quality checks and data submission into ACE	285	117.87	33,592	0.01944 (1.166 minutes)	653
Total	.....	.....	.....	.....	672

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We adopt the average burden per response estimates reported in table 3 from the analysis in the ACE final rule (81 FR 85854 at 85869). To estimate the number of respondents, number of responses per respondent, and total annual responses reported in table 3, we have used the relevant assumptions and estimates discussed in Section VI. Economic Analysis of Impacts and the actual data for 2016 to 2018. Other key assumptions in the RIA for the ACE final rule (Ref. 2) and for this final rule that affect our estimate of the annual recurring reporting burden are:

- Average burden per response for preparing the required information that applies to unique product-manufacturer import lines only (81 FR 85854 at 85869). It is estimated to take between 0.0167 hours (1 minute) and 0.0667 (4 minutes), with the best estimate of 0.03889 hours (2.333 minutes).
- Average burden per response for quality checks and data submission into ACE applies to all veterinary device lines. It is estimated to take between 0.0083 hours (0.5 minute) and 0.0333 hours (2 minutes) with the best estimate of 0.01944 hours (1.166 minutes).

TABLE 4—ESTIMATED ONE-TIME REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent (approximate)	Total annual responses	Average burden per response	Total hours
First year adjusting to new requirements that will result in an average of 25 percent more time for quality checks and submission into ACE.	206	119.74	24,667	0.00486 (0.29 minutes)	120

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Table 4 shows the subset of the estimated one-time (*i.e.,* occurring only in the first year) reporting burden associated specifically with the importation of veterinary medical devices by medical device importers. We adopt the average burden per response estimates reported in table 4 from the analysis in the ACE final rule (81 FR 85854 at 85869). We expect that, in the first year, respondents would be required to adjust to new requirements that will result in an average of 25 percent more time for quality checks and submission into ACE, for a total of 120 hours. Table 2 from the analysis in the ACE final rule (81 FR 85854 at 85869) also included an estimate of the time needed for review and familiarization with the rule. We have not included that estimate in this analysis because all importers of medical devices that import veterinary medical devices also import human medical devices, which are covered in the ACE final rule; thus, they are already familiar with those requirements.

We estimate the subset of burden specific to the import entries for veterinary devices approved under OMB control number 0910–0046 to be 792 hours in the first year (672 recurring hours + 120 one-time hours) and 672 hours recurring after the first year.

In compliance with the PRA (44 U.S.C. 3407(d)), the Agency has submitted the information collection provisions of this final rule to OMB for review. These requirements will not be effective until FDA obtains OMB approval. FDA will publish a notice concerning OMB approval of these requirements in the **Federal Register**.

X. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the final rule does not contain policies that 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, we conclude that this final rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

XI. Consultation and Coordination With Indian Tribal Governments

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13175. We have determined that the final rule does not contain policies that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the Executive Order and, consequently, a tribal summary impact statement is not required.

XII. References

The following references are on display in the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA, ''Submission of Food and Drug Administration Import Data in the Automated Commercial Environment.'' **Federal Register** (Docket No. FDA–2016–N–1487). Online November 29, 2016. *https://www.federalregister.gov/documents/2016/11/29/2016-28582/submission-of-food-and-drug-administration-import-data-in-the-automated-commercial-environment.*
2. FDA. Submission of Food and Drug Administration Import Data in the Automated Commercial Environment (Final Rule) Regulatory Impact Analysis. Economic Impact Analyses of FDA Regulations. Online November 29, 2016. *https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations.*
3. FDA. Office of Regulatory Affairs Reporting, Analysis, and Decision Support System (ORADSS). 2015–2017 data.

List of Subjects in 21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 1 is amended as follows:

PART 1—GENERAL ENFORCEMENT REGULATIONS

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

Authority: 15 U.S.C. 1333, 1453, 1454, 1455, 4402; 19 U.S.C. 1490, 1491; 21 U.S.C. 321, 331, 332, 333, 334, 335a, 342, 343, 350c, 350d, 350e, 350j, 350k, 352, 355, 360b, 360ccc, 360ccc–1, 360ccc–2, 362, 371, 373, 374, 379j–31, 381, 382, 384, 384a, 384b, 384d, 387, 387a, 387c, 393; 42 U.S.C. 216, 241, 243, 262, 264, 271; Pub. L. 107–188, 116 Stat. 594, 668–69; Pub. L. 111–353, 124 Stat. 3885, 3889.

■ 2. Amend § 1.71 by adding in alphabetical order the definition for ''Veterinary device'' to read as follows:

§ 1.71 Definitions.

* * * * *

Veterinary device means a device as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act, that is intended for use in animals.

■ 3. Revise § 1.72 introductory text to read as follows:

§ 1.72 Data elements that must be submitted in ACE for articles regulated by FDA.

General. When filing an entry in ACE, the ACE filer shall submit the following information for food contact substances, drugs, biological products, HCT/Ps, medical devices, veterinary devices, radiation-emitting electronic products, cosmetics, and tobacco products.

* * * * *

■ 4. Revise § 1.75 to read as follows:

§ 1.75 Animal drugs and veterinary devices.

(a) *Animal drugs.* In addition to the data required to be submitted in § 1.72, an ACE filer must submit the following information at the time of filing entry in ACE for animal drugs:

(1) *Registration and listing.* For a drug intended for animal use, the Drug Registration Number and the Drug Listing Number if the foreign establishment where the drug was manufactured, prepared, propagated, compounded, or processed before being imported or offered for import into the United States is required to register and list the drug under part 207 of this chapter. For the purposes of this section, the Drug Registration Number that must be submitted in ACE at the time of entry is the Unique Facility Identifier of the foreign establishment where the animal drug was manufactured, prepared, propagated, compounded, or processed before being imported or offered for import into the United States. The Unique Facility Identifier is the identifier submitted by a registrant in accordance with the system specified under section 510(b) of the Federal Food, Drug, and Cosmetic Act. For the purposes of this section, the Drug Listing Number is the National Drug Code number of the animal drug article being imported or offered for import.

(2) *New animal drug application number.* For a drug intended for animal use that is the subject of an approved application under section 512 of the Federal Food, Drug, and Cosmetic Act, the number of the new animal drug application or abbreviated new animal drug application. For a drug intended for animal use that is the subject of a conditionally approved application under section 571 of the Federal Food, Drug, and Cosmetic Act, the application number for the conditionally approved new animal drug.

(3) *Veterinary minor species index file number.* For a drug intended for use in animals that is the subject of an Index listing under section 572 of the Federal Food, Drug, and Cosmetic Act, the Minor Species Index File number of the new animal drug on the Index of Legally Marketed Unapproved New Animal Drugs for Minor Species.

(4) *Investigational new animal drug file number.* For a drug intended for animal use that is the subject of an investigational new animal drug or generic investigational new animal drug file under part 511 of this chapter, the number of the investigational new animal drug or generic investigational new animal drug file.

(b) *Veterinary devices.* An ACE filer must submit the data specified in § 1.72 at the time of filing entry in ACE for veterinary devices.

Dated: October 6, 2022.

Robert M. Califf,

Commissioner of Food and Drugs.

In concurrence with FDA.

Dated: October 6, 2022.

Thomas C. West, Jr.,

Deputy Assistant Secretary of the Treasury for Tax Policy, Department of the Treasury.

[FR Doc. 2022–22532 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 518

RIN 3141–AA72

Self-Regulation of Class II Gaming

AGENCY: National Indian Gaming Commission, Department of the Interior.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission (NIGC) is amending its regulations regarding self-regulation of Class II gaming under the Indian Gaming Regulatory Act. The amendment revises the regulations to address an ambiguity in the petitioning process and clarifies the Office of Self-Regulation's (OSR) role once the Commission issues a certificate. Notably, the amendment: Clarifies the NIGC may issue a final decision on issuing a certificate within 30 days instead of after 30 days; removes the requirement that the director of the OSR must be a Commissioner; enumerates the OSR is the correct party to receive notifications of material changes from self-regulated tribes; expands the deadline for tribes to report material changes to the OSR from three business days to 10 business days; clarifies the OSR will be the office to make any recommendations to revoke a certificate of self-regulation before the Commission; and clarifies that, in any revocation proceeding, the OSR has the burden to show just cause for the revocation and carry that burden by a preponderance of the evidence.

DATES: Effective November 17, 2022.

FOR FURTHER INFORMATION CONTACT: Michael Hoenig, National Indian Gaming Commission; 1849 C Street NW, MS 1621, Washington, DC 20240. Telephone: (202) 632–7003.

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands.

On January 31, 2012, the Commission published a notice of proposed rulemaking to promulgate part 518, the procedures controlling self-regulation. 77 FR 4714 (Jan. 31, 2012). Once promulgated, part 518 established the procedures for the Commission and the OSR to, among other things, receive, evaluate, recommend, issue, deny, or revoke a certificate of self-regulation. On September 1, 2013, after initial publication, the Commission enacted minor revisions to part 518 to amend certain timelines and an incorrect section heading and reference to IGRA. 78 FR 37114 (Sept. 1, 2013).

II. Development of the Proposed Rule

On June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the procedures controlling self-regulation. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments are intended to improve the Agency's efficiency in evaluating petitions for self-regulation, reduce the time it takes to obtain a certificate of self-regulation, and clarify the Office of Self-Regulation's functions.

The Commission held two virtual consultation sessions in September and one virtual consultation in October of 2021 to receive tribal input on any proposed changes. After considering the comments received from the public and through tribal consultations, the Commission published a notice of proposed rulemaking on April 7, 2022, 87 FR 20351. The notice of proposed rulemaking indicated that comments were due on or before June 6, 2022. On June 16, 2022, 87 FR 36280, the NIGC announced the reopening of the comment period until June 23, 2022.

The Commission reviewed all of the public's comments and now adopts these changes, which it believes will improve the self-regulation process.

III. Review of Public Comments

The Commission received the following comments in response to the notice of proposed rulemaking.

Comment: Several commenters approved of the change that clarified the Commission may issue a final determination for a certificate of self-regulation within 30 days if no hearing is requested, as the prior language was ambiguous and potentially left open an indefinite time period for a determination.

Response: The Commission appreciates the comment and has left the language in the final rule.

Comment: Several commenters approved of the change from three to ten business days for tribes to notify the OSR of material changes.

Response: The Commission appreciates the comment and has left the language in the final rule.

Comment: Several commenters approved that placing the burden of proof on the OSR in revocation hearings.

Response: The Commission appreciates these comments and has left the language in the final rule.

Comment: A commenter stated that procedural questions were left unanswered for § 518.7(f), specifically (1) to whom should the notice be directed, (2) what restrictions exist to who may send a notice, and (3) the contents of the notice and what it must include.

Response: The Commission appreciates the comment and intends to provide clarity on these and other process questions. It does not wish, however, to codify a process that may change in the future. The Commission intends to publish guidance for administrative and procedural matters on its website where it can be updated as needed.

Comment: Numerous commenters expressed concern with the reporting requirements in § 518.11 and commented that there were unanswered questions as to what needs to be reported.

Response: The Commission appreciates the comments, and notes that the only proposed change to the rule pertained to the office the Tribe or Tribal Gaming Regulatory Authority reports such information. The Commission believes the scope of what needs to be detailed is sufficiently covered by the reference to § 518.5, which does specify criteria that will be considered by the Commission when deciding to grant a certificate of self-regulation, as well as the examples given in § 518.11. To the extent that additional guidance or detail is needed, the Commission will include such information in future bulletins.

Comment: Several commenters expressed concern that if a Commissioner is appointed the head of the OSR they would be the proponent of any case to revoke a certificate before the Commission and also voting on the revocation. The commenters stated that this would create an insurmountable conflict of interest.

Response: The Commission has changed the rule to no longer require that a Commissioner serve as the head of the OSR. That being said, there is nothing to prohibit the Commission from appointing a Commissioner to lead the office, and the Commission disagrees with the commenter's assertion that a Commissioner serving as head of the OSR would create a conflict of interest. It is not a violation of due process for the Commissioners to serve both investigatory and adjudicatory functions. The United State Supreme Court held as much in the case *Withrow* v. *Larkin,* 421 U.S. 35, 51–52 (1975), following the cases that rejected the idea that the combination (of) judging (and) investigating functions is a denial of due process. The Court further stated there is a presumption of honesty and

integrity in those serving as adjudicators. Moreover, the NIGC is familiar with such a structure and the dual role of investigator and adjudicator comes from IGRA itself. Section 2706 of IGRA tasks the Commission with investigatory and inspection powers, while section 2713 requires the Commission to hear any appeals of a civil fine or closure order issues by the Chairman. The Commission has long worked under such a structure. For example, the Chairman makes a determination on a gaming ordinance and also sits on the panel if it is appealed. And although there is a presumption of fairness, the NIGC nevertheless has policies and procedures in place to ensure a fair decision on all appeals and investigations.

Comment: A commenter requested that if a commissioner is appointed as Director of OSR that they recuse themselves from participating as a Commissioner of NIGC in revocation hearings for due process concerns.

Response: The Commission declines to adopt this suggestion for the same reason as above.

Comment: Several comments were outside the scope of the rulemaking and related generally to the self-regulation process, the lack of guidance and the inability of more tribes to participate in the self-regulation process.

Response: The Commission appreciates these comments and will take them into consideration for future guidance or amendments to the rule.

IV. Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of $100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of section 3(a) and 3(b)(2) of the order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141–0003.

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC consultation policy specifies that it will consult with tribes on Commission Actions with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the self-regulation process.

List of Subjects in 25 CFR Part 518

Gambling, Indian—lands, Indian—tribal government, Reporting and recordkeeping requirements.

Therefore, for reasons stated in the preamble, 25 CFR part 518 is amended as follows:

PART 518—SELF-REGULATION OF CLASS II GAMING

■ 1. The authority citation for part 518 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 25 U.S.C. 2710(c).

■ 2. Revise § 518.2 to read as follows:

§ 518.2 Who will administer the self-regulation program for the Commission?

The self-regulation program will be administered by the Office of Self–Regulation. The Chair shall appoint a Director to administer the Office of Self–Regulation.

■ 3. Revise § 518.5(b) introductory text to read as follows:

§ 518.5 What criteria must a tribe meet to receive a certificate of self-regulation?

* * * * *

(b) A tribe may illustrate that it has met the criteria listed in paragraph (a) of this section by addressing factors such as those listed in paragraphs (b)(1) through (9) of this section. The list of factors is not all-inclusive; other factors not listed here may also be addressed and considered.

* * * * *

■ 4. Revise § 518.7(f) to read as follows:

§ 518.7 What process will the Commission use to review and certify petitions?

* * * * *

(f) The Commission shall issue a final determination within 30 days after issuance of its preliminary findings if the tribe has informed the Commission in writing that the tribe does not request a hearing or within 30 days after the conclusion of a hearing, if one is held. The decision of the Commission to approve or deny a petition shall be a final agency action.

* * * * *

■ 5. Revise § 518.11 to read as follows:

§ 518.11 Does a tribe that holds a certificate of self-regulation have a continuing duty to advise the Commission of any additional information?

Yes. A tribe that holds a certificate of self-regulation has a continuing duty to

advise the Office of Self-Regulation within 10 business days of any changes in circumstances that are material to the approval criteria in § 518.5 and may reasonably cause the Commission to review and revoke the tribe's certificate of self-regulation. Failure to do so is grounds for revocation of a certificate of self-regulation. Such circumstances may include, but are not limited to, a change of primary regulatory official; financial instability; or any other factors that are material to the decision to grant a certificate of self-regulation.

■ 4. Revise §§ 518.13 and 518.14 to read as follows:

§ 518.13 When may the Commission revoke a certificate of self-regulation?

If the Office of Self-Regulation determines that the tribe no longer meets or did not comply with the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10, or the requirements of § 518.11, the Office of Self-Regulation shall prepare a written recommendation to the Commission and deliver a copy of the recommendation to the tribe. The Office of Self-Regulation's recommendation shall state the reasons for the recommendation and shall advice the tribe of its right to a hearing under part 584 of this chapter or right to appeal under part 585 of this chapter. The Commission may, after an opportunity for a hearing, revoke a certificate of self-regulation by a majority vote of its members if it determines that the tribe no longer meets the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10 or the requirements of § 518.11.

§ 518.14 May a tribe request a hearing on the Commission's proposal to revoke its certificate of self-regulation?

Yes. A tribe may request a hearing regarding the Office of Self-Regulation's recommendation that the Commission revoke a certificate of self-regulation. Such a request shall be filed with the Commission pursuant to part 584 of this chapter. Failure to request a hearing within the time provided by part 584 of this chapter shall constitute a waiver of the right to a hearing. At any hearing where the Commission considers revoking a certificate, the Office of Self-Regulation bears the burden of proof to support its recommendation by a preponderance of the evidence. The decision to revoke a certificate is a final agency action and is appealable to Federal District Court pursuant to 25 U.S.C. 2714.

Dated: September 27, 2022.

E. Sequoyah Simermeyer,

Chairman.

Jeannie Hovland,

Vice Chair.

[FR Doc. 2022–21948 Filed 10–17–22; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Parts 207 and 326

RIN 0710–AB13

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is issuing this final rule to adjust its civil monetary penalties (CMP) under the Rivers and Harbors Appropriation Act of 1922 (RHA), the Clean Water Act (CWA), and the National Fishing Enhancement Act (NFEA) to account for inflation.

DATES: This final rule is effective on October 18, 2022.

FOR FURTHER INFORMATION CONTACT: For the RHA portion, please contact Mr. Paul Clouse at 202–761–4709 or by email at *Paul.D.Clouse@usace.army.mil,* or for the CWA and NFEA portion, please contact Mr. Matt Wilson 202–761–5856 or by email at *Matthew.S.Wilson@usace.army.mil* or access the U.S. Army Corps of Engineers Regulatory Home Page at *https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/.*

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, codified at 28 U.S.C. 2461, note, as amended, requires agencies to annually adjust the level of CMP for inflation to improve their effectiveness and maintain their deterrent effect, as required by the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Public Law 114–74, sec. 701, November 2, 2015 (''Inflation Adjustment Act'').

With this rule, the new statutory maximum penalty levels listed in Table 1 will apply to all statutory civil penalties assessed on or after the effective date of this rule. Table 1 shows the calculation of the 2022 annual inflation adjustment based on the guidance provided by the Office of Management and Budget (OMB) (see December 15, 2021, Memorandum for the Heads of Executive Departments and Agencies, Subject: Implementation of Penalty Inflation Adjustments for 2022, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015). The OMB provided to agencies the cost-of-living adjustment multiplier for 2022, based on the Consumer Price Index for All Urban Consumers (CPI–U) for the month of October 2021, not seasonally adjusted, which is 1.06222. Agencies are to adjust ''the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.'' For 2022, agencies multiply each applicable penalty by the multiplier, 1.06222, and round to the nearest dollar. The multiplier should be applied to the most recent penalty amount, *i.e.,* the one that includes the 2021 annual inflation adjustment.

TABLE 1

Citation	Civil Monetary Penalty (CMP) amount established by law	2021 CMP amount in effect prior to this rulemaking	2022 Inflation adjustment multiplier	CMP Amount as of October 18, 2022
Rivers and Harbors Act of 1922 (33 U.S.C. 555).	$2,500 per violation	$5,903 per violation	1.06222	$6,270 per violation.
CWA, 33 U.S.C. 1319(g)(2)(A).	$10,000 per violation, with a maximum of $25,000.	$22,585 per violation, with a maximum of $56,461.	1.06222	$23,990 per violation, with a maximum of $59,974.
CWA, 33 U.S.C. 1344(s)(4) ...	Maximum of $25,000 per day for each violation.	Maximum of $56,461 per day for each violation.	1.06222	Maximum of $59,974 per day for each violation.

TABLE 1—Continued

Citation	Civil Monetary Penalty (CMP) amount established by law	2021 CMP amount in effect prior to this rulemaking	2022 Inflation adjustment multiplier	CMP Amount as of October 18, 2022
National Fishing Enhancement Act, 33 U.S.C. 2104(e).	Maximum of $10,000 per violation.	Maximum of $24,730 per violation.	1.06222	Maximum of $26,269 per violation.

Section 4 of the Inflation Adjustment Act directs federal agencies to publish annual penalty inflation adjustments. In accordance with section 553 of the Administrative Procedures Act (APA), many rules are subject to notice and comment and are effective no earlier than 30 days after publication in the **Federal Register**. Section 4(b)(2) of the Inflation Adjustment Act further provides that each agency shall make the annual inflation adjustments ''notwithstanding section 553'' of the APA. According to the December 2021 OMB guidance issued to Federal agencies on the implementation of the 2022 annual adjustment, the phrase ''notwithstanding section 553'' means that, ''the public procedure the APA generally requires—notice, an opportunity for comment, and a delay in effective date—is not required for agencies to issue regulations implementing the annual adjustment.'' Consistent with the language of the Inflation Adjustment Act and OMB's implementation guidance, this rule is not subject to notice and opportunity for public comment or a delay in effective date. This rule adjusts the value of current statutory civil penalties to reflect and keep pace with the levels originally set by Congress when the statutes were enacted, as required by the Inflation Adjustment Act. This rule will apply prospectively to penalty assessments beginning on the effective date of this final rule.

Regulatory Procedures

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps and the use of ''you'' refers to the reader. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

This rule is not designated a ''significant regulatory action'' under Executive Order 12866 and OMB determined this rule to not be significant. Moreover, this final rule makes nondiscretionary adjustments to existing civil monetary penalties in accordance with the Inflation Adjustment Act and OMB guidance. The Corps, therefore, did not consider alternatives and does not have the flexibility to alter the adjustments of the civil monetary penalty amounts as provided in this rule.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

The Department of Defense determined that provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements. This action merely increases the level of statutory civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of Corps-administered statutes and implementing regulations.

Executive Order 13132, ''Federalism''

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

The Assistant Secretary of the Army (Civil Works) certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act are inapplicable. Therefore, the Regulatory Flexibility Act, as amended, does not require the Corps of Engineers to prepare a regulatory flexibility analysis.

Unfunded Mandates Reform Act (2 U.S.C. Chapter 25)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule the mandates of which require spending in any year of $100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 104–113, ''National Technology Transfer and Advancement Act'' (15 U.S.C. Chapter 7)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. This rule does not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks''

Executive Order 13045 applies to any rule that: (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2)

concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives. This rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments''

Executive Order 13175 requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' This rule does not have tribal implications. The rule imposes no new substantive obligations on tribal governments. Therefore, Executive Order 13175 does not apply to this rule.

Public Law 104–121, ''Congressional Review Act,'' (5 U.S.C. Chapter 8)

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

Executive Order 12898, ''Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations''

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin. This rule merely adjusts civil penalties to account for inflation, and therefore, is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use''

This rule is not a ''significant energy action'' as defined in Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

33 CFR Part 207

Navigation (water), Penalties, Reporting and recordkeeping requirements, and Waterways.

33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations, Investigations, Law enforcement, Navigation (Water), Water pollution control, and Waterways.

Approved by:

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

For the reasons set out in the preamble, title 33, chapter II, part 207 of the Code of Federal Regulations is amended as follows:

PART 207—NAVIGATION REGULATIONS

■ 1. The authority citation for part 207 is revised to read as follows:

Authority: 33 U.S.C. 1; 33 U.S.C. 555; 28 U.S.C. 2461 note.

■ 2. Amend § 207.800 by revising paragraph (c)(2) to read as follows:

§ 207.800 Collection of navigation statistics.

* * * * *

(c) * * *

(2) In addition, any person or entity that fails to provide timely, accurate, and complete statements or reports required to be submitted by the regulation in this section may also be assessed a civil penalty of up to $6,270 per violation under 33 U.S.C. 555, as amended.

* * * * *

PART 326—ENFORCEMENT

■ 3. The authority citation for part 326 continues to read as follows:

Authority: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2104; 33 U.S.C. 1319; 28 U.S.C. 2461 note.

■ 4. Amend § 326.6 by revising paragraph (a)(1) to read as follows:

§ 326.6 Class I administrative penalties.

(a) * * * (1) This section sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act, judicially-imposed civil penalties under Section 404(s) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. Under Section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed $23,990 per violation, except that the maximum amount of any Class I civil penalty shall not exceed $59,974. Under Section 404(s)(4) of the Clean Water Act, judicially-imposed civil penalties may not exceed $59,974 per day for each violation. Under Section 205(e) of the National Fishing Enhancement Act, penalties for violations of permits issued in accordance with that Act shall not exceed $26,269 for each violation.

TABLE 1 TO PARAGRAPH(a)(1)

Environmental statute and U.S. code citation	Statutory civil monetary penalty amount for violations that occurred after November 2, 2015, and are assessed on or after October 18, 2022
Clean Water Act (CWA), Section 309(g)(2)(A), 33 U.S.C. 1319(g)(2)(A)	$23,990 per violation, with a maximum of $59,974.
CWA, Section 404(s)(4), 33 U.S.C. 1344(s)(4)	Maximum of $59,974 per day for each violation.
National Fishing Enhancement Act, Section 205(e), 33 U.S.C. 2104(e)	Maximum of $26,269 per violation.

* * * * *

[FR Doc. 2022–22480 Filed 10–17–22; 8:45 am]

BILLING CODE 3720–58–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2020–0187; FRL–10244–01–R4]

Air Plan Approval; North Carolina; Revisions to Exclusionary Rules and Permit Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving portions of revisions to the State Implementation Plan (SIP) submitted by the State of North Carolina, through the North Carolina Department of Environmental Quality, Division of Air Quality (DAQ), on September 18, 2009, and July 10, 2019. These revisions modify two different sections of the North Carolina SIP which (1) exclude certain categories of facilities from title V permitting requirements by imposing limitations on their potential emissions (Section 2Q .0800, ''Exclusionary Rules''), and (2) exclude certain categories of facilities from the SIP's permitting requirements by imposing limitations on their potential emissions (Section 2Q .0900, ''Permit Exemptions''). EPA is approving these revisions pursuant to the Clean Air Act (CAA or Act).

DATES: This rule is effective November 17, 2022.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2020–0187. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials can either be retrieved electronically via *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Pearlene Williams, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Ms. Williams can be reached via telephone at (404) 562–9144 or via electronic mail at *williams.pearlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In a notice of proposed rulemaking (NPRM) published on January 19, 2021 (86 FR 5091), EPA proposed to approve changes to several provisions under 15A North Carolina Administrative Code (NCAC) Subchapter 2Q, Air Quality Permit Procedures,[1] of the North Carolina SIP. EPA proposed revisions to the following rules under Section 2Q .0800 (''Exclusionary Rules''), which defines the categories of facilities that are not subject to title V permitting requirements due to limitations on their potential emissions: 2Q .0801, *Purpose and Scope;* 2Q .0802, *Gasoline Service Stations and Dispensing Facilities;*[2] 2Q .0803, *Coating, Solvent Cleaning, Graphic Arts Operations;* 2Q .0804, *Dry Cleaning Facilities;* 2Q .0805, *Grain Elevators;* 2Q .0806, *Cotton Gins;* and 2Q .0807, *Emergency Generators.* In addition, EPA proposed to remove from the SIP Rule 2Q .0809, *Concrete Batch Plants.*

EPA also proposed revisions to the following rules under Section 2Q .0900 (''Permit Exemptions''), which defines the categories of facilities that are exempt from the State's SIP permitting requirements for non-title V facilities by limiting their potential emissions: 2Q .0901, *Purpose and Scope,* and 2Q .0902, *Temporary Crushers.*[3] [4] The January 19, 2021, NPRM provides additional detail regarding the background and rationale for EPA's action. Comments were due on or before February 18, 2021.

II. Response to Comments

EPA received comments on the January 19, 2021, NPRM, which are included in the docket for this rulemaking. The comments arrived in a letter dated February 18, 2021, and originate from one commentor, Air Law for All. The Commenter also provided supplemental documentation to support its comments. The comments are generally opposed to the revisions to the permit exemption provisions of Rule 2Q .0902, *Temporary Crushers,* which exempts temporary rock crushers that meet certain criteria from the requirement to obtain stationary source construction and operating permits under Section 2Q .0300 of the SIP. EPA received no comments on the changes to rules under Section 2Q .0800 or other rule revisions proposed for approval in the NPRM. Below, EPA summarizes and responds to the comments received and briefly describes the temporary crushers covered by Rule 2Q .0902.

A crusher is a machine designed to crush rocks into sand, gravel, or smaller crushed rocks. The term ''temporary crusher'' means a crusher that will be operated at any one site or facility for

[1] In the table of North Carolina regulations federally approved into the SIP at 40 CFR 52.1770(c), 15A NCAC 2Q is referred to as ''Subchapter 2Q Air Quality Permits.''

[2] This amendment changes the title of Rule 2Q .0802 in 40 CFR 52.1770(c) from ''Gasoline Servicing Stations and Dispensing Facilities'' to ''Gasoline Service Stations and Dispensing Facilities.''

[3] In the September 18, 2009, submittal, North Carolina changes the title of Rule 2Q .0902 from ''Portable Crushers'' to ''Temporary Crushers.''

[4] DAQ supplemented the September 18, 2009, submittal in a letter dated June 7, 2019, which includes the correct redline/strikeout of the regulatory changes and final regulations that became state effective on January 1, 2009. This letter is available in the docket for this rulemaking.

no more than 12 months. *See* provision 2Q .0902(a). To operate, a crusher is attached to either a diesel engine, which powers the crusher, or to a diesel-fired generator, which provides electrical power to the crusher and can either be mounted on the crusher or separated from it on a trailer. These diesel engines are mobile sources that meet the definition of ''nonroad engine'' in the CAA and its general compliance provisions for highway, stationary, and nonroad programs. *See* 72 U.S.C. 7550(10); 40 CFR 1068.30 (definition of ''nonroad engine'').[5] The existing SIP-approved version of Rule 2Q .0902 exempts temporary crushers from permitting if, among other specific criteria, any diesel-fired generator or a diesel engine that powers the crusher burns no more than 17,000 gallons of diesel fuel at any one facility or site.

Comment 1: The Commenter states that diesel engines used at a temporary source are considered nonroad engines and that the State has the authority to regulate the ''use and operation'' of nonroad engines under a permissible interpretation of section 209(e) of the CAA. The Commenter quotes 40 CFR part 1074, subpart A, Appendix A, which states, in part, ''EPA believes that states are not precluded under 42 U.S.C. 7543 [CAA section 209] from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded, once the engine is no longer new.'' [6] The Commenter then asserts that regulation of total fuel consumption pursuant to Rule 2Q .0902 at a temporary crusher facility is a regulation of ''the use and operation'' of the diesel engines.

Response 1: EPA disagrees that the existing SIP-approved version of Rule 2Q .0902 imposes any restriction or limitation on the ''the use and operation'' of diesel engines. Paragraph (b) of the SIP-approved version states that the Rule applies to any temporary crusher that:

(1) crushes no more than 300,000 tons at any one facility or site;

(2) burns no more than 17,000 gallons of diesel fuel at any one facility or site if uses:

(A) a diesel-fired generator, or

(B) a diesel engine to drive the crusher;

(3) does not operate at a quarry that has an air permit issued under this subchapter;

(4) continuously uses water spray to control emissions from the crushers; and

(5) does not operate at a facility that is required to have a mining permit issued by the Division of Energy, Mineral, and Land Resources.

These five criteria are not regulating the use and operation of the crushers or the diesel engines that run them; they are the criteria that a temporary crusher must meet under the existing North Carolina SIP to qualify for an exemption from the State's construction and operation permit provisions at Section 2Q .0300. North Carolina's July 10, 2019, SIP revision removes only one of these five criteria—the second one regarding the burning of diesel fuel, which places no restriction on the combustion of diesel fuel by an engine or generator and no limitation on the emissions from such combustion. The other four criteria remain for determining whether a temporary crusher qualifies for the permit exemption.

EPA agrees with the Commenter that diesel engines used at a temporary source, such as these temporary crushers, are considered nonroad engines and that states are not precluded from regulating the use and operation of these engines. However, North Carolina's SIP explicitly exempts title II nonroad engines from its permitting requirements.[7] Further, the Commenter provides no evidence that the fuel combustion threshold being removed from the permitting exemption criteria of Rule 2Q .0902 was originally adopted as an in-use restriction. The fuel combustion criterion was only one of five criteria North Carolina originally chose to adopt in this rule for the purpose of deciding whether a temporary crusher qualifies for a stationary source permit exemption, as explained further below. The State did not create this criterion to regulate emissions from the diesel engines. Under the existing rule, for example, if a temporary crusher that opted for coverage under Rule 02Q .0902 were to combust more than 17,000 gallons of diesel fuel at any one facility or site, it would not be in violation of any fuel combustion limitation (because none exists). Instead, such facility would be in violation of the requirement to obtain a permit in accordance with 15A NCAC 2Q .0300.

North Carolina submitted the temporary crusher permitting exemption to EPA as a SIP revision on December 14, 2004, and EPA approved the revision on September 29, 2017.[8] In that original submittal, the State estimated that crushers processing 300,000 tons of material would emit approximately 1,775 pounds of particulate matter (PM),[9] the only pollutant emitted by temporary crushers subject to Rule 2Q .0902. The State also observed that many of these crushers, in combination with their associated diesel-powered engines or generators, emit less than 5 tons per year of each pollutant per site.[10] The State noted that the subject crushers are used on a temporary basis at construction sites to crush concrete, asphalt, and stone, are moved from site to site with little notice, and are generally at one location for only a few days to a few months at a time.[11] The State asserted that ''[b]ecause of the mobile nature of these crushers, requiring them to obtain an air permit before moving to a new location is cumbersome and creates compliance problems for the crushers and the Division of Air Quality.'' [12] Thus, the purpose of Rule 2Q .0902 is not to regulate the ''use and operation'' of these nonroad engines, but to identify the ''temporary crushers'' that are *exempt* from the State's construction and operation permits program at Section 2Q .0300 due to the temporary nature of their operating location and their low level of air pollutant emissions.

Comment 2: The Commenter states that the diesel engine requirement was a valid regulation, and its removal is not merely a clarification.

Response 2: In its July 10, 2019, submittal, North Carolina states that language related to engines throughout Rule 2Q .0902 was deleted because DAQ does not regulate engines under CAA title II, *Emission Standards For Moving Sources* (title II).[13] In other words,

[5] *See also* 40 CFR 1068.30, *General Compliance Provisions for Highway, Stationary, and Nonroad Programs,* which defines ''nonroad engines,'' in part, as any internal combustion engine that, by itself or in or on a piece of equipment, is portable or transportable, and does not remain at a location for more than 12 consecutive months.

[6] The Commenter quotes 40 CFR part 89, subpart A, Appendix A, which EPA moved to 40 CFR part 1074 in 2021. *See* 86 FR 34308 (July 29, 2021).

[7] *See* provision 2Q .0102(c)(1)(L)(ii), which states ''[t]he following activities do not need a permit or permit modification under this Section .0300 of this Subchapter; however, the Director may require the owner or operator of these activities to register them under 15A NCAC 2D .0200: . . . non self-propelled non-road engines, except generators, regulated by rules adopted under Title II of the federal Clean Air Act. . . .''

[8] *See* December 14, 2004, SIP revision, included in the docket (Docket Identification No. EPA–R04–OAR–2016–0362) for EPA's September 29, 2017, rulemaking (82 FR 45473).

[9] *Id.* at Attachment 10, Memorandum, Paul Grable to Mr. Thomas Allen, June 9, 2003.

[10] *Id.* at Attachment 9, Economic Assessment.

[11] *Id.*

[12] *Id.*

[13] *See* July 10, 2019, SIP revision, Attachment 2, p. HR–1–202.

because emissions from nonroad engines are mobile source emissions and not stationary source emissions, those emissions are not subject to any requirement of the North Carolina SIP. Indeed, the SIP specifically exempts title II nonroad engines from its permitting requirements, and the quantity of diesel fuel combusted by a nonroad engine or generator driving a crusher has no relevance to stationary source emissions. Therefore, removal of the diesel combustion threshold helps to clarify that mobile source emissions are not regulated under the current North Carolina SIP.[14]

Comment 3: The Commenter states that the removal of the diesel fuel combustion threshold on engines at temporary crushers is a relaxation of the SIP. According to the Commenter, it is possible that a permit for a temporary crusher with engines that burn more than 17,000 gallons of diesel will not contain any restrictions on the engines themselves but impose restrictions on other emissions from the crusher, and that more temporary crushers will qualify for the permit exemption as result of the change. The Commenter adds that this exemption is from the State's general construction and operating permit program, which is intended to protect air quality standards. The Commenter concludes that EPA must disapprove the revision for temporary crushers because the State has not demonstrated, as required under section 110(l) of the Act, that the revisions to the eligibility criteria for the permit exemption for temporary crushers will not interfere with requirements regarding attainment, reasonable further progress, and other requirements of the Act.

Response 3: EPA disagrees that the requirements of CAA section 110(l) have not been satisfied. Section 110(l) states that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.'' As discussed below, EPA has concluded that the changes to Rule 2Q .0902 will not interfere with any applicable requirement concerning attainment or any other applicable CAA requirement because there are no potential emission increases associated with these changes.

As discussed above, North Carolina does not regulate nonroad engines, which are instead regulated by EPA under title II of the CAA.[15] EPA agrees with the State that nonroad diesel emissions are mobile source emissions regulated by EPA under title II and are not part of the stationary source emissions from temporary crushers. Therefore, removing the diesel engine combustion criterion will not cause engine emissions to increase because (1) North Carolina does not regulate these engines to begin with, (2) this criterion never served to limit either the quantity of diesel fuel that an engine or generator was allowed to combust or the quantity of emissions allowed from such combustion, and (3) title II requirements continue to limit emissions from nonroad engines and generators and this action will not change title II requirements.

With regard to permitting the stationary source, even if a temporary crusher with a nonroad engine that combusts more than 17,000 gallons at any one facility or site were to become exempt from the State's construction and operation permits program following removal of the fuel combustion criterion, EPA expects no appreciable impact on air quality. First, provision 2Q .0902(c) protects the fine and coarse PM NAAQS by requiring the owner or operator of a temporary crusher to reduce to a minimum any particulate matter from becoming airborne to prevent exceeding the ambient air quality standards for particulate matter beyond the property line.[16] Second, EPA does not expect that any permit issued by North Carolina to a material crusher prior to becoming exempt would have included any emission limitations beyond what is already required under state and federal rules and this action does not change those requirements. Requirements from 40 CFR part 60, subpart OOO, *Standards of Performance for Nonmetallic Mineral Processing Plants,*[17] and from North Carolina rules 2D .0510, *Particulates from Sand, Gravel, Or Crushed Stone Operations,* and 2D .0540, *Particulates from Fugitive Non-Process Dust Emission Sources* continue to apply to these material crushers, in accordance with the terms of such rules. These rules contain limitations for particulate matter emissions, fugitive emissions, and opacity only. Third, the 300,000-ton material processing criterion remains in place, and as noted above, temporary crushers that emit more than approximately 1,775 pounds of PM at a site per 12-month period would continue to be subject to permitting.

For the reasons discussed above, EPA has concluded that the revisions to Rule 2Q .0902 will not interfere with any applicable requirement concerning attainment, reasonable further progress, or any other applicable CAA requirement.

Comment 4: The Commenter states that North Carolina's SIP revision must include a CAA section 110(l) noninterference demonstration, consisting of an air quality analysis or substitute equivalent emissions reductions, and that the revision contains no such demonstration. Therefore, the Commenter claims that the SIP revision does not meet the completeness requirements of Appendix V to 40 CFR part 51, and in turn, does not contain the information necessary to enable EPA to determine whether the plan submission complies with the provisions of the Act, as required by CAA section 110(k)(1)(A). The Commenter also states that in the absence of any information from the State to support the SIP revision, EPA cannot supplement it with technical information about temporary crushers and air quality to approve the submittal because to do so would violate the notice requirements of the Administrative Procedure Act (APA) (citing *Ober* v. *U.S. EPA,* 84 F.3d 304, 312 (9th Cir. 1996)). If the State or EPA has information that supports approval of the SIP revision, the Commenter argues that EPA must re-propose its action and allow for comment on the information.

Response 4: EPA disagrees with the Commenter. Pursuant to CAA section 110(k)(1)(B), the SIP submissions being acted on were deemed complete by operation of law on March 18, 2010, and

[14] While Rule 2Q .0902 relates only to North Carolina's SIP permitting requirements at Section 2Q .0300, EPA notes that the State's title V permitting rules likewise exempt mobile source emissions from permitting requirements under that program. *See* Rules 02Q .0502(d) and 0503(7)(a).

[15] Section 213 of the CAA requires the EPA Administrator to promulgate (and periodically revise) regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, air pollution. Those regulations are codified under 40 CFR part 1039, *Control of Emissions from New and In-Use Nonroad Compression-Ignition Engines.*

[16] The SIP-approved version of Rule 2Q .0902 states ''The owner or operator of a portable crusher shall not cause or allow any material to be produced, handled, transported, or stockpiled without taking measures to reduce to a minimum any particulate matter from becoming airborne to prevent exceeding the ambient air quality standards beyond the property line for particulate matter ($PM_{2.5}$, PM_{10}, and total suspended particulates).''

[17] 40 CFR part 60, subpart OOO, which applies to temporary crushers in North Carolina that meet certain applicability criteria (*see* 40 CFR 60.670(a)(1) and (c)(2)), does not include any provision regulating the engines or generators that power such equipment.

January 10, 2020, respectively (*i.e.,* six months after the dates of submission), because EPA did not make an affirmative finding that the submissions were complete or incomplete before those dates. Furthermore, given the nature of the revisions to Rule 2Q .0902, the SIP submittals did not need a technical air quality analysis or equivalent emissions reductions to demonstrate compliance with the CAA. Removal of the diesel fuel combustion criterion from Rule 2Q .0902 is appropriate because, among other things, mobile source emissions are not part of the stationary source (*i.e.,* the temporary crusher) emissions, nonroad engines are not regulated by North Carolina, and the criterion did not require any air pollutant emission reductions from the nonroad engines.[18] EPA's evaluation of North Carolina's revisions to Rule 2Q .0902 is based entirely on the State's December 14, 2004, SIP submittal (original request for approval of Rule 2Q .0902); the State's September 18, 2009, and July 10, 2019, SIP submittals; the State's June 7, 2019, and June 1, 2020, letters included in the docket for this rulemaking; the SIP; and on the CAA. EPA has not relied on any new technical information in approving this rule revision. Under these circumstances, re-proposal of this action is not required by the APA.

III. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as discussed in Section I and II of this preamble, EPA is finalizing the incorporation by reference of the following rules under Subchapter 2Q Air Quality Permits with a state-effective date of April 1, 2018: 2Q .0801, *Purpose and Scope;* 2Q .0802, *Gasoline Service Stations and Dispensing Facilities;* 2Q .0803, *Coating, Solvent Cleaning, Graphic Arts Operations;* 2Q .0804, *Dry Cleaning Facilities;* 2Q .0805, *Grain Elevators;* 2Q .0806, *Cotton Gins;* 2Q .0807, *Emergency Generators;* 2Q .0901, *Purpose and Scope;* and 2Q .0902, *Temporary Crushers* (with the exception of .0902(d)).[19] Also in this document, EPA is finalizing the removal of Rule 2Q .0809, *Concrete Batch Plants,* from the North Carolina SIP, which was previously incorporated by reference in accordance with the requirements of 1 CFR part 51. These changes to the North Carolina SIP revise the recordkeeping and reporting requirements of the permitting exclusionary rules, revise language, reformat the regulatory citations contained in these regulations, remove the ''Concrete Batch Plants'', and remove provision 2Q .0902(b)(2). EPA has made, and will continue to make, the State Implementation Plan generally available at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, the revised materials as stated above, have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.

IV. Final Action

EPA is approving the changes described above to the North Carolina SIP submitted by the State of North Carolina on September 18, 2009, and July 10, 2019. The changes to 2Q .0801, *Purpose and Scope;* 2Q .0802, *Gasoline Service Stations and Dispensing Facilities;* 2Q .0803, *Coating, Solvent Cleaning, Graphic Arts Operations;* 2Q .0804, *Dry Cleaning Facilities;* 2Q .0805, *Grain Elevators;* 2Q .0806, *Cotton Gins;* 2Q .0807, *Emergency Generators;* 2Q .0901, *Purpose and Scope;* and 2Q .0902, *Temporary Crushers,* revise the recordkeeping and reporting requirements of the permitting exclusionary rules, revise language, reformat the regulatory citations contained in these regulations, remove 2Q .0809, *Concrete Batch Plants,* and remove provision 2Q .0902(b)(2). The changes are consistent with the CAA.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory actions subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate,

[18] See prior comment responses in this notice for additional rationale.

[19] The changes to paragraph .0902(d) in the July 10, 2019, and September 18, 2009, SIP revisions were withdrawn from EPA consideration in a letter from DAQ dated June 1, 2020. Additionally, the withdrawal of paragraph (d) from Rule 2Q .0902 leaves the rule with two paragraphs (c), one state-effective on January 1, 2005, and one state-effective on April 1, 2018. DAQ plans to submit revisions to address the two paragraphs (c) in a future submission.

the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 19, 2022. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: September 30, 2022.

Daniel Blackman,

Regional Administrator, Region 4.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart II—North Carolina

■ 2. In § 52.1770(c) amend Table (1) under ''Subchapter 2Q Air Quality Permits'' by:

■ a. Removing the entries for ''Section .0801'', ''Section .0802'', ''Section .0803'', ''Section .0804'', ''Section .0805'', ''Section .0806'', ''Section .0807'', and adding in their place entries for ''Rule .0801'', ''Rule .0802'', ''Rule .0803'', ''Rule .0804'', ''Rule .0805'', ''Rule .0806'', ''Rule .0807'';

■ b. Removing the entry for ''Section .0809''; and

■ c. Removing the entries for ''Section .0901'' and ''Section .0902'' and adding in their place entries for ''Rule .0901'' and ''Rule .0902''.

The amendment reads as follows:

§ 52.1770 Identification of plan.

* * * * *

(c) * * *

(1) EPA Approved North Carolina Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	* * *
Subchapter 2Q Air Quality Permits				
*	*	*	*	* * *
Rule .0801 ...	Purpose and Scope	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0802 ...	Gasoline Service Stations and Dispensing Facilities.	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0803 ...	Coating, Solvent Cleaning, Graphic Arts Operations.	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0804 ...	Dry Cleaning Facilities	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0805 ...	Grain Elevators	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0806 ...	Cotton Gins	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0807 ...	Emergency Generators	4/1/2018	10/18/2022, [Insert citation of publication].	
*	*	*	*	* * *
Rule .0901 ...	Purpose and Scope	4/1/2018	10/18/2022, [Insert citation of publication].	
Rule .0902 ...	Temporary Crushers	4/1/2018	10/18/2022, [Insert citation of publication].	With the exception of .0902(d). This rule contains two paragraph ''(c)''s. One has an effective date of 1/1/2001. The other has a state effective date of 4/1/2018.

* * * * *

[FR Doc. 2022–21651 Filed 10–17–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R03–RCRA–2022–0351; FRL–9947–02–R3]

Virginia: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Virginia has applied to the United States Environmental Protection Agency (EPA) for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these revisions satisfy all requirements needed to qualify for final authorization and is hereby authorizing Virginia's revisions through this direct final rule. In the ''Proposed Rules'' section of this issue of the **Federal Register**, EPA is also publishing a separate document that serves as the proposal to authorize these revisions. EPA believes this action is not controversial and does not expect comments that oppose it. Authorization of Virginia's revisions to its hazardous waste program will take effect 30 days after the conclusion of the public comment period unless EPA receives written comments that oppose this authorization. If EPA receives adverse comments pertaining to this State revision, then EPA will publish in the **Federal Register** a timely withdrawal of this direct final rule before it takes effect, and the separate document in the ''Proposed Rules'' section of the **Federal Register** will serve as the proposal to authorize any revisions made based on comments received.

DATES: This final authorization will become effective on December 19, 2022, unless EPA receives adverse written comments by November 17, 2022. If EPA receives any such comments, then EPA will publish a timely withdrawal of this direct final rule in the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–RCRA–2022–0351 at *www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www.epa.gov/dockets/commenting-epa-dockets.* The EPA encourages electronic submittals, but if you are unable to submit electronically or need other assistance, please contact Jacqueline Morrison, the contact listed in the **FOR FURTHER INFORMATION CONTACT** provision below. Please also contact Jacqueline Morrison if you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you.

FOR FURTHER INFORMATION CONTACT: Jacqueline Morrison, RCRA Programs Branch, Land, Chemicals and Redevelopment Division, U.S. Environmental Protection Agency Region III, Four Penn Center, 1600 John F. Kennedy Blvd. (Mail code 3LD30), Philadelphia, PA 19103–2852, Phone number: (215) 814–5664; email: *Morrison.Jacqueline@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. Why are revisions to the State programs necessary?

States that have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program is revised to become more stringent or broader in scope, States must revise their programs and apply to EPA to authorize the revisions. Authorization of revisions to state programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other revisions occur. Most commonly, States must revise their programs because of revisions to the EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 268, 270, 273, and 279.

B. What decisions have we made in this rule?

On January 10, 2022, Virginia submitted a final program revision application (with subsequent corrections) seeking authorization of revisions to its hazardous waste program that correspond to certain Federal rules promulgated through February 22, 2019.

EPA concludes that Virginia's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA, as set forth in RCRA section 3006(b), 42 U.S.C. 6926(b), and 40 CFR part 271. Therefore, EPA grants Virginia final authorization to operate its hazardous waste program with the revisions described in its authorization application, as outlined below in Section G of this document. Virginia has responsibility for permitting treatment, storage, and disposal facilities (TSDFs) within its borders and for carrying out the aspects of the RCRA program described in its application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those HSWA requirements and prohibitions for which Virginia has not been authorized, including issuing HSWA permits, until the State is granted authorization to do so.

C. What is the effect of this authorization decision?

This action serves to authorize revisions to Virginia's authorized hazardous waste program. This action does not impose additional requirements on the regulated community because the regulations for which Virginia is being authorized by this action are already effective and are not changed by this action. Virginia has enforcement responsibilities under its State hazardous waste program for violations of its program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Perform inspections, and require monitoring, tests, analyses or reports;
- Enforce RCRA requirements and suspend or revoke permits; and

• Take enforcement actions regardless of whether Virginia has taken its own actions.

D. Why was there not a proposed rule before this rule?

Along with this direct final rule, EPA is publishing a separate document in the ''Proposed Rules'' section of this issue of the **Federal Register** that serves as the proposed rule to authorize these State program revisions. EPA did not publish a proposed rule before this issue of the **Federal Register** because EPA views this action as a routine program change and does not expect comments that oppose its approval. EPA is providing an opportunity for public comment now, as described in Section E of this document.

E. What happens if EPA receives comments that oppose this action?

If EPA receives adverse comments pertaining to this State revision, EPA will withdraw this direct final rule by publishing a document in the **Federal Register** before the rule becomes effective. EPA will base any further decision on the authorization of Virginia's program revisions on the proposed rule mentioned in the previous section, after considering all comments received during the comment period. EPA will then address all relevant comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

F. What has Virginia previously been authorized for?

Virginia initially received final authorization of its hazardous waste program effective December 18, 1984 (49 FR 47391). EPA granted authorization for revisions to Virginia's regulatory program effective August 13, 1993 (58 FR 32855); September 29, 2000 (65 FR 46607); June 20, 2003 (68 FR 36925); July 10, 2006 (71 FR 27204); July 30, 2008 (73 FR 44168); and November 4, 2013 (78 FR 54178).

G. What revisions are we authorizing with this action?

On January 10, 2022, Virginia submitted a final program revision application (with subsequent corrections) seeking authorization of additional revisions to its hazardous waste program, as published in the Code of Federal Regulations from June 13, 2011, through February 22, 2019.

EPA now makes a direct final rule, subject to receipt of written comments that oppose this action, that Virginia's hazardous waste program revision application satisfies all of the requirements necessary to qualify for final authorization. Therefore, EPA grants Virginia final authorization for the following program revisions:

1. Program Revision Changes for Federal Rules

Virginia seeks authority to administer the Federal requirements that are listed in Table 1 of this document. Virginia incorporates by reference these Federal provisions, in accordance with the dates specified in Title 9, Virginia Administrative Code (9VAC 20–60–18). This Table 1 lists the Virginia analogs that are being recognized as no less stringent than the analogous Federal requirements.

The Virginia Waste Management Act (VWMA) enacted by the 1986 session of Virginia's General Assembly and recodified in 1988 as Chapter 14, Title 10.1, Code of Virginia, forms the basis of the Virginia program. These regulatory references are to Title 9, Virginia Administrative Code (9 VAC) effective through August 23, 2019. On November 4, 2013 (78 FR 54178, September 3, 2013), Virginia received approval of Program Revision V to its hazardous waste management program. Since then, Virginia's regulations have been updated to include Federal regulatory changes. This application, Program Revision VI, addresses certain changes made to Virginia's hazardous waste program between January 1, 2011, and August 23, 2019.

TABLE 1—VIRGINIA'S ANALOGS TO THE FEDERAL REQUIREMENTS

Description of Federal requirement (revision checklists [1])	**Federal Register** page and date	Analogous Virginia authority
RCRA Cluster VIII		
Exclusion of Recycled Wood Preserving Wastewaters, Revision Checklist 167F.	63 FR 28556, May 26, 1988	9VAC20–60–18; 9VAC20–60–261 A.
RCRA Cluster XXI		
Revisions of the Treatment Standards for Carbamate Wastes, Revision Checklist 227.	76 FR 34147, June 13, 2011	9VAC20–60–18; 9VAC20–60–268.
RCRA Cluster XXII		
Hazardous Waste Technical Corrections and Clarifications, Revision Checklist 228.	77 FR 22229, April 13, 2012	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–266.
RCRA Cluster XXIII		
Conditional Exclusions for Solvent Contaminated Wipes, Revision Checklist 229.	78 FR 46448, July 31, 2013	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261.
Conditional Exclusion for Carbon Dioxide (CO_2) Streams in Geologic Sequestration Activities, Revision Checklist 230.	79 FR 350, January 3, 2014	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261.
Hazardous Waste Electronic Manifest Rule, Revision Checklist 231.	79 FR 7518, February 7, 2014	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–262; 9VAC20–60–263; 9VAC20–60–264; 9VAC20–60–265.
Revisions to the Export Provisions of the Cathode Ray Tube Rule, Revision Checklist 232.	79 FR 36220, June 26, 2014	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261.
RCRA Cluster XXIV		
Revisions to the Definition of Solid Waste: Changes affecting all non-waste determinations and variances, Revision Checklist 233A.	80 FR 1694, January 13, 2015	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–1390; 9VAC20–60–1420.
Revisions to the Definition of Solid Waste: Speculative Accumulation, Revision Checklist 233C.	80 FR 1694, January 13, 2015	9VAC20–60–18; 9VAC20–60–261.

TABLE 1—VIRGINIA'S ANALOGS TO THE FEDERAL REQUIREMENTS—Continued

Description of Federal requirement (revision checklists [1])	**Federal Register** page and date	Analogous Virginia authority
Revisions to the Definition of Solid Waste: 2008 DSW exclusions and non-waste determinations, including revisions from 2015 DSW final rule and 2018 DSW final rule, Revision Checklist 233D2.	80 FR 1694, January 13, 2015 83 FR 24664 May 30, 2018	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261; 9VAC20–60–1390; 9VAC20–60–1420.
Revisions to the Definition of Solid Waste: Remanufacturing exclusion, Revision Checklist 233E.	80 FR 1694, January 13, 2015	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261.
Response to Vacaturs of the Comparable Fuels Rule and the Gasification Rule, Revision Checklist 234.	80 FR 18777, April 8, 2015	9VAC20–60–18; 9VAC20–60–260; 9VAC20–60–261.
Disposal of Coal Combustion Residuals from Electric Utilities, Revision Checklist 235.	80 FR 21302, April 17, 2015	9VAC20–60–18; 9VAC20–60–261.
RCRA Cluster XXV		
Imports and Exports of Hazardous Waste, Revision Checklist 236.	81 FR 85696, November 28, 2016. 82 FR 41015, August 29, 2017 83 FR 38263, August 6, 2018 ..	9VAC20–60–18; 9VAC20–60–260, 261, 262, 263, 264, 265, 266, 267, and 273.
Hazardous Waste Generator Improvements Rule, Revision Checklist 237.	81 FR 85732, November 28, 2016.	9VAC20–60–18; 9VAC20–60–260, 261, 262, 263, 264, 265, 267, 268, 270, 273, and 279.
RCRA Cluster XXVI		
Confidentiality Determinations for Hazardous Waste Export and Import Documents, Revision Checklist 238.	82 FR 60894, December 26, 2017.	9VAC 20–60–18; 9VAC20–60–260, 261, and 262.
RCRA Cluster XXVII		
Safe Management of Recalled Airbags, Revision Checklist 240	83 FR 61552, November 30, 2018.	9VAC20–60–18; 9VAC20–60–260, 261, 262.
Management Standards for Hazardous Waste Pharmaceuticals and Amendment to the P075 Listing for Nicotine, Revision Checklist 241.	84 FR 5816, February 22, 2019	9VAC20–60–18; 9VAC20–110–110; 9VAC20–60–261, 262, 264, 265, 266, 268, 270, and 273.

[1] A Revision Checklist is a document that addresses the specific revisions made to the Federal regulations by one or more related final rules published in the **Federal Register**. EPA develops these checklists as tools to assist States in developing their authorization applications and in documenting specific State analogs to the Federal Regulations. For more information see EPA's RCRA State Authorization web page at *https://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra.*

2. State-Initiated Revisions

In addition, Virginia will be authorized to carry out, in lieu of the Federal program, State-initiated revisions to provisions of the State's program. These State-initiated revisions to some of Virginia's existing regulations are for the purpose of correcting errors and adding consistency or clarification to the existing regulations. The following State provisions were previously equivalent, more stringent, or broader in scope and now they are all equivalent and analogous to the RCRA provisions found at Title 40 of the Code of Federal Regulations: 9VAC20–60–315 H, 9VAC20–60–420 E, 9VAC20–60–430 F, 9VAC20–60–440 A, B, C, C 1, D, and E, 9VAC20–60–450 (repealed), 9VAC20–60–480 E 1, L, and M, 9VAC20–60–490 B 3, and 9VAC20–60 Forms.

H. Where are the revised Virginia rules different from the Federal rules?

When revised State rules differ from the Federal rules in the RCRA State authorization process, EPA determines whether the State rules are equivalent to, more stringent than, or broader in scope than the Federal program. Pursuant to RCRA section 3009, 42 U.S.C. 6929, State programs may contain requirements that are more stringent than the Federal regulations. Such more stringent requirements can be federally authorized and, once authorized, become federally enforceable.

1. Virginia Requirements That Are More Stringent Than the Federal Program

The following Virginia provisions are more stringent than the Federal program.

- Virginia is more stringent than the Federal program at 9VAC20–60–490 C 4 by requiring that reports be submitted to the State as well as to Federal authorities.
- Virginia is more stringent than the Federal program at 9VAC20–60–262 B 4 by requiring that large quantity generators notify the State of each location where hazardous waste is accumulated.
- Virginia is more stringent than the Federal program at 9VAC20–60–262 B 6 by requiring any receiving treatment, storage, or disposal facility to hold a permit; Virginia is also more stringent than the Federal program by requiring an EPA identification number for transporters.
- Virginia's regulations, at 9VAC20–60–260 A, incorporate by reference the Federal regulations at 40 CFR part 260, with some additions, modifications, and exceptions, including the modification at 9VAC20–60–260 B 2. This provision is more stringent than the Federal program in that it imposes additional requirements for the management of hazardous secondary materials in a land-based unit.
- On January 13, 2015, EPA issued a final rule that became effective on July 13, 2015, revising several recycling-related provisions associated with the definition of solid waste used to determine hazardous waste regulation under RCRA subtitle C (80 FR 1694). The revisions included adding conditions to certain exclusions and adding a codified definition of ''contained.'' On May 30, 2018, EPA issued the final rule: ''Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule,'' 83 FR 24664. Because the 2018 rule included provisions that are less stringent than the 2015 revisions, states that adopted the 2015 rule were not required to adopt the 2018 rule. The Virginia regulations, at 9VAC20–60–18, 9VAC20–60–260 B 9, 9VAC20–60–260 B 14, and 9VAC20–60–261 B 14, specify that Virginia is retaining the 2015 rules. In that respect, the Virginia regulations are more stringent than the Federal program.

2. Virginia Requirements That Are Broader in Scope Than the Federal Program

Although the statute does not prevent States from adopting regulations that are broader in scope than the Federal program, States cannot receive authorization for such regulations. EPA cannot enforce requirements that are broader in scope, although compliance with such provisions is required by Virginia law.

The following Virginia provisions are broader in scope than the Federal program in that they require the payment of fees that are not required by the Federal program:

- 9VAC20–60–1280 B requires the payment of permit application fees.
- 9VAC20–60–1284 B 2 requires the payment of annual fees.
- 9VAC20–60–1260 B, C, D, E, F, and G 3, insofar as these provisions address hazardous waste program fees.
- 9VAC20–60–1270 B, C, C 5, D, and E set forth the method by which application fee amounts shall be determined.
- 9VAC20–60–1283 A, B, and C set forth the method by which annual fee amounts shall be determined.
- 9VAC20–60–1285 Table 1 sets forth the schedule of permit application fees.

I. Who handles permits after this authorization takes effect?

After this authorization revision, Virginia will continue to issue permits covering all the provisions for which it is authorized and will administer all such permits. EPA will continue to administer any RCRA hazardous waste permits or portions of permits that it issued prior to the effective date of this authorization until the timing and process for effective transfer to the State are mutually agreed upon. Until such time as EPA formally transfers responsibility for a permit to Virginia and EPA terminates its permit, EPA and Virginia agree to coordinate the administration of such a permit in order to maintain consistency. EPA will not issue any more new permits or new portions of permits for the provisions listed in Section G of this document after the effective date of this authorization. EPA will continue to implement, and issue permits for HSWA requirements for which Virginia is not yet authorized.

J. How does this action affect Indian country in Virginia?

Virginia is not authorized to carry out the hazardous waste program in Indian country (18 U.S.C. 1151) within the State. EPA will implement and administer the RCRA program on these lands.

K. What is codification and is EPA codifying Virginia's hazardous waste program as authorized in this rule?

Codification is the process of placing a State's statutes and regulations that comprise the State's authorized hazardous waste program into the Code of Federal Regulations. EPA does this by referencing the authorized State rules in 40 CFR part 272. EPA is not proposing to codify the authorization of Virginia's revisions at this time. However, EPA reserves the amendment of 40 CFR part 272, subpart VV, for this authorization of Virginia's program revisions until a later date.

L. Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Therefore, this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant, and it does not make decisions based on environmental health or safety risks that may disproportionately affect children. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 18, 1988) by examining the takings implications of the rule in accordance with the Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, because it approves pre-existing State rules that are no less stringent than existing Federal requirements and imposes no additional requirements beyond those imposed by State law. For these reasons, this rule is not subject to Executive Order 12898.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). However, this action will not be effective until December 19, 2022 because it is a direct final rule.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indian lands, Intergovernmental relations, Penalties, Reporting and record keeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Adam Ortiz,

Regional Administrator, EPA Region III.

[FR Doc. 2022–22578 Filed 10–17–22; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2022–05; FAR Case 2021–008, Docket No. 2021–0008, Sequence No. 1]

RIN 9000–AO22

Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements; Correction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule; correction.

SUMMARY: DoD, GSA, and NASA are issuing a correction to FAC 2022–05; FAR Case 2021–008; Amendments to the FAR Buy American Act Requirements; which published in the **Federal Register** at 87 FR 12780, on March 7, 2022. This correction makes an editorial change to correct amendatory instruction 21.b. to section 52.212–3.

DATES: Effective: October 25, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868 or by email at *mahruba.uddowla@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2022–05, FAR Case 2021–008; Correction.

SUPPLEMENTARY INFORMATION:

Correction

In rule FR Doc. 2022–04173, published in the **Federal Register** at 87 FR 12780, on March 7, 2022, make the following correction:

52.212–3 [Corrected]

■ 1. On page 12795, in the first column, correct amendatory instruction number 21.b., to read as follows:

■ b. In paragraph (f)(1)(i) removing the word ''product'' from the end of the sentence, and adding the phrase ''product and that each domestic end product listed in paragraph (f)(3) of this provision contains a critical component'' in its place;

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2022–22564 Filed 10–17–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 802, 807, 808, 810, 813, 819, 832, 852 and 853

RIN 2900–AR06

VA Acquisition Regulation: Acquisition Planning; Required Sources of Supplies and Services; Market Research; and Small Business Programs

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing a final rule amending the VA Acquisition Regulation (VAAR). This rulemaking revises coverage concerning Acquisition Planning, Required Sources of Supplies and Services, Market Research, and Small Business Programs, as well as affected parts to include Definitions of Words and Terms, Simplified Acquisition Procedures, Contract Financing, Solicitation Provisions and Contract Clauses, and Forms.

DATES: Effective November 17, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Bogdan Vaga, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 810 Vermont Avenue NW, Washington, DC 20420, (202) 894–0686. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

Background

VA published a proposed rule in the **Federal Register** at 87 FR 13598 on March 9, 2022, to amend the VAAR to implement and supplement the Federal Acquisition Regulation (FAR). VA provided a 60-day comment period for the public to respond to the proposed rule and submit comments. The public comment period closed on May 9, 2022. VA received no public comments.

This rulemaking is issued under the authority of the Office of Federal Procurement Policy (OFPP) Act which provides the authority for an agency head to issue agency acquisition regulations that implement or supplement the FAR.

The VAAR has been revised to add new policy or regulatory requirements, to update existing policy, and to remove any redundant guidance where it may exist in affected parts, and to place guidance that is applicable only to VA's internal operating processes or procedures in the VA Acquisition Manual (VAAM).

This rule adopts as a final rule the proposed rule published in the **Federal Register** on March 9, 2022, except for one technical non-substantive revision as described below.

Discussion and Analysis

Technical Non-Substantive Change to the Rule

This rule makes one non-substantive change to the rule to provide clarity, eliminate confusion, and to ensure compliance with the Federal Acquisition Regulation (FAR). Specifically, in section 819.7002, Applicability, VA is revising the term ''commercial acquisitions'' as used in the section to reflect ''commercial products or commercial services'' in alignment with FAR final rule, Federal Acquisition Regulation: Revision of Definition of ''Commercial Item'', RIN 9000–AN76, effective December 6, 2021.

Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Paperwork Reduction Act

This final rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). This rule also contains collections of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that are already approved by OMB. The collection of information for 48 CFR 819.704–70, 852.219–70, and 853.219(b) is currently approved by OMB and has been assigned OMB control number 2900–0741.

Separately, a revised collection of information associated with this rulemaking is contained in 48 CFR 852.207–70, Report of Employment Under Commercial Activities, under OMB control number 2900–0590. This final rule removes one of the existing information collection requirements associated with this action at 48 CFR 852.207–70 to reflect the discontinuation of 852.207–70, as well as the related prescriptions for the clause at 807.304–77 and 873.110, paragraph (f).

Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval, including all comments received on the proposed information collections and any changes made in response to comments. There were no public comments received on the proposed rule or on the collection of information. OMB has reviewed and has not approved the revisions and removal at this time. In accordance with 5 CFR part 1320, the revised information collection is not approved at this time. OMB has up to 30 days to approve the request after the final rule publishes.

If OMB does not approve the revised collection of information as requested, VA will immediately take action to reinstate the information collection or take such other action as is directed by OMB.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612).

The overall impact of the final rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating processes or procedures. VA estimates no increased or decreased costs to small business entities. This rulemaking clarifies VA's policy regarding the contracting order of priority for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) as a result of the U.S. Supreme Court's decision in *Kingdomware Technologies, Inc.* vs. *the United States,* July 25, 2018, (*Kingdomware*) only as it pertains to the application of the VA Rule of Two in accordance with Public Law 109–461 as codified at 38 U.S.C. 8127–8128, and via the original final rule—VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses—published in the **Federal Register** at 74 FR 64619, on December 9, 2009, and effective January 7, 2010.

This regulation seeks to simplify and streamline VA guidance regarding its small business program. The impact on small business overall is positive, as VA continues to implement its small business policies in accordance with legislative mandates pertaining to the Department of Veterans Affairs in 38 U.S.C. 8127–8128 to ensure that that small business owned and controlled by Veterans receive a fair share of contracting opportunities at the Department. VA's hierarchy of contracting preferences, established by law, mandates VA Vendor Information Pages (VIP)-listed SDVOSBs first, then VOSBs, prior to other small business preferences. While consistent with VA's legislation and mission to serve Veterans, this mandate necessarily makes achievement of other small business goals more challenging that fall in a statutorily based lower contracting order of priority, *e.g.,* awards in the general small business category. Through renewed emphasis on the program in 2016 post the U.S. Supreme Court decision in *Kingdomware Technologies, Inc.,* and through increased training and revised implementing policy and procedures issued to VA contracting officers, VA has successfully achieved specific SDVOSB, VOSB, and small business goals for FY 2020 as discussed below.

This rulemaking does not change VA's overall policy regarding small businesses, does not have an economic impact to individual businesses, and there are no increased or decreased costs to small business entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. However, VA has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

a. *Statement of the need for, and the objectives of, the rule. A description of the reasons why action by VA is being considered.*

Response: VA is issuing a final rule to implement updated requirements to the Department of Veterans Affairs' (VA) policy and procedures pertaining to 38 U.S.C. 8127–8128 (Pub. L. 109–461), known as the Veterans First Contracting Program, as well as additional legislative amendments and statutory changes to 38 U.S.C. 8127 as a result of Public Law 116–155, the Department of Veterans Affairs Contracting Preference Consistency Act of 2020, which had an effective date of August 8, 2020, and Public Law 116–183, Protecting Business Opportunities for Veterans Act of 2019, enacted October 30, 2020, which were implemented in advance of this rulemaking through separate class deviations. This final rule also makes other necessary updates to the VAAR to bring current with the Federal Acquisition Regulation (FAR).

b. *Statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made to the rule as a result of such comments.*

Response: There were no public comments received on the proposed rule and accordingly no changes were made to the rule in response to the initial regulatory flexibility analysis.

c. *A description of and, where feasible, an estimate of the number of*

small entities to which the rule would apply.

Response: This rulemaking is not expected to have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612.

To determine the number of potential affected small businesses and other entities, VA examined the data in the Federal Procurement Data System (FPDS) to estimate the number of small business entities that will be affected by this rule. Based on preliminary data from Fiscal Year 2021, there were 80,148 SDVOSB coded contract actions, and 143,452 coded contract actions to VOSBs. In addition to specific SDVOSB/VOSB contract actions, in FY 2021 there were a total of 219,301 small business contract actions in FPDS. *Note:* SDVOSBs may also be coded in addition to the SDVOSB category as both a small business and VOSB award. VA analysis indicates that in FY 2021 VA exceeded its goals for SDVOSB, VOSB and small businesses. In FY 2020, VA exceeded—(1) its SDVOSB goal of 15% with a 23.9% achievement; (2) its VOSB goal of 17% with a 24.4% achievement; and (3) its overall small business goal of 28.45% with a 30.3% achievement, even during the midst of the declared national emergency on COVID–19. Considering VA had to make critical and urgent emergency procurements under other authorities, including sole source, of Personal Protective Equipment (PPE) and other related medical supplies and services in support of continuity of its core mission to provide Veterans' healthcare and as part of its overarching pandemic response in support of the declared national emergency, the VA acquisition workforce worked diligently hand-in-hand with its program/project offices to continue to comply with the requirements of 38 U.S.C. 8127–8127 in priority awards to SDVOSBs, then VOSBs. These table below provides the referenced data and successful small business program goal achievements in these categories.

PRELIMINARY FISCAL YEAR 2021 SMALL BUSINESS GOALING DATA

Fiscal year 2021	Total contract dollars and actions	Small business	SDVOSB	VOSB
Goal		28.45%	15.0%	17.0%
Actual Performance		30.3%	23.9%	24.4%
Dollars awarded by VA	$34,351,110,891	$10,307,742,213	$8,144,793,570	$8,365,441,281
Total Contract Awards	1,833,460	219,301	80,148	143,452

Source: Federal Procurement Data System. Dataset downloaded on December 9, 2021.

This rule should help small businesses continue to receive a fair share of VA contracting dollars. VA exceeded its small business goal of 28.45% in Fiscal Year 2021, achieving 30.3%, valued at $10,307,742,213, while awards to SDVOSBs were valued at $8,144,793,570.

d. *A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which would be subject to the requirement and the type of professional skills necessary for preparation of the report or record.*

Response: This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

e. *A description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.*

Response: There are no known significant alternative approaches to the final rule. VA is unable to identify any significant alternatives that would accomplish the requirements of this rule. Through the proposed rule, the public had an opportunity to provide public comment prior to publication of a final rule. VA considered initially issuing a complete revision to the VAAR in one case, but given ongoing litigation and legislative initiatives, as well as the complexity of the various VAAR parts, the phased incremental approach permitted the public to be able to focus on specific topics and parts of interest and allow them to timely submit public comments which may have been more onerous if the complete VAAR were revised at one time. VA received no comments on the proposed rule.

VA has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments or on the private sector.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects

48 CFR Parts 802, 807, 808, 810, 813, 832, and 853

Government procurement.

48 CFR Part 819

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements, Small business, Veterans.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 23, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 48 CFR chapter 8 as follows:

PART 802—DEFINITIONS OF WORDS AND TERMS

■ 1. Revise the authority citation for part 802 to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

■ 2. Amend section 802.101 by:
■ a. Adding definitions in alphabetical order for ''Public Law (Pub. L.) 109–461'' and ''SDVOSB/VOSB'';
■ b. Removing the definition of ''Service-disabled veteran-owned small business concern (SDVOSB)'' and adding the definition ''Service-disabled veteran-owned small business (SDVOSB)'' in its place;
■ c. Adding a definition in alphabetical order for ''VA Rule of Two'';
■ d. Removing the definitions of ''Vendor Information Pages (VIP)'' and ''Veteran-owned small business concern (VOSB)'' and adding the definitions ''Vendor Information Pages (VIP) or VIP database'' and ''Veteran-owned small business (VOSB)'' in their places, respectively; and
■ e. Adding a definition in alphabetical order for ''Veterans First Contracting Program''.

The additions read as follows:

802.101 Definitions.

* * * * *

Public Law (Pub. L.) 109–461 means the Veterans Benefits, Health Care and Information Technology Act of 2006, as codified in 38 U.S.C. 8127 and 8128.

SDVOSB/VOSB when used as an initialism means a service-disabled veteran-owned small business (SDVOSB) and/or veteran-owned small business (VOSB) that has been found by VA eligible to participate in the Veterans First Contracting Program implemented at subpart 819.70 and listed in the Vendor Information Pages. The term is synonymous with VA or VIP-verified small business concerns owned and controlled by Veterans.

Service-disabled veteran-owned small business (SDVOSB) or small business concern owned and controlled by Veterans with service-connected disabilities has the same meaning as *service-disabled veteran-owned small business concern* defined in FAR 2.101, except that for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program, these businesses must be listed as verified in the VIP database. In addition, some SDVOSB listed in the VIP database may be owned and controlled by a surviving spouse. See definition of *surviving spouse* in this section.

* * * * *

VA Rule of Two means the determination process mandated in 38 U.S.C. 8127(d)(1) whereby a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by Veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States. For purposes of this VA specific rule, a service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB), must meet the eligibility requirements in 38 U.S.C. 8127(e), (f) and VAAR 819.7003 and be listed as verified in the Vendor Information Pages (VIP) database.

* * * * *

Vendor Information Pages (VIP) or *VIP database* means the Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization (OSDBU) Center for Verification and Evaluation (CVE) Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/.* This site's database lists businesses that VA CVE has determined eligible for the Veterans First Contracting Program.

Veteran-owned small business (VOSB) has the same meaning as v*eteran-owned small business concern* defined in FAR 2.101, except that for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program, these businesses must be listed as verified in the VIP database. SDVOSBs, including businesses whose SDVOSB status derive from ownership and control by a surviving spouse, are also considered VOSBs, as long as they are listed as eligible in VIP.

Veterans First Contracting Program means the program authorized by Public Law 109–461 (38 U.S.C. 8127 and 8128), as implemented in subpart 819.70. This program applies to all VA contracts (see FAR 2.101 for the definition of contracts) as well as Blanket Purchase Agreements (BPAs), Basic Ordering Agreements (BOAs), and orders against the Federal Supply Schedules (FSS), unless otherwise excluded by law.

* * * * *

PART 807 [REMOVED AND RESERVED]

■ 3. Under the authority of 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 1303, and 1702; and 48 CFR 1.301 through 1.304, remove and reserve part 807.

■ 4. Revise part 808 to read as follows:

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.

Authority: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

808.000 Scope of part.

This part deals with prioritizing sources of supplies and services for use by the Government based on unique VA statutory programs, as well as requirements when using the General Services Administration (GSA) Federal Supply Schedules program including the GSA delegated VA Federal Supply Schedule program.

808.001 General.

808.001–70 Definitions.

As used in this part—

Veterans Affairs (VA) Federal Supply Schedule (FSS) or ''VA FSS'' means FSS contracts awarded by the VA National Acquisition Center, under authority delegated by the General Services Administration (GSA) per FAR 8.402(a). VA FSS contracts include medical, dental, pharmacy and veterinary equipment and supplies in Federal Supply Classification (FSC) Group 65, instruments and laboratory equipment in FSC Group 66 and health care services in FSC Group 621.

808.002 Priorities for use of mandatory Government sources.

(a) *Priorities.* Contracting activities shall satisfy requirements for supplies and services from or through the mandatory sources listed in paragraphs (a)(1) and (2) of this section in descending order of priority:

(1) *Supplies.* (i) VA inventories including the VA supply stock program (41 CFR 101–26.704) and VA excess.

(ii) Excess from other agencies (see FAR subpart 8.1).

(iii) Federal Prison Industries, Inc. (see 808.603). Prior to considering

award of a contract to Federal Prison Industries, Inc., contracting officers shall apply the VA Rule of Two (see 802.101) to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127–28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified service-disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) as provided in subpart 819.70, FPI remains a mandatory source in accordance with FAR 8.002.

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, through the AbilityOne Program (FAR subpart 8.7). Supplies that are on the Procurement List but which do not meet the definition of a covered product in paragraph (a)(1)(iv)(A) of this section are only required to be procured from a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(A) *Definition.* As used in this paragraph (a)(1)(iv), *covered product* means a product that—

(*1*) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006; or

(*2*) Meets the following criteria—

(*i*) Is a replacement for a product under this paragraph (a)(1)(iv);

(*ii*) Is essentially the same and meeting the same requirement as the product being replaced; and

(*iii*) The contracting officer determines the product meets the quality standards and delivery schedule requirements of VA.

(B) *Policy.* Except as provided in paragraphs (a)(1)(iv)(C) and (D) of this section, contracting officers shall procure covered products that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure products that are on the Procurement List, but which do not meet the definition of a covered product using the procedures set forth in FAR subpart 8.7, unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(C) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart 819.70.* If a contract for a covered product awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7006 and 819.7007.

(D) *Termination or expiration of excepted contracts.* When a contract previously awarded as set forth in paragraph (a)(1)(iv)(C) of this section is terminated or expires, contracting officers shall procure such covered product through the AbilityOne Program as a priority mandatory Government source (see paragraph (a)(1)(iv)(B) of this section), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(*1*) Two or more SDVOSBs/VOSBs will submit offers; and

(*2*) Award can be made at a fair and reasonable price that offers best value to the United States.

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101–26.3), the Defense Logistics Agency (see 41 CFR 101–26.6), the Department of Veterans Affairs (see 41 CFR 101–26.704), and military inventory control points.

(2) *Services.* Services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, through the AbilityOne Program (FAR subpart 8.7). For services that are on the Procurement List, but which do not meet the definition of a covered service in paragraph (a)(2)(i) of this section are only required to be procured from a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(i) *Definition.* As used in this paragraph (a)(2)—

Covered service means a service that—

(*1*) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006; or

(*2*) Meets the following criteria—

(*i*) Is a replacement for a service under this paragraph (a)(2);

(*ii*) Is essentially the same and meeting the same requirement as the service being replaced; and

(*iii*) The contracting officer determines the service meets the quality standards and delivery schedule requirements of VA.

(ii) *Policy.* Except as provided in paragraphs (a)(2)(iii) and (iv) of this section, contracting officers shall procure covered services that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure services that are on the Procurement List, but which do not meet the definition of a covered service using the procedures set forth in FAR subpart 8.7, unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(iii) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart 819.70.* If a contract for a covered service awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7006 and 819.7007.

(iv) *Termination or expiration of certain excepted contracts.* When a contract previously awarded as set forth in paragraph (a)(2)(iii) of this section is terminated or expires, contracting officers shall procure such covered service through the AbilityOne Program as a priority mandatory Government source (see paragraph (a)(2)(ii) of this section), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(A) Two or more SDVOSBs/VOSBs will submit offers; and

(B) Award can be made at a fair and reasonable price that offers best value to the United States.

(b) *Unusual and compelling urgency.* The contracting officer may use a source other than those listed in paragraph (a) of this section when the need for supplies or services is of an unusual and compelling urgency (see FAR 6.302–2, 8.405–6, and 13.106–1 and part 806 for justification requirements).

808.004 Use of other sources.

808.004–70 Use of other priority sources.

(a) *Veterans contracting priority.* In order to fulfill the requirements of 38 U.S.C. 8127–8128 (see subpart 819.70), contracting officers shall award contracts (see FAR 2.101 for the definition of contracts), as well as Blanket Purchase Agreements (BPAs), and orders against VA and GSA Federal Supply Schedules (FSS), providing priority in the awarding of such contracts to VIP-listed SDVOSBs first, then VOSBs.

(b) *Strategic sourcing priorities and application of the VA Rule of Two.* To provide medical supplies in Federal Supply Classification (FSC) groups 65 and 66 efficiently and effectively the

VA, through previous reform initiatives, has implemented key strategic sourcing contract vehicles (*e.g.,* prime-vendor, national contracts, VA FSS). If these strategic sourcing contracts were subject to the VA Rule of Two (see 802.101), they may be determined mandatory by the head of the contracting activity. Contracting officers shall consider these priority contract vehicles before using other existing contract vehicles.

Subpart 808.4—Federal Supply Schedules

808.402 General.

(a) GSA has delegated authority to the VA to procure medical equipment, supplies, services and pharmaceuticals under the VA Federal Supply Schedule (FSS) program. The VA FSS program includes medical supplies in Federal Supply Classification (FSC) Groups 65 and 66 and services in FSC 621 for Professional and Allied Healthcare Staffing Services and Medical Laboratory Testing and Analysis Services.

808.404 Use of Federal Supply Schedules.

808.404–70 Use of Federal Supply Schedules—the Veterans First Contracting Program.

(a) The Veterans First Contracting Program, implemented in subpart 819.70 pursuant to 38 U.S.C. 8127–8128, applies to BPAs, and orders under FAR subpart 8.4 and has precedence over other small business programs.

(b) Contracting officers, when establishing a BPA or placing an order against the FSS, shall ensure that priorities for veteran-owned small businesses are implemented within the VA hierarchy of small business program preferences in subpart 819.70. Specifically, the contracting officer will consider preferences for verified SDVOSBs first, then preferences for verified VOSBs. These priorities will be followed by preferences for other small businesses in accordance with 819.7005.

(c) If unable to satisfy requirements for supplies and services from the mandatory sources in 808.002 and 808.004–70, contracting officers may consider commercial sources in the open market (see FAR 8.004(b)) if an open market acquisition is most appropriate (see FAR 8.004) and a VA Rule of Two (see 802.101) determination is made (see subpart 819.70).

(d) When the servicing agency will award contracts under an interagency agreement on behalf of the VA, the contracting officer shall ensure the interagency acquisition complies with FAR subpart 17.5 and subpart 817.5 and includes terms requiring compliance with the VA Rule of Two (see 817.501).

808.405 Ordering procedures for Federal Supply Schedules.

808.405–70 Set-aside procedures for VA and GSA Federal Supply Schedules.

To satisfy VA legislative requirements, contracting officers shall use the supplemental ordering procedures of this section when establishing a BPA or placing an order for supplies or services under this subpart as follows:

(a) *When market research supports set-asides.* Pursuant to 38 U.S.C. 8127, contracting activities shall set-aside BPAs and orders for VIP-listed SDVOSBs or VOSBs when, based on research, the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by Veterans or owned and controlled by Veterans with service-connected disabilities will submit offers and that award can be made at a fair and reasonable price that offers best value to the United States. When the VA Rule of Two (see 802.101) is met:

(1) The set-aside requirements as provided in 819.7006 and 819.7007 are mandatory.

(2) The requirements in FAR 8.405–1, 8.405–2, and 8.405–3 apply, except only quotes received from verified (*i.e.,* VIP-listed) and eligible SDVOSBs or VOSBs will be considered.

(3) The eligibility requirements of 819.7003, 819.7006, and 819.7007 apply, including the requirement for offerors to be VIP-listed at the time they submit offers/quotes as well as at the time awards are made.

(4) The contracting officer shall notify potential offerors of the unique VA verification requirements by including in the solicitation the applicable set-aside clause prescribed at 819.7011.

(b) *When market research does not support set-asides.* Pursuant to 38 U.S.C. 8128 and to the extent that market research does not support an SDVOSB or VOSB set-aside in either FSS or the open market, the contracting activity shall give priority in the award of orders placed under this part to VIP-listed SDVOSBs/VOSBs through the use of evaluation preferences giving priority to SDVOSBs first, then to a lesser extent VOSBs, and finally to any firm that proposes to use SDVOSBs/VOSBs as subcontractors. Contracting officers must use the clause prescribed in 808.405–570(b).

(c) *SDVOSB/VOSB eligibility requirements.* The SDVOSB and VOSB eligibility requirements in 819.7003 apply, including current SDVOSB and VOSB VIP-listed status at the time of submission of offer/quote and at time of award. The offeror must also represent that it meets the small business size standard for the assigned North American Industry Classification System (NAICS) code as well as other small business requirements (including completing the certification found in 852.219–75 or 852.219–76.

808.405–570 Small business set-asides and preferences—Veterans First Contracting Program clauses.

(a) When setting aside an order pursuant to 808.405–70(a), the applicable clause prescribed in 819.7011 for SDVOSB/VOSB set-asides shall be used.

(b) When an SDVOSB/VOSB set-aside is not feasible, the ordering activity shall use the clause at 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs, for task orders, delivery orders, or BPAs using evaluation factors other than price alone.

(c) The ordering activity shall insert the clause at 852.208–71, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factor Commitments—Orders or BPAs, in request for quotes and resulting orders that include clause 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs.

Subpart 808.6—Acquisition From Federal Prison Industries, Inc.

808.603 Purchase priorities.

A waiver from Federal Prison Industries is not needed when comparable supplies and services are procured in accordance with subpart 819.70.

Subpart 808.8 [Reserved]

■ 5. Part 810 is revised to read as follows:

PART 810—MARKET RESEARCH

Sec.
810.000 Scope of part.
810.001 Policy.
810.001–70 Market research policy—use of VA Vendor Information Pages.

Authority: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

810.000 Scope of part.

The Veterans First Contracting Program in subpart 819.70 applies to contract actions under this part and takes precedence over other small

business programs referenced in FAR part 10 and FAR part 19.

810.001 Policy.

810.001–70 Market research policy—use of VA Vendor Information Pages.

When performing market research, contracting officers shall review the Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/* as required by subpart 819.70. The contracting officer will search the VIP database by applicable North American Industry Classification System (NAICS) codes to determine whether two or more verified service-disabled veteran-owned small businesses (SDVOSBs) and/or veteran-owned small businesses (VOSBs), with the appropriate NAICS code, are listed as verified in the VIP database. The contracting officer will determine, among other things as the requirement dictates, whether VIP-listed SDVOSBs or VOSBs identified as a result of market research are capable of performing the work, are likely to submit an offer/quote, and whether an award can be made at a fair and reasonable price that offers best value to the Government. The contracting officer shall use the market research for acquisition planning purposes, and as set forth in subpart 819.70, conduct a VA Rule of Two (see 802.101) determination in accordance with the contracting order of priority (see 819.7005 and 819.7006).

PART 813—SIMPLIFIED ACQUISITION PROCEDURES

■ 6. The authority citation for part 813 continues to read as follows:

Authority: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

■ 7. Revise section 813.003–70 to read as follows:

813.003–70 General policy.

(a) The Veterans First Contracting Program in subpart 819.70 applies to VA contracts, orders and BPAs under this part and has precedence over other small business programs referenced in FAR parts 13 and 19. For VA policy regarding mandatory Government sources, refer to 808.002.

(b) Notwithstanding FAR 13.003(b)(2), the contracting officer shall make an award utilizing the priorities for veteran-owned small businesses as implemented within the VA hierarchy of small business program preferences, the Veterans First Contracting Program in subpart 819.70. Specifically, the contracting officer shall consider preferences for verified service-disabled veteran-owned small businesses (SDVOSBs) first, then preferences for verified veteran-owned small businesses (VOSBs). These priorities will be followed by preferences for other small businesses in accordance with 819.7005.

(c) When using competitive procedures, the preference for restricting competition to verified SDVOSBs/VOSBs in accordance with paragraph (b) of this section is mandatory whenever market research provides a reasonable expectation of receiving two or more offers/quotes from eligible, capable and verified firms, and that an award can be made at a fair and reasonable price that offers best value to the Government.

(1) Pursuant to 38 U.S.C. 8127, contracts under this part shall be set-aside for SDVOSBs/VOSBs, in accordance with 819.7006 or 819.7007 when supported by market research. Contracting officers shall use the applicable set-aside clause prescribed at 819.7011.

(2) Pursuant to 38 U.S.C. 8128 and to the extent that market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall include evaluation factors as prescribed at 815.304–70 and the evaluation criteria clause prescribed at 815.304–71(a).

(d) The SDVOSB and VOSB eligibility requirements in 819.7003 apply, including verification of the SDVOSB and VOSB status of an offeror, and other small business requirements in 13 CFR part 121 and 13 CFR 125.6 (*e.g.,* small business representation, nonmanufacturer rule, and subcontracting limitations (see 819.7004 and 819.7011)).

Subpart 813.1—Procedures

■ 8. Revise section 813.106–70 to read as follows:

813.106–70 Soliciting competition, evaluation of quotations or offers, award and documentation—the Veterans First Contracting Program.

(a) When using competitive procedures under this part, the contracting officer shall use the Veterans First Contracting Program in subpart 819.70 and the guidance set forth in 813.003–70.

(b) Pursuant to 38 U.S.C 8127(b), contracting officers may use other than competitive procedures to enter into a contract with a verified SDVOSB or VOSB for procurements below the simplified acquisition threshold, as authorized by FAR 6.302–5 and 806.302–570(a) and (b).

(c) For procurements above the simplified acquisition threshold, pursuant to 38 U.S.C. 8127(c), contracting officers may also award a contract under this part to a firm verified under the Veterans First Contracting Program at subpart 819.70, using procedures other than competitive procedures, as authorized by FAR 6.302–5 and 806.302–570(a) and (c), and in accordance with 819.7008 and 819.7009.

■ 9. Part 819 is revised to read as follows:

PART 819—SMALL BUSINESS PROGRAMS

Subpart 819.71—[Reserved]

Authority: 15 U.S.C. 631, *et seq.;* 15 U.S.C. 637(d)(4)(E); 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

819.000 Scope of part.

(a) This part supplements FAR part 19 and implements the service-disabled veteran-owned small business (SDVOSB), veteran-owned small business (VOSB), and small business provisions of 38 U.S.C. 8127 and 8128, Executive Order 13360, and the Small Business Act (15 U.S.C. 631 et. seq.) as applied to the Department of Veterans Affairs (VA). This part also covers—

(1) Goals for using SDVOSBs and VOSBs;

(2) Priorities and preferences for using SDVOSBs/VOSBs;

(3) SDVOSB/VOSB eligibility and contract compliance;

(4) Setting aside acquisitions for SDVOSBs/VOSBs;

(5) Sole-source awards to SDVOSBs and VOSBs; and

(6) Evaluation preferences and contract clauses.

Subpart 819.2—Policies

819.201 General policy.

(a) It is VA policy that small business concerns owned and controlled by veterans shall have maximum practicable opportunity to participate in VA acquisitions, consistent the priorities and preferences prescribed under the Veterans First Contracting Program in subpart 819.70.

(1) To carry out this policy the Secretary shall establish annual SDVOSB and VOSB contracting goals.

(2) In support of these goals, each administration and staff office shall in turn establish annual goals for each subordinate contracting activity that present, for that activity, the maximum practicable opportunity for small business concerns, and particularly SDVOSBs/VOSBs, to participate in the performance of the activity's contracts and subcontracts.

(3) The attainment of these goals or the use of interagency acquisition vehicles does not limit the applicability of the Veterans First Contracting Program and priorities in subpart 819.70.

(c) In addition to the duties and responsibilities in FAR 19.201(c), the Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU), is responsible for overseeing implementation of the Veterans First Contracting Program under subpart 819.70.

(d) Each organization with contracting authority shall designate small business specialists/technical advisors in coordination with the OSDBU Director.

819.202 Specific policies.

OSDBU is responsible for reviewing procurement strategies, establishing thresholds for such reviews and making recommendations to assist contracting officers in the implementation of this part. These responsibilities shall be conducted within the VA hierarchy of small business program preferences established by 38 U.S.C. 8127(h) (see subpart 819.70), which requires VA to consider preferences for VIP-listed SDVOSBs first, then preferences for VIP-listed VOSBs. Contracting officers shall use VA Form 2268, Small Business Program and Contract Bundling Review, to document actions and recommendations.

819.203 Relationship among small business programs.

819.203–70 Priority for SDVOSB/VOSB contracting preferences.

(a) 38 U.S.C. 8127 and 8128 require the VA to provide priority and establish special acquisition methods to increase contracting opportunities for SDVOSBs/VOSBs. These priorities and special acquisition methods are set forth in subpart 819.70 and shall be applied by contracting officers before other priorities and preferences in FAR 19.203.

(b) Pursuant to 38 U.S.C. 8128, contracting officers shall give priority to SDVOSBs/VOSBs if such business concern(s) also meet the requirements of that contracting preference. The requirement in this paragraph (b) applies even when using a contracting preference under FAR part 19 (for example, a women-owned small business set-aside).

Subpart 819.3—Determination of Small Business Size and Status for Small Business Programs

819.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

819.307–70 SDVOSB/VOSB status protests.

All protests relating to size, status, and/or whether an SDVOSB or a VOSB is a ''small business'' are subject to the Small Business Administration (SBA) regulations at 13 CFR part 121 and must be filed in accordance with SBA guidelines at 13 CFR part 134 (see FAR subpart 19.3). Pursuant to Public Law 114–328, SBA will hear cases related to size and status, including ownership and control challenges under the VA Veterans First Contracting Program (see 38 U.S.C. 8127(f)(8)).

Subpart 819.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

819.501 General.

819.501–70 General principles for setting aside VA acquisitions.

(a) The following principles apply to VA acquisitions under this subpart:

(1) Before setting aside or reserving an acquisition for small businesses under FAR subpart 19.5, contracting officers shall refer to 808.002 and 819.203–70 and subpart 819.70 for VA SDVOSB/VOSB priorities and preferences.

(2) Set-asides under the Veterans First Contracting Program in subpart 819.70 (see 819.7006 and 819.7007) have precedence over other small business set-asides authorized in FAR part 19, both above and below the simplified acquisition threshold (SAT). An SDVOSB/VOSB set-aside satisfies the legislative requirement to reserve actions below the SAT for small business.

(3) Pursuant to 38 U.S.C. 8127(d), set-asides for SDVOSBs/VOSBs are mandatory whenever a contracting officer has a reasonable expectation of receiving two or more offers/quotes from eligible, capable and verified firms, and that an award can be made at a fair and reasonable price that offers best value to the Government. (VA Rule of Two (see 802.101))

(b) The set-aside principles in this section apply to VA acquisitions even when a procuring activity is meeting its goals or is planning the use of an interagency agreement, Federal Supply Schedule, or a multiple award contract, including a Governmentwide contract vehicle.

(c) The requirements in this section apply to all VA acquisitions under this subpart, including reserves, orders, and BPAs under multiple award contracts, GSA Federal Supply Schedule contracts, and Multi-Agency Contracts (MACs) awarded by another agency. A set-aside restricted to SDVOSBs/VOSBs pursuant to subpart 819.70 satisfies competition requirements in FAR part 6, as well as fair opportunity requirements for orders under multiple-award contracts (see FAR 16.505(b)(2)(i)(F)).

819.502 Setting aside acquisitions.

819.502–1 Requirements for setting aside acquisitions.

(b) Contracting officers shall refer to 808.002 for the VA policy regarding priorities for use of SDVOSBs/VOSBs and mandatory Government sources.

819.502–2 Total small business set-asides.

(a) If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis or, if permitted in the solicitation, the contracting officer will follow the tiered set-aside evaluation procedures in 819.7010, Tiered evaluation, and proceed to the next eligible tier in the evaluation process.

819.507 Solicitation provisions and contract clauses.

819.507–70 Additional VA solicitation provisions and contract clauses.

For contracts, orders, or BPAs to be issued as SDVOSB/VOSB reserve, tiered evaluation, set-aside, or sole source, see 819.7011. Also see subparts 808.4 and 815.3 and 819.203–70 for requirements and clauses applicable to VA small business set-asides.

Subpart 819.6—[Reserved]

Subpart 819.7—The Small Business Subcontracting Program

819.704–70 VA subcontracting plan requirements.

(a) VA's current subcontracting goals, at a minimum, shall be inserted into all solicitations which contain FAR clause 52.219–9. To the maximum extent possible, the contracting officer shall ensure that individual subcontracting plans submitted by offerors subject to clause 852.219–70, VA Small Business Subcontracting Plan Minimum Requirements, include SDVOSB/VOSB goals that are commensurate with the annual VA SDVOSB/VOSB subcontracting goals (see 819.708).

(1) Only firms listed as verified on the Vendor Information Pages (VIP) database (see subpart 819.70) will count towards SDVOSB and VOSB goals.

(2) A contractor may reasonably rely on a subcontractor's status as shown in the VIP database as of the date of subcontract award, provided the contractor retains records of the results of the VIP database query.

(3) In furtherance of 38 U.S.C. 8127(a)(4), contractors shall submit subcontracting plan reports to OSDBU as set forth in clause 852.219–70, VA Small Business Subcontracting Plan Minimum Requirements. Unless otherwise directed by OSDBU, VA Form 0896A, Report of Subcontracts to Small and Veteran Owned Business, shall be used to submit the required information.

(b) Subcontracting goals should be expressed as a percentage of total dollars to be subcontracted unless otherwise stated in the solicitation.

(c) If an offeror proposes to use an SDVOSB/VOSB subcontractor for the purpose of receiving SDVOSB/VOSB evaluation factors credit pursuant to 808.405–70 or 815.304–70, the contracting officer shall ensure that the offeror, if awarded the contract, actually uses the proposed subcontractor or another SDVOSB/VOSB for that subcontract or for work of similar value, in accordance with clause 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs, or 852.215–71, Evaluation Factor Commitments.

(d) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB or VOSB status is subject to debarment from contracting with the Department for a period of not less than five years. This includes the debarment of all principals in the business (see 809.406–270).

819.708 Contract clauses.

(b) The contracting officer shall insert clause 852.219–70, Small Business Subcontracting Plan Minimum Requirements, in solicitations and contracts that include FAR clause 52.219–9, Small Business Subcontracting Plan.

Subpart 819.8—Contracting With the Small Business Administration (the 8(a) Program)

819.800 General.

(e) The Small Business Administration (SBA) and the Department of Veterans Affairs (VA) have entered into a Partnership Agreement delegating SBA's contract execution and administrative functions to VA. Contracting officers shall follow the alternate procedures in the Partnership Agreement and this subpart, as applicable, to award an 8(a) contract. In the event the Partnership Agreement ceases to be in effect, contracting officers shall follow the procedures in FAR subpart 19.8.

819.811 Preparing the contracts.

819.811–370 VA/SBA Partnership Agreement and contract clauses.

(a) Before placing new requirements under the 8(a) program, the contracting officer must determine whether an SDVOSB/VOSB set-aside is mandated under the VA Rule of Two (see 802.101). If the determination does not result in an SDVOSB/VOSB set-aside, the contracting officer may consider the 8(a) program.

(b) The Partnership Agreement provides that SBA can release procurements already in the program whenever an SDVOSB or VOSB set-aside is feasible.

(c) When an 8(a) acquisition is processed pursuant to the Partnership Agreement, the contracting officer shall:

(1) For competitive solicitations and awards, use the clause at 852.219–71, VA Notification of Competition Limited to Eligible 8(a) Participants, substituting paragraph (c) of FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, with paragraph (c) contained in 852.219–71.

(2) For noncompetitive solicitations and awards insert the clause at 852.219–72, Notification of Section 8(a) Direct Awards, instead of the prescribed FAR clauses at 52.219–11, Special 8(a) Contract Conditions; 52.219–12, Special 8(a) Subcontract Conditions; and 52.219–17, Section 8(a) Award.

(3) In all instances, contracting include the clause at FAR 52.219–14, Limitations on Subcontracting, or if applicable 52.219–33, Nonmanufacturer Rule.

Subpart 819.70—The VA Veterans First Contracting Program

819.7001 General.

(a) Sections 502 and 503 of Public Law 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended (38 U.S.C. 8127- 8128), authorizes a VA specific program to increase contracting opportunities for eligible small business concerns owned and controlled by Veterans with service-connected disabilities and small business concerns owned and controlled by Veterans. Once ownership and control by these veterans is verified, these businesses are referred to as service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) or collectively SDVOSB/VOSB for ease of reference.

(b) The program as implemented in this subpart shall be known as the Veterans First Contracting Program. The purpose of the program is to increase

contracting opportunities and provide for priority in the award of contracts and subcontracts to SDVOSBs/VOSBs so they can fully participate in the VA contracting process. Eligible SDVOSBs qualify for any VOSB preferences under this subpart.

(c) VA's program is codified at 38 U.S.C. 8127(b), (c), and (d), and provides the authority for VA contracting officers to make awards to SDVOSBs/VOSBs using restricted competition, as well as other than full and open competition (sole source), as set-forth in this subpart. Additionally, 38 U.S.C. 8128 provides the authority for VA to give SDVOSBs/VOSBs priority in the awarding of contracts and subcontracts using evaluation preferences.

(d) Contracting officers shall award contracts by restricting competition to eligible SDVOSBs/VOSBs as provided in 819.7006 and 819.7007. The contracting officer may use other preferences in this subpart as appropriate and in accordance with procuring activity guidelines.

(e) Pursuant to 38 U.S.C. 8128, contracting officers shall give priority to SDVOSBs/VOSBs if such business concern(s) also meet the requirements of that contracting preference. In carrying out this responsibility, contracting officers shall include the clauses prescribed at 808.405–570 and 815.304–71 in competitive solicitations and contracts that are not set-aside for SDVOSB/VOSB, including those under FAR part 12. The requirement in this paragraph (e) applies even when using a contracting preference under FAR part 19 (for example, a women-owned small business set-aside).

(f) The attainment of goals or the use of interagency vehicles or Governmentwide contract vehicles (*i.e.,* Federal Supply Schedules (FSS)) does not relieve the contracting officer from using SDVOSB/VOSB set-asides and other preferences as provided in subpart 819.70. Moreover, if the VA enters into a contract, agreement, or other arrangement with any governmental entity to acquire goods or services, the entity acting on behalf of the VA through such an interagency acquisition or other agreement will comply, to the maximum extent feasible, with the provisions of the Veterans First Contracting Program as set forth in this subpart.

(g) Contracting officers shall ensure awards are made using the VA hierarchy of SDVOSB/VOSB preferences in this subpart. Specifically, the contracting officer will consider preferences for eligible SDVOSBs first, then preferences for other eligible VOSBs.

(h) When an offer of an SDVOSB/VOSB prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the contracting officer must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

819.7002 Applicability.

Unless otherwise exempted by law, this subpart applies to VA contracting activities and contracts (see FAR 2.101) including BPAs and orders under FAR subpart 8.4 and acquisition of commercial products or commercial services under FAR part 12. In addition, this subpart applies to VA contractors, their subcontractors and to any Government entity that has a contract, agreement, or other arrangement with the VA to acquire goods and services on behalf of the VA (see 817.502). For applicability and VA policy regarding priorities for use of mandatory Government sources see 808.002.

819.7003 Eligibility.

(a) SDVOSB/VOSB size eligibility, challenges, and appeals are governed by the Small Business Administration (SBA) regulations at 13 CFR parts 121, 125, and 134, except where directed otherwise by this part or 38 CFR part 74.

(b) At the time of submission of offers/quotes, and at the time of award of any contract, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB or VOSB eligible under this subpart;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Listed as a verified SDVOSB/VOSB on the VA's Vendor Information Pages (VIP) at *https://www.vetbiz.va.gov/vip/*.

(c) A joint venture may be considered eligible if it meets the requirements in 13 CFR part 125; and the joint venture is listed in the VIP database.

(d) To receive a benefit under the Veterans First Contacting Program, an otherwise eligible SDVOSB/VOSB must also meet SBA requirements at 13 CFR parts 121 and 125, including the nonmanufacturer rule requirements at 13 CFR 121.406(b) and limitations on subcontracting at 13 CFR 125.6. The nonmanufacturer rule (see 13 CFR 121.406) and the limitations on subcontracting requirements apply to all SDVOSB and VOSB set-aside and sole source contracts above the micro-purchase threshold. An offeror shall submit a certification of compliance to be considered eligible for any award under this part (see 819.7004).

(e) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment from contracting with the Department for a period of not less than five years. This includes the debarment of all principals in the business. See 809.406–270.

819.7004 Limitations on subcontracting compliance requirements.

(a) A contract awarded under this subpart is subject to the SBA limitations on subcontracting requirements in 13 CFR 125.6, provided that—

(1) Only VIP-listed SDVOSBs are considered eligible and/or ''similarly situated'' under an SDVOSB sole source or set-aside.

(2) A VOSB is subject to the same limitations on subcontracting that apply to an SDVOSB.

(3) Any VIP-listed SDVOSB/VOSB is considered eligible and/or ''similarly situated'' under a VOSB sole source or set-aside.

(b) Pursuant to the authority of 38 U.S.C. 8127(k)(2), a contracting officer may award a contract under this subpart only after obtaining from the offeror a certification that the offeror will comply with the limitations on subcontracting requirement as provided in the solicitation and which shall be included in the resultant contract (see 819.7011).

(1) The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal.

(2) The Government will not consider offers for award from offerors that do not provide the certification with their bid, quotation, or proposal, and all such responses will be deemed ineligible for evaluation and award.

(c) An otherwise eligible first tier subcontractor must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded.

(d) An SDVOSB/VOSB awarded a contract on the basis of a set-aside, sole source, or an evaluation preference is

required to comply with the limitations on subcontracting either by—

(1) The end of the base term, and then by the end of each subsequent option period; or, by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside for SDVOSB/VOSB as described in 808.405 and FAR 16.505(b)(2)(i)(F), or for an order issued directly to an SDVOSB/VOSB in accordance with FAR 19.504(c)(1)(ii), by the end of the performance period for the order.

(e) The contracting officer may also, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance of the contract, and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(f) Pursuant to Public Law 116–183, the Office of the Small and Disadvantaged Business Utilization (OSDBU) and Chief Acquisition Officer (CAO), will implement a process to monitor compliance with the requirement in this section. The OSDBU and CAO shall jointly refer any violations or suspected violations to the VA Office of Inspector General. This referral obligation does not relieve contracting officers of their obligation to report suspected violations of law to the Office of the Inspector General (OIG).

(1) If the Secretary or designee determines in consultation with the Inspector General that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith with respect to the requirements described in 819.7003(d), such SDVOSB/VOSB shall be subject to any or all of the following—

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating 18 U.S.C. 1001.

(2) The Inspector General shall report to the Congress annually on the number of referred violations and suspected violations, and the disposition of such violations, including the number of small business concerns suspended or debarred from federal contracting or referred for Department of Justice prosecution.

819.7005 Contracting order of priority.

(a) In determining the acquisition strategy applicable to a procurement requirement not otherwise covered under 808.002, the contracting officer shall observe the order of contracting preferences in 38 U.S.C. 8127(h).

(b) Specifically, preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded to small business concerns owned and controlled by Veterans with service-connected disabilities as provided in this subpart.

(2) Contracts to small business concerns owned and controlled by Veterans that are not covered by paragraph (b)(1) of this section as provided in this subpart.

(3) Contracts awarded pursuant to—

(i) Section 8(a) of the Small Business Act (15 U.S.C. 637(a) as provided in FAR subpart 19.8; or

(ii) Section 31 of the Small Business Act (15 U.S.C. 657a) as provided in FAR subpart 19.13.

(4) Contracts awarded pursuant to any other small business set aside contracting preference, with due deference to the priority for awarding to women-owned small businesses as provided in FAR 19.203(b) through (e) and FAR subpart 19.15.

819.7006 VA service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 808.002, 813.106, 819.7007, and 819.7008, the contracting officer shall set-aside a contract action exceeding the micro-purchase threshold for competition restricted to VIP-listed SDVOSB upon a reasonable expectation based on market research that—

(1) Offers/quotations will be received from two or more eligible VIP-listed SDVOSBs; and

(2) Award can be made at a fair and reasonable price that offers the best value to the Government.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure that—

(1) Offerors are registered and verified as eligible in the VIP database at the time of submission of offers and at time of award; and

(2) Offerors affirmatively represent their SDVOSB and small business status based on the size standard corresponding to the North American Industrial Classification System (NAICS) code assigned to the solicitation/contract, as set forth in 819.7003(b) or (c).

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VIP-listed SDVOSB, the contracting officer may make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSBs, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition if warranted or otherwise procured using the most appropriate strategy based on the results of market research.

819.7007 VA veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 808.002, 813.106, 819.7007, and 819.7008, the contracting officer shall set aside a contract action exceeding the micro-purchase threshold for competition restricted to VIP-listed VOSBs upon a reasonable expectation based on market research that—

(1) Offers/quotations will be received from two or more VIP-listed VOSBs; and

(2) Award can be made at a fair and reasonable price that offers the best value to the Government.

(b) When conducting VOSB set-asides, the contracting officer shall ensure that—

(1) Offerors are registered and verified as eligible in the VIP database at the time of submission of offers and at time of award; and

(2) Offerors affirmatively represent their SDVOSB/VOSB and small business status based on the size standard corresponding to the NAICS code assigned to the solicitation/contract (see 819.7003(b) and (c)).

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VIP-listed VOSB in response to a VOSB set-aside, the contracting officer may make an award to that concern. If the contracting officer decides not to make an award to the single acceptable offer received, or if the contracting officer receives no acceptable offers from eligible VOSBs, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs in accordance with 819.7005 or otherwise procured using the most appropriate strategy based on the results of market research.

819.7008 Sole source awards to verified service-disabled veteran-owned small businesses.

(a) A contracting officer may award a contract to a VIP-listed service-disabled veteran-owned small business (SDVOSB) using other than competitive procedures provided—

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized and the required justification pursuant to FAR 6.302–5(c)(2)(ii) is posted in accordance with FAR part 5;

(3) The SDVOSB has been determined to be a responsible contractor with respect to performance; and

(4) In the estimation of the contracting officer contract award can be made at a fair and reasonable price that offers best value to the Government.

(b) The contracting officer's determination to make a sole source award is a business decision wholly within the discretion of the contracting officer. To ensure that opportunities are available to the broadest number of SDVOSBs, this authority is to be used only when in the best interest of the Government.

(c) A determination that only one SDVOSB can meet the requirement is not required. However, in accordance with FAR 6.302–5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable.

(d) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure the business meets eligibility requirements in 819.7003.

(e) A procurement requirement estimated to exceed the legislative threshold of $5 million shall not be split or subdivided to permit the use of this SDVOSB sole source authority.

819.7009 Sole source awards to verified veteran-owned small businesses.

(a) A contracting officer may award a contract to a VIP-listed veteran-owned small business (VOSB) using other than competitive procedures provided—

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized and the required justification pursuant to FAR 6.302–5(c)(2)(ii) is posted in accordance with FAR part 5;

(3) The VOSB has been determined to be a responsible contractor with respect to performance;

(4) In the estimation of the contracting officer contract award can be made at a fair and reasonable price that offers best value to the Government; and

(5) No responsible SDVOSB has been identified.

(b) The contracting officer's determination to make a sole source award is a business decision wholly within the discretion of the contracting officer. To ensure that opportunities are available to the broadest number of VOSBs, this authority is to be used only when in the best interest of the Government.

(c) A determination that only one VOSB can meet the requirement is not required. However, in accordance with FAR 6.302–5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable.

(d) When conducting a VOSB sole source acquisition, the contracting officer shall ensure the business meets eligibility requirements in 819.7003.

(e) A procurement requirement estimated to exceed the legislative threshold of $5 million shall not be split or subdivided to permit the use of this VOSB sole source authority.

819.7010 Tiered set-aside evaluation.

(a) Pursuant to the authority of 38 U.S.C. 8127 and under limited circumstances as set forth in this section, contracting officers may consider using a tiered set-aside evaluation approach to minimize delays in the re-solicitation process.

(b) Tiered evaluation of offers is a procedure that may be used in competitive negotiated acquisitions, including construction and acquisitions for commercial products and commercial services when the VA Rule of Two (see 802.101) determination indicates a set-aside is required, but other circumstances preclude a confident conclusion that an award can be made at the SDVOSB or VOSB tier. The contracting officer—

(1) Solicits and receives offers from targeted tiers of small business groups, with SDVOSB as the first tier and VOSB as the second tier;

(2) Establishes a tiered order of priority for evaluating offers that is specified in the solicitation; and

(3) If no award can be made at the first tier, evaluates offers at the next lower tier, until award can be made.

(c) Market research, which shall be conducted and documented in advance of issuing the solicitation, will inform which of the following types of tiers will be included in the solicitation:

(1) Tiered evaluations limited to SDVOSBs or VOSBs;

(2) Tiered evaluations including 8(a) and HUBZone small businesses; or

(3) Tiered evaluations including all other small business concerns.

(d) The tiered order of priority shall be consistent with 819.7005. Consideration shall be given to HUBZone and 8(a) small business concerns before evaluating offers from other small business concerns.

819.7011 Contract clauses.

(a) The contracting officer shall insert clause 852.219–73, VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses, or clause 852.219–74, VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses, as applicable, in solicitations, orders and contracts that are set-aside, reserved, evaluated or awarded under this subpart. This includes sole source awards as well as multiple-award contracts when orders may be set aside for SDVOSBs/VOSBs as described in 808.405 and FAR 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 852.219–75, VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction, in solicitations and contracts for services and construction, including BPAs, BOAs, and orders, for acquisitions that are evaluated, set-aside, or awarded on a sole source basis under this subpart. This includes orders awarded under multiple-award contracts to SDVOSBs/VOSBs.

(c) The contracting officer shall insert the clause at 852.219–76, VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products, in solicitations and contracts for supplies or products, including BPAs, BOAs, and orders, for acquisitions that are to be awarded on the basis of an SDVOSB/VOSB set-aside, sole source, or an evaluation preference under this subpart. This includes orders awarded under multiple-award contracts to SDVOSBs/VOSBs. The contracting officer shall tailor clause 852.219–76, and paragraph (a)(2)(iii) of the clause, as appropriate.

Subpart 819.71—[Reserved]

PART 832—CONTRACT FINANCING

■ 10. Revise the authority citation for part 832 to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 832.9 [Removed and Reserved]

■ 11. Remove and reserve subpart 832.9.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Revise the authority citation for part 852 to read as follows:

Authority: 38 U.S.C. 8127–8128 and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 852.2—Text of Provisions and Clauses

852.207–70 [Removed and Reserved]

■ 13. Remove and reserve section 852.207–70.

■ 14. Add Section 852.208–70 to read as follows:

852.208–70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs.

As prescribed in 808.405–570, insert the following clause:

Service–Disabled Veteran–Owned and Veteran–Owned Small Business Evaluation Factors—Orders or BPAs (Nov 2022)

(a) In an effort to increase contracting opportunities for Veterans, depending on the evaluation factors included in the solicitation, VA will evaluate responses received based on the schedule Contractor's VIP-verified service-disabled veteran-owned small business/veteran-owned small business (SDVOSB/VOSB) status; and/or their proposed use of VIP-listed SDVOSB/VOSB as subcontractors or teaming partners.

(b) To receive credit under this clause a contractor or subcontractor must be listed, at time of submission of offer/quotes and at time of award, as an eligible SDVOSB/VOSB in the Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/.*

(c) A VIP-listed SDVOSB schedule holder will receive full credit, and a VIP-listed VOSB schedule holder will receive partial credit for the SDVOSB/VOSB status evaluation factor.

(d) Offerors other than SDVOSBs or VOSBs proposing to use VIP-listed SDVOSBs/VOSBs as subcontractors/teaming partners, will receive some consideration under this evaluation factor. To receive consideration, offerors must provide in their proposals:

(1) The name(s) and contact information of the VIP-listed SDVOSB(s)/VOSB(s) with whom they intend to team or subcontract.

(2) A brief description of the proposed team or subcontractor(s) arrangement.

(3) The approximate dollar value of the proposed teaming arrangements or subcontract(s).

(4) Evidence of teaming partner/subcontractor's VIP database registration and verification.

(e) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

■ 15. Add section 852.208–71 to read as follows:

852.208–71 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factor Commitments—Orders and BPAs.

As prescribed in 808.405–570, insert the following clause:

Service–Disabled Veteran–Owned and Veteran–Owned Small Business Evaluation Factor Commitments—Orders and BPAs (Nov 2022)

(a) The Contractor agrees, if selected on the basis of service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) status, to comply with the eligibility requirements in subpart 819.70, including the limitation on subcontracting requirements at 13 CFR 125.6.

(b) The Contractor agrees, if selected for award on the basis of teaming/subcontracting in accordance with 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders and BPAs, to use the evaluated firm(s) as proposed or if approved by contracting officer to substitute one or more VIP-verified SDVOSB/VOSB for work of the same or similar value.

(c) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

852.219–9,852.219–10, and 852.219–11 [Removed]

■ 16. Remove sections 852.219–9, 852.219–10, and 852.219–11.

■ 17. Add section 852.219–70 to read as follows:

852.219–70 VA Small Business Subcontracting Plan Minimum Requirements.

As prescribed in 819.708, insert the following clause:

VA Small Business Subcontracting Plan Minimum Requirements (NOV 2022)

(a) This clause does not apply to small business concerns.

(b) If the offeror is required to submit an individual subcontracting plan, the minimum goals for award of subcontracts to VA verified service-disabled veteran-owned small business and veteran-owned small business SDVOSB/VOSB shall be at least commensurate with the Department's annual SDVOSB/VOSB subcontracting goals.

(c) For a commercial plan, the minimum goals for award of subcontracts to SDVOSB/VOSB shall be at least commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business subcontracting goals for the total value of projected subcontracts to support the sales for the commercial plan.

(d) To be credited toward goal achievements, SDVOSB/VOSBs must be verified as eligible in the VA's Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/.* A contractor may reasonably rely on a subcontractor's status as shown in the VIP database as of the date of subcontract award, provided the contractor retains records of the results of the VIP database query.

(e) The Contractor shall annually submit a listing of SDVOSB/VOSB (for which credit toward goal achievement is to be applied) for review by personnel in the Office of Small and Disadvantaged Business Utilization. Use VA Form 0896A, Report of Subcontracts to Small and Veteran-Owned Business.

(f) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

■ 18. Revise section 852.219–71 to read as follows:

852.219–71 Notification of Competition Limited to Eligible 8(a) Participants.

As prescribed in 819.811–370, when FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, is utilized, use this clause in conjunction with the FAR clause.

Notification of Competition Limited to Eligible 8(A) Participants (NOV 2022)

Substitute paragraph (c) in FAR Clause 52.219–18 as follows:

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror. Although SBA is not identified as such in the award form, SBA is still the Prime Contractor. Contractor shall comply with the limitations on subcontracting as provided in 13 CFR 125.6 and other 8(a) program requirements, as set forth in 13 CFR part 124.

(End of clause)

■ 19. Revise section 852.219–72 to read as follows:

852.219–72 Notification of Section 8(a) Direct Award.

As prescribed in 819.811–370, paragraph (a), insert the following clause:

Notification of Section 8(a) Direct Award (NOV 2022)

(a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program. By submission of its offer, the Offeror represents that it is in good standing and that it meets all of the criteria for participation in the program in accordance with 13 CFR part 124.

(b) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror. Although SBA is not identified as such in the award form, SBA is still the Prime Contractor.

(c) This contract is issued as a direct award between the contracting activity and the 8(a) Contractor pursuant to the Partnership Agreement (PA) between the Small Business Administration (SBA) and the Department of Veterans Affairs.

(d) SBA retains responsibility for 8(a) certification, 8(a) eligibility determinations

and related issues, and providing counseling and assistance to the 8(a) Contractor under the 8(a) program. The cognizant SBA district office is:

[To be completed by the Contracting Officer at the time of award]

(e) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall obtain SBA's approval prior to processing any novation agreement(s). The contracting activity may assign contract administration functions to a contract administration office.

(f) The Contractor agrees:

(1) To notify the Contracting Officer, simultaneous with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern.

(2) Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership and control.

(3) It will adhere to the requirements of 52.219–14, Limitations of Subcontracting and other requirements in 13 CFR part 124 and 13 CFR 125.6, as applicable

(g) Any proposed joint venture involving an 8(a) Participant must be approved by SBA before contracts are awarded.

(End of clause)

■ 20. Add section 852.219–73 to read as follows:

852.219–73 VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses.

As prescribed in 819.7011, insert the following clause:

VA Notice Of Total set-Aside For Verified Service–Disabled Veteran–Owned Small Businesses (NOV 2022)

(a) *Definition.* for the Department of Veterans Affairs, ''*Service-disabled Veteran-owned small business concern or SDVOSB*'':

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more service-disabled Veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled Veterans or eligible surviving spouses (see VAAR 802.201, Surviving Spouse definition);

(ii) The management and daily business operations of which are controlled by one or more service-disabled Veterans (or eligible surviving spouses) or, in the case of a service-disabled Veteran with permanent and severe disability, the spouse or permanent caregiver of such Veteran;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is listed in VA's Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/;* and

(v) The business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR parts 121 and 125, provided that any reference therein to a service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to apply to a VA verified and VIP-listed SDVOSB, unless otherwise stated in this clause.

(2) The term ''Service-disabled Veteran'' means a Veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(3) The term ''small business concern'' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term ''small business concern owned and controlled by Veterans with service-connected disabilities'' has the meaning given the term ''*small business concern owned and controlled by service-disabled veterans*'' under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) of this clause).

(b) *General.* (1) Offers are solicited only from VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed SDVOSBs at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made to a VIP-listed SDVOSB who is eligible at the time of submission of offer(s) and at the time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as an SDVOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed SDVOSBs are considered eligible to receive award of a resulting contract. By submitting an offer, the prospective contractor represents that it is an eligible SDVOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70.

(d) *Agreement.* When awarded a contract action, including orders under multiple-award contracts, an SDVOSB agrees that in the performance of the contract, the SDVOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on small business size and government contracting programs at 13 CFR part 121 and part 125, including the non-manufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406(b) and 13 CFR 125.6. Unless otherwise stated in this clause, a requirement in 13 CFR parts 121 and 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed SDVOSB. For the purpose of limitations on subcontracting, only VIP-listed SDVOSBs (including independent contractors) shall be considered eligible and/or ''similarly situated'' (*i.e.,* a firm that has the same small business program status as the prime contractor). An otherwise eligible firm further agrees to comply with the required certification requirements in this solicitation (see 852.219–75 or 852.219–76 as applicable). These requirements are summarized as follows:

(1) *Services.* In the case of a contract for services (except construction), the SDVOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance to firms that are not VIP-listed SDVOSBs (excluding direct costs to the extent they are not the principal purpose of the acquisition and the SDVOSB/VOSB does not provide the service, such as airline travel, cloud computing services, or mass media purchases). When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract

(2) *Supplies/products.* (i) In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), the SDVOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed SDVOSBs. When a contract includes both supply and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(ii) In the case of a contract for supplies from a non-manufacturer, the SDVOSB prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) has been granted. Refer to 13 CRF 125.6(a)(2)(ii) for guidance pertaining to multiple item procurements.

(3) *General construction.* In the case of a contract for general construction, the SDVOSB prime contractor will not pay more than 85% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed SDVOSBs.

(4) *Special trade construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, may be paid to firms that are not VIP-listed SDVOSBs.

(5) *Subcontracting.* An SDVOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed SDVOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, the cost of materials is excluded and not considered to be subcontracted. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the portion of the contract with the preponderance of the expenditure upon which the assigned NAICS is based. For information and more specific requirements, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* An SDVOSB shall comply with the limitations on subcontracting as follows:

[*Contracting Officer check as appropriate.*]

____By the end of the base term of the contract or order, and then by the end of each subsequent option period; or

____By the end of the performance period for each order issued under the contract.

(f) *Joint ventures.* A joint venture may be considered eligible as an SDVOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to apply to a VIP-listed SDVOSB. A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause will be performed by the aggregate of the joint venture participants.

(g) *Precedence.* The VA Veterans First Contracting Program, as defined in VAAR 802.101, subpart 819.70, and this clause, takes precedence over any inconsistencies between the requirements of the SBA Program for SDVO SBCs, and the VA Veterans First Contracting Program.

(h) *Misrepresentation.* Pursuant to 38 U.S.C. 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406–2 Causes for Debarment).

(End of clause)

■ 21. Add section 852.219–74 to read as follows:

852.219–74 VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses.

As prescribed in 819.7011, insert the following clause:

VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses (NOV 2022)

(a) *Definition.* For the Department of Veterans Affairs, ''*Veteran-owned small business or VOSB*'':

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more Veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more Veteran(s);

(ii) The management and daily business operations of which are controlled by one or more Veteran(s);

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is listed in VA's Vendor Information Pages (VIP) database at: *https://www.vetbiz.va.gov/vip/;* and

(v) The business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR parts 121 and 125, provided that any requirement therein that applies to a service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to also apply to a VA verified and VIP-listed VOSB, unless otherwise stated in this clause.

(vi) The term VOSB includes VIP-listed service-disabled veteran-owned small businesses (SDVOSB).

(2) ''*Veteran*'' is defined in 38 U.S.C. 101(2).

(3) The term ''*small business concern*'' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term ''*small business concern owned and controlled by Veterans*'' has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) of this clause).

(b) *General.* (1) Offers are solicited only from VIP-listed VOSBs, including VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made only to a VIP-listed VOSB who is eligible at the time of submission of offer(s) and at time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as a VOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed VOSBs are considered eligible to receive award of a resulting contract. By submitting an offer, the prospective contractor represents that it is an eligible VOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70.

(d) *Agreement.* When awarded a contract action, including orders under multiple-award contracts, a VOSB agrees that in the performance of the contract, the VOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on small business size and government contracting programs at 13 CFR parts 121 and 125, including the non-manufacturer rule and limitations on-subcontracting requirements in 13 CFR 121.406(b) and 125.6. Unless otherwise stated in this clause, any requirement in 13 CFR parts 121 and 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed VOSB. For the purpose of the limitations on subcontracting, only VIP-listed VOSB, (including independent contractors) is considered eligible and/or ''similarly situated'' (*i.e.,* a firm that has the same small business program status as the prime contractor). An otherwise eligible firm further agrees to comply with the required certification requirements in this solicitation (see 852.219–75 and/or 852.219–76 as applicable). These requirements are summarized as follows:

(1) *Services.* In the case of a contract for services (except construction), the VOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance to firms that are not VIP-listed VOSBs (excluding direct costs to the extent they are not the principal purpose of the acquisition and the SDVOSB/VOSB does not provide the service, such as airline travel, cloud computing services, or mass media purchases). When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.

(2) *Supplies/products.* (i) In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), the VOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed VOSBs. When a contract includes both supply and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(ii) In the case of a contract for supplies from a non-manufacturer, the VOSB prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) has been granted. Refer to 13 CFR 125.6(a)(2)(ii) for guidance pertaining to multiple item procurements.

(3) *General construction.* In the case of a contract for general construction, the VOSB prime contractor will not pay more than 85% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed VOSBs.

(4) *Special trade construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, may be paid to firms that are not VIP-listed VOSBs.

(5) *Subcontracting.* A VOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed VOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, the cost of materials is excluded and not considered to be subcontracted. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the portion of the contract with the preponderance of the expenditure upon which the assigned NAICS is based. For information and more specific requirements, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* A VOSB shall comply with the limitations on subcontracting as follows:

[*Contracting Officer check as appropriate.*]

____By the end of the base term of the contract or order, and then by the end of each subsequent option period; or

____By the end of the performance period for each order issued under the contract.

(f) *Joint ventures.* A joint venture may be considered eligible as a VOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to also apply to a VIP-listed VOSB. A joint venture agrees that, in the performance of the

contract, the applicable percentage specified in paragraph (d) of this clause will be performed by the aggregate of the joint venture participants.

(g) *Precedence.* The VA Veterans First Contracting Program, as defined in VAAR 802.10, subpart 819.70, and this clause, takes precedence over any inconsistencies between the requirements of the SBA Program for SDVO SBCs and the VA Veterans First Contracting Program.

(h) *Misrepresentation.* Pursuant to 38 U.S.C. 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's VOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406–2, Causes for Debarment).

(End of clause)

■ 22. Add section 852.219–75 to read as follows:

852.219–75 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction.

As prescribed in 819.7011(b), insert the following clause:

VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction (NOV 2022)

(a) Pursuant to 38 U.S.C. 8127(k)(2), the offeror certifies that—

(1) If awarded a contract (see FAR 2.101 definition), it will comply with the limitations on subcontracting requirement as provided in the solicitation and the resultant contract, as follows: [*Contracting Officer check the appropriate box below based on the predominant NAICS code assigned to the instant acquisition as set forth in FAR 19.102.*]

(i) ☐ *Services.* In the case of a contract for services (except construction), the contractor will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service as set forth in 13 CFR 125.6.

(ii) ☐ *General construction.* In the case of a contract for general construction, the contractor will not pay more than 85% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(iii) ☐ *Special trade construction contractors.* In the case of a contract for special trade contractors, the contractor will not pay more than 75% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(2) The offeror acknowledges that this certification concerns a matter within the jurisdiction of an Agency of the United States. The offeror further acknowledges that this certification is subject to Title 18, United States Code, Section 1001, and, as such, a false, fictitious, or fraudulent certification may render the offeror subject to criminal, civil, or administrative penalties, including prosecution.

(3) If VA determines that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith, such SDVOSB/VOSB shall be subject to any or all of the following:

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating section 1001 of title 18.

(b) The offeror represents and understands that by submission of its offer and award of a contract it may be required to provide copies of documents or records to VA that VA may review to determine whether the offeror complied with the limitations on subcontracting requirement specified in the contract. Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(c) The offeror further agrees to cooperate fully and make available any documents or records as may be required to enable VA to determine compliance with the limitations on subcontracting requirement. The offeror understands that failure to provide documents as requested by VA may result in remedial action as the Government deems appropriate.

(d) Offeror completed certification/fill-in required. The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal. The Government will not consider offers for award from offerors that do not provide the certification, and all such responses will be deemed ineligible for evaluation and award.

Certification

I hereby certify that if awarded the contract, [*insert name of offeror*] will comply with the limitations on subcontracting specified in this clause and in the resultant contract. I further certify that I am authorized to execute this certification on behalf of [*insert name of offeror*].

Printed Name of Signee: _____

Printed Title of Signee: _____

Signature: _____

Date: _____

Company Name and Address: _____

(End of clause)

■ 23. Add section 852.219–76 to read as follows:

852.219–76 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products.

As prescribed in 819.7011(c), insert the following clause. The contracting officer shall tailor the clause in paragraph (a)(2)(iii) as appropriate:

VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products (NOV 2022)

(a) Pursuant to 38 U.S.C. 8127(k)(2), the offeror certifies that—

(1) If awarded a contract (see FAR 2.101 definition), it will comply with the limitations on subcontracting requirement as provided in the solicitation and the resultant contract, as follows: [*Offeror check the appropriate box*]

(i) ☐ In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(ii) ☐ In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) is granted. The offeror understands that, as provided in 13 CFR 121.406(b)(7), such a waiver has no effect on requirements external to the Small Business Act, such as the Buy American Act or the Trade Agreements Act.

(2) Manufacturer or nonmanufacturer representation and certification. [*Offeror fill-in—check each applicable box below. The offeror must select the applicable provision below, identifying itself as either a manufacturer or nonmanufacturer*]:

(i) ☐ *Manufacturer or producer.* The offeror certifies that it is the manufacturer or producer of the end item being procured, and the end item is manufactured or produced in the United States, in accordance with paragraph (a)(1)(i).

(ii) ☐ *Nonmanufacturer.* The offeror certifies that it qualifies as a nonmanufacturer in accordance with the requirements of 13 CFR 121.406(b) and paragraph (a)(1)(ii). The offeror further certifies it meets each element below as required in order to qualify as a nonmanufacturer. [*Offeror fill-in—check each box below.*]

☐ The offeror certifies that it does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS code 541519, which is found at 13 CFR 121.201, footnote 18).

☐ The offeror certifies that it is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied.

☐ The offeror certifies that it will take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.

(iii) ☐ The offeror certifies that it will supply the end item of a small business manufacturer, processor, or producer made in the United States, unless a waiver as provided in 13 CFR 121.406(b)(5) has been issued by SBA. [*Contracting Officer fill-in or removal (see 13 CFR 121.1205). This requirement must be included for a single end item. However, if SBA has issued an applicable waiver of the nonmanufacturer rule for the end item, this requirement must be removed in the final solicitation or contract.*]

or [*Contracting officer tailor clause to remove one or other block under subparagraph (iii).*]

☐ If this is a multiple item acquisition, the offeror certifies that at least 50% of the estimated contract value is composed of items that are manufactured by small business concerns. [*Contracting Officer fill-in or removal. See 13 CFR 121.406(d) for multiple end items. If SBA has issued an applicable nonmanufacturer rule waiver, this requirement must be removed in the final solicitation or contract.*]

(3) The offeror acknowledges that this certification concerns a matter within the jurisdiction of an Agency of the United States. The offeror further acknowledges that this certification is subject to Title 18, United States Code, Section 1001, and, as such, a false, fictitious, or fraudulent certification may render the offeror subject to criminal, civil, or administrative penalties, including prosecution.

(4) If VA determines that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith, such SDVOSB/VOSB shall be subject to any or all of the following:

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating section 1001 of title 18.

(b) The offeror represents and understands that by submission of its offer and award of a contract it may be required to provide copies of documents or records to VA that VA may review to determine whether the offeror complied with the limitations on subcontracting requirement specified in the contract or to determine whether the offeror qualifies as a manufacturer or nonmanufacturer in compliance with the limitations on subcontracting requirement. Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(c) The offeror further agrees to cooperate fully and make available any documents or records as may be required to enable VA to determine compliance. The offeror understands that failure to provide documents as requested by VA may result in remedial action as the Government deems appropriate.

(d) Offeror completed certification/fill-in required. The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal. The Government will not consider offers for award from offerors that do not provide the certification, and all such responses will be deemed ineligible for evaluation and award.

Certification

I hereby certify that if awarded the contract, [*insert name of offeror*] will comply with the limitations on subcontracting specified in this clause and in the resultant contract. I further certify that I am authorized to execute this certification on behalf of [*insert name of offeror*].

Printed Name of Signee: _____

Printed Title of Signee: _____

Signature: _____

Date: _____

Company Name and Address: _____

_____

(End of clause)

PART 853—FORMS

■ 24. The authority citation for part 853 continues to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 853.2—Prescription of Forms

■ 25. Add section 853.219 to read as follows:

853.219 Small business forms.

(a) *VA Form 2268, Small Business Program and Contract Bundling Review.* VA Form 2268 is prescribed for use to document actions and recommendations related to small business, as specified in 819.202.

(b) *VA Form 0896A, Report of Subcontracts to Small and Veteran-Owned Businesses.* VA Form 0896A is prescribed for use to submit subcontracting information, as specified in 819.704–70.

(c) *Availability.* Forms are available at *https://www.va.gov/vaforms.*

[FR Doc. 2022–21541 Filed 10–17–22; 8:45 am]

BILLING CODE 8320–01–P

Proposed Rules

Federal Register
Vol. 87, No. 200
Tuesday, October 18, 2022

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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 210, 229, 230, 232, 239, 240, 242, 249, 270, 274, 275, and 279

[Release Nos. 33–11117, 34–96005, IA–6162, IC–34724; File Nos. S7–32–10, S7–18–21, S7–21–21, S7–22–21, S7–03–22, S7–08–22, S7–09–22, S7–10–22, S7–13–22, S7–16–22, S7–17–22, S7–18–22]

RINs 3235–AK77, 3235–AM34, 3235–AM72, 3235–AM80, 3235–AM87, 3235–AM89, 3235–AM90, 3235–AM94, 3235–AM95, 3235–AM96, 3235–AN01, 3235–AN07

Resubmission of Comments and Reopening of Comment Periods for Several Rulemaking Releases Due to a Technological Error in Receiving Certain Comments

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules; resubmission of comment letters; reopening of comment periods.

SUMMARY: Due to a technological error, a number of public comments submitted through the Securities and Exchange Commission's (''Commission'' or ''SEC'') internet comment form were not received by the Commission. The majority of the affected comments were submitted in August 2022; however, the technological error is known to have occurred as early as June 2021. All commenters who submitted a public comment to one of the affected comment files through the internet comment form between June 2021 and August 2022 are advised to check the relevant comment file posted on *SEC.gov* to determine whether their comment was received and posted. If a comment has not been posted, commenters should resubmit that comment by following the instructions provided below. To further ensure that interested persons, including any affected commenters, have the opportunity to comment on the affected releases or to resubmit comments, the Commission is reopening the comment periods for certain Commission rulemaking releases listed herein (collectively, ''Rulemaking Releases'').

DATES: The comment periods for the Rulemaking Releases, published at 86 FR 69802 (Dec. 8, 2021) (reopened at 87 FR 11659 (March 2, 2022)), 87 FR 6652 (Feb. 4, 2022), 87 FR 7248 (Feb. 8, 2022), 87 FR 8443 (Feb. 15, 2022), 87 FR 14950 (Mar. 16, 2022), 87 FR 16590 (Mar. 23, 2022), 87 FR 16886 (Mar. 24, 2022) (reopened at 87 FR 29059 (May 12, 2022)), 87 FR 21334 (Apr. 11, 2022) (reopened at 87 FR 29059 (May 12, 2022)), 87 FR 29458 (May 13, 2022), 87 FR 36594 (June 17, 2022), 87 FR 36654 (June 17, 2022), and 87 FR 37254 (June 22, 2022), are reopened until November 1, 2022.

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*).
- Send an email to *rule-comments@sec.gov.*

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

Please include the file number for the specific action being commented upon. 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 of submission. The Commission will post all comments on the Commission's website (*https://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 on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. 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.

FOR FURTHER INFORMATION CONTACT: J. Matthew DeLesDernier, Deputy Secretary, Office of the Secretary, at (202) 551–5400, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, or by email at *Rule-Comments@sec.gov.*

SUPPLEMENTARY INFORMATION: Due to a technological error, a number of public comments submitted through the Commission's internet form for the submission of comment letters [1] were not received by the Commission and therefore were not posted in the relevant comment file. The majority of the affected comments were submitted in August 2022; however, a relatively small number of affected comments date from earlier months, and the technological error is known to have occurred as early as June 2021. The vast majority of the affected comments have now been received by the Commission and posted. To date, the staff's review of the available information indicates that the error only affected the comment files for the Rulemaking Releases and self-regulatory organization (''SRO'') matters identified in the tables below.[2] Commenters who submitted a public comment to any of these files through the internet comment form between June 2021 and August 2022 are advised to check the relevant comment file posted on *SEC.gov* to determine whether their comment was received and posted. If a comment has not been posted, commenters should resubmit that comment. Any resubmitted comment will be treated as if it were received on its original submission date. Comments already received and posted on the Commission website need not be resubmitted. If commenters have questions or concerns about whether their comment was received by the Commission, they should contact the SEC staff at the address, telephone number, or email address listed above.

To further ensure that interested persons, including any affected commenters, have the opportunity to comment on the releases or to resubmit comments, the Commission is reopening the comment periods for the following Rulemaking Releases, which SEC staff

[1] *https://www.sec.gov/rules/submitcomments.htm.*

[2] In the event the SEC staff determines that any other comment files were affected, the Commission will consider whether additional action is warranted.

have identified as having comment files that were potentially affected by the technological error, until November 1, 2022:

Release title and identifying information (including **Federal Register** publication date)	Date comment period closed *
Reporting of Securities Loans (Release No. 34–93613; File No. S7–18–21), 86 FR 69802 (Dec. 8, 2021)	April 1, 2022.
Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions (Release No. 34–93784; File No. S7–32–10), 87 FR 6652 (Feb. 4, 2022).	March 21, 2022.
Money Market Fund Reforms (Release No. IC–34441; File No. S7–22–21), 87 FR 7248 (Feb. 8, 2022)	April 11, 2022.
Share Repurchase Disclosure Modernization (Release Nos. 34–93783, IC–34440; File No. S7–21–21), 87 FR 8443 (Feb. 15, 2022).	April 1, 2022.
Short Position and Short Activity Reporting by Institutional Investment Managers (Release No. 34–94313; File No. S7–08–22), 87 FR 14950 (Mar. 16, 2022); *see also* Notice of the Text of the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-Related Data Collection (Release No. 34–94314; File No. S7–08–22), 87 FR 15022 (Mar. 16, 2022).	April 26, 2022.
Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (Release Nos. 33–11038, 34–94382, IC–34529; File No. S7–09–22), 87 FR 16590 (Mar. 23, 2022).	May 9, 2022.
Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Release No. IA–5955; File No. S7–03–22), 87 FR 16886 (Mar. 24, 2022).	June 13, 2022.
The Enhancement and Standardization of Climate-Related Disclosures for Investors (Release Nos. 33–11042, 34–94478; File No. S7–10–22), 87 FR 21334 (Apr. 11, 2022).	June 17, 2022.
Special Purpose Acquisition Companies, Shell Companies, and Projections (Release Nos. 33–11048, 34–94546, IC–34549; File No. S7–13–22), 87 FR 29458 (May 13, 2022).	June 13, 2022.
Investment Company Names (Release Nos. 33–11067, 34–94981, IC–34593; File No. S7–16–22), 87 FR 36594 (June 17, 2022).	August 16, 2022.
Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices (Release Nos. 33–11068, 34–94985, IA–6034, IC–34594; File No. S7–17–22), 87 FR 36654 (June 17, 2022).	August 16, 2022.
Request for Comment on Certain Information Providers Acting as Investment Advisers (Release Nos. IA–6050, IC–34618; File No. S7–18–22), 87 FR 37254 (June 22, 2022).	August 16, 2022.

* With respect to releases that were previously reopened for public comment, the date in this column reflects the close of the most recent comment period.

The technological error also may have affected certain comments with respect to the following SRO matters. The Commission will evaluate any comments resubmitted with respect to these matters and consider whether further action is warranted.

File No.	File description
SR–BOX–2022–08	BOX Exchange LLC; Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rule 12140 (Imposition of Fines for Minor Rule Violations), to Expand the List of Violations Eligible for Disposition under the Exchange's Minor Rule Violation Plan and to Update the Fine Schedule Applicable to Minor Violations of Certain Rules.
SR–CboeBZX–2021–083	Cboe BZX Exchange, Inc.; Proposed Rule Change, as Modified by Amendment No. 2, to Amend Rule 25.3, Which Governs the Exchange's Minor Rule Violation Plan, in Connection with Certain Minor Rule Violations and Applicable Fines.
SR–FINRA–2022–017	Financial Industry Regulatory Authority, Inc.; Proposed Rule Change to Amend FINRA Rule 6750 Regarding the Publication of Aggregated Transaction Information on U.S. Treasury Securities.
SR–FINRA–2022–024	Financial Industry Regulatory Authority, Inc.; Proposed Rule Change To Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information.
SR–MEMX–2021–10	MEMX LLC; Proposed Rule Change to Establish a Retail Midpoint Liquidity Program.
SR–NYSEARCA–2022–52	NYSE Arca, Inc.; Proposed Rule Change to Amend Rule 6.64P–O.
SR–NYSENAT–2021–19	NYSE National, Inc.; Proposed Rule Change to Extend the Pilot Related to the Market-Wide Circuit Breaker in Rule 7.12.
SR–OCC–2022–802	The Options Clearing Corporation; Advance Notice Related to a Master Repurchase Agreement as Part of The Options Clearing Corporation's Overall Liquidity Plan.

By the Commission.

Dated: October 7, 2022.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–22295 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 201

[Docket No. FR–6207–P–01]

RIN 2502–AJ52

Indexing Methodology for Title I Manufactured Home Loan Limits

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Housing and Urban Development (HUD).

ACTION: Proposed rule.

SUMMARY: Section 2145 of the Housing and Economic Recovery Act of 2008 amended the maximum loan limits for manufactured home loans insured under Title I of the National Housing Act and required regulations to implement future indexing of the loan limit amounts for manufactured homes originated under the Manufactured Home Loan program and the Property Improvement Loan program. This proposed rule would establish indexing methodologies using data from the United States Census Bureau to annually calculate the loan limits for Manufactured Home Loans, Manufactured Home Lot Loans, and Manufactured Home and Lot Combination Loans (''Combination Loans'') insured under Title I of the National Housing Act for the Manufactured Home Loan program.

DATES: *Comment due date:* December 19, 2022.

ADDRESSES: HUD invites interested persons to submit comments to the Office of the General Counsel, Regulations Division, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Communications should refer to the above docket number and title and should contain the information specified in the ''Request for Comments'' section. There are two methods for submitting public comments.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at all Federal agencies, however, submission of comments by mail often results in delayed delivery. To ensure timely receipt, HUD recommends that comments be mailed at least two weeks in advance of the public comment deadline.

2. *Electronic Submission of Comments.* Comments may also be submitted electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the website can be viewed by other commenters and interested members of the public. Commenters should follow instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted using one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Comments. All comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at HUD Headquarters, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708-3055. This is not a toll-free number. Individuals can dial 7–1–1 to access the Telecommunications Relay Service (TRS), which permits users to make text-based calls, including Text Telephone (TTY) and Speech to Speech (STS) calls. Copies of all comments submitted are available for inspection and downloading at: *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin Stevens, Department of Housing and Urban Development, 451 7th St SW, Room 9266, Washington, DC 20410–4000; telephone number 202–402–2378 (this is not a toll-free number). Individuals can dial 7–1–1 to access the Telecommunications Relay Service (TRS), which permits users to make text-based calls, including Text Telephone (TTY) and Speech to Speech (STS) calls.

SUPPLEMENTARY INFORMATION:

I. Background

Title I of the National Housing Act authorizes the Secretary of HUD to insure, through the Federal Housing Administration (FHA), loans made by FHA-approved lenders to eligible borrowers to finance the purchase, refinance, or improvement of a manufactured home, with or without the lot. HUD insures these loans under HUD's Property Improvement Loan program and HUD's Manufactured Home Loan program. FHA insures the lender against loss if the borrower defaults. A Title I Manufactured Home Loan may be used for the purchase or refinancing of a manufactured home, a lot on which to place a manufactured home, or a manufactured home and lot in combination. The manufactured home must be used as the principal residence of the borrower. Applicable loan limits and requirements are codified in 24 CFR part 201.

Section 2117 of the Housing and Economic Recovery Act of 2008 (HERA) [1] added the definition of real estate to include all natural resources and structures permanently affixed to the land, amended the maximum loan limits for manufactured home loans and certain property improvement loans insured under Title I of the National Housing Act, and required future changes to the amounts for manufactured home loans to be made through regulation. HERA also stipulated that the Secretary develop a metric that uses United States Census Bureau (''Census Bureau'') data [2] on manufactured home prices to calculate an index for adjusting loan limits in the future.

In compliance with HERA, on March 3, 2009, HUD published Title I Letter TI–480 [3] notifying lenders of the new statutory loan limits. HUD also noted in that Title I Letter the need for the Secretary to develop an indexing method that would determine future loan limits. HUD regulations still reflect the outdated, pre-HERA Loan Limits. Initially after HERA's enactment, Census Bureau data showed a decline in home prices. However, for compliance with HERA, HUD did not lower loan limits and the limits were kept at the

[1] Public Law 110–289, 2117, 122 Stat. 2654, 2844–45 (2008).

[2] See generally, U.S. Commerce Department, Census Bureau data on manufactured homes, available at: *www.census.gov/programs-surveys/mhs.html.*

[3] ''Increased Maximum Loan Limits for Title I Manufactured Home Loans,'' *https://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/title1.*

threshold set under HERA. The outdated Loan Limits, and the 2008 Loan Limits currently in effect as described in the Title I letter are outlined below:

TABLE 1—LOAN LIMITS UNDER HERA COMPARED TO PRE-HERA LOAN LIMITS

Title I loan program name	Eligible loan name for property type	Loan limits prior to HERA	2008 Loan limit basis per HERA currently in effect
Property Improvement Loan Program	Manufactured Home Improvement Loan for units classified as real estate.	$7,500	$25,090
Manufactured Home Loan Program	Manufactured Home Loan (unit only)	48,600	69,678
	Manufactured Home Lot Loan (lot only)	16,200	23,226
	Manufactured Home and Lot (Combination Loan).	64,800 (48,600 + 16,200)	92,904 (69,678 + 23,226)

HUD has developed preliminary indexes on which future loan limits could be annually adjusted. This methodology uses Census Bureau data, as required by HERA. The indexes for Title I unit-only loan limits would rely on the Census Bureau's Manufactured Housing Survey, which collects manufactured home sale prices for units that are sold (or intended to be sold) for residential use. At this time, it does not collect prices for land or lot sales or costs for home improvements, as it relates to manufactured housing. However, the Census Bureau's New Residential Sales data do provide estimates of the median price of newly constructed single-family homes, which includes the value of the lot. For compliance with the HERA statute, the index for Title I Lot Loan limits would be based on Census Bureau data on prices for newly constructed single-family homes with land.

II. Proposed Rule

As required by HERA, this proposed rule would update the loan limits in § 201.10 to establish an index for which future loan limits would be revised through notice. HUD is also proposing to amend the definition of ''manufactured home'' in § 201.2 to conform to the loan limit change. HUD proposes to index loan limits based on sale prices, unit sizes, and property data collected by the Census Bureau. HUD seeks comments on the proposed indexes and methodology for the different loan types. Further, commenters are invited to suggest whether the methodology should include an additional or alternative index for specific loans and how they could better represent adjustment in the loan limits.

HUD proposes to establish separate indexing methodologies to annually calculate future loan limits for manufactured home loans, manufactured home lot loans, and manufactured home and lot combination loans under the Manufactured Home Loan program. HUD assigns ''Index 100'' to the loan limit amounts enacted by HERA, as shown in Table 3 of this preamble.

First, the proposed rule would create a dual index based on purchase prices of manufactured homes, which are collected by the Census Bureau. The dual index would distinguish purchase prices based on the number of sections that make up a home. An index for single-section manufactured homes would use only single-section home sale data. A separate index for double- and multi-section manufactured homes would use only double-section home sale data.[4] This would allow HUD to apply loan limits which more closely reflect the prices of homes with one section (single-section) and homes with more than one section (double or multi-section).

HUD proposes to adjust loan limits for single-section and double or multi-section manufactured home loans annually based on changes to indexes for the average price of single-section and double-section manufactured homes, respectively. To determine each index, HUD proposes to use the average price data for the most recent 12 months available at the time HUD calculates the adjustment, weighted according to the number of manufactured units shipped during that same period. Each index would be calculated separately, using shipping and price data for single-section units for the single-section index and shipping and price data for double-section units for the double- or greater section index. Consistent with HERA, HUD would not decrease loan limits even if an annual index reflects a decline.

Second, HUD proposes creating an index for Manufactured Home Lot Loans based on median home prices in Census Bureau's New Residential Sales data.[5] Since these estimates reflect sales of newly constructed single-family housing including land, they are a suitable general indicator of the movement of prices for land to be financed with Manufactured Home Lot Loans. HUD would set Manufactured Home Lot Loan limits annually by indexing the loan limit established by HERA in 2008 to the growth in median new home prices.

Finally, the loan limit for manufactured home and lot Combination Loans would be determined by adding the manufactured home lot loan limit to either the single- or double-section loan limit, depending on the home.

HUD's proposed indexes are demonstrated in table 2 of this preamble:

[4] For an example of the latest data according to Census, see ''MHS Latest Data,'' *https://www.census.gov/data/tables/time-series/econ/mhs/latest-data.html.*

[5] The New Residential Sales data come from Census's Survey of Construction. More information can be found here: *www.census.gov/construction/nrs/index.html.*

TABLE 2—PROPOSED INDEX METHODOLOGIES FOR TITLE I MANUFACTURED HOME LOAN LIMITS

Three eligible loan types	Proposed methodology/index
1. Manufactured Home Loan *(Home only).*	• Single-Section Index for single-section homes: average single-section home price with future indexing based on movement in single-section home prices *or* • Double Section Index for homes composed of two or more sections: average double-section home price with future indexing based on movement in double-section home prices *
2. Manufactured Home Lot Loan *(Lot only).*	Manufactured Home Lot Loan limit indexed using changes in the median new home price *
3. Manufactured Home and Lot Loan *(Combination Loan).*	Manufactured Home and Lot Combination indexed using the Manufactured Home Lot Loan Index, *plus* the applicable index for sections in a Manufactured Home • Single-Section Index for single-section homes, *or* • Double Section Index for homes composed of more than one section.

* Single-and double-section price averages based on data at: *www.census.gov/data/tables/time-series/econ/mhs/latest-data.html.* The median new home price comes from: *www.census.gov/construction/nrs/historical_data/index.html.*

Table 3 below shows examples of the loan limits, based on recent data from Census Bureau.

TABLE 3—EXAMPLE LOAN LIMITS—TITLE I MANUFACTURED HOME LOAN PROGRAM

Title I loan program name	Description of property	Future index methodology	Current limits (per HERA)	Example 2022 loan limits (based on 2021 Census data)	
				Index	Loan limit
Manufactured Home Loan Program.	Single-section Manufactured Home (unit only)	Indexed to average single-section manufactured home price. *Note 1.*	$69,678	*104.2*	$72,600
Manufactured Home Loan Program.	Double- or greater-section Manufactured Home (unit only).	Indexed to average double-section manufactured home price. *Note 1.*	69,678	*189.4*	132,000
Manufactured Home Loan Program.	Manufactured Home Lot (lot only)	Indexed to median sales price for new single-family homes. *Note 2.*	23,226	*160.2*	37,205
Manufactured Home Loan Program.	Single-section Manufactured Home and Lot (Combination Loan).	Limit for Single-Section + Limit for Lot Loan.	92,904 (69,678 + 23,226)	*NA*	109,805 (72,600 + 37,205)
Manufactured Home Loan Program.	Double- or greater-section Manufactured Home and Lot (Combination Loan).	Limit for Double- or Multi-Section + Limit for Lot Loan.	92,904 (69,678 + 23,226)	*NA*	169,205 (132,000 + 37,205)

Table 3 Notes:
1. Indexing to occur at the beginning of each year, based on the weighted average price data for the most recent 12 months available from the Manufactured Housing Survey.
2. Indexing to occur at the beginning of each year, based on the median sales price of the most recent 12 months available from the New Residential Sales data.

As discussed in the proposed § 201.10(h), HUD would annually adjust future loan limits using the above methodology and post new loan limits, including an explanation of the calculation by notice, such as through a Title I letter and on *HUD.gov.*

III. Manufactured Home Improvement Loans

This proposed rule does not propose an index for Manufactured Home Improvement Loans, which are insured under regulations for the Property Improvement Loan program. While HERA authorized adjustments to the limit of loans that finance improvements to manufactured homes under the Property Improvement Loan program, that authorization was not extended to site-built condominiums, townhomes, or detached dwellings. HUD does not believe any existing Census Bureau data fully reflect changes in the manufactured housing property improvement loan market. Therefore, the implementation of HERA regarding Manufactured Home Improvement Loans would be subject to inaccuracy. Additionally, setting different loan limits for only this subset of the broader Property Improvement Loan program would cause complication, as the program and market for property improvements makes no other differentiation between improvements to manufactured homes vs. non manufactured homes. Therefore, HUD intends to publish an advanced notice of proposed rulemaking requesting public comment seeking input on implementation of a Property Improvement Loan index for manufactured homes.

Because the Manufactured Home Improvement Loan program is such a small subset of the overall Property Improvement Loan program, HUD believes that this delay in the implementation of HERA to Manufactured Home Improvement Loans would have minimal, if any, effect on the Property Improvement Loan program. However, HUD seeks comment on the impact of delaying increases to the loan limit for Manufactured Home Improvement Loans.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Pursuant to Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive

Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This proposed rule has been determined to be a ''significant regulatory action,'' as defined in section 3(f) of the order, but not economically significant under section 3(f)(1) of the order. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals can dial 7–1–1 to access the Telecommunications Relay Service (TRS), which permits users to make text-based calls, including Text Telephone (TTY) and Speech to Speech (STS) calls.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Accordingly, the undersigned certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less-burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

Environmental Impact

This proposed rule would establish and review loan limits. Accordingly, under 24 CFR 50.19(c)(6) this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132—Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (ii) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects in 24 CFR Part 201

Claims, Health facilities, Historic preservation, Home improvement, Loan programs-housing and community development, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 201 as follows:

PART 201—TITLE I PROPERTY IMPROVEMENT AND MANUFACTURED HOME LOANS

■ 1. The authority for 24 CFR part 201 continues to read as follows:

Authority: 12 U.S.C. 1703; 15 U.S.C. 1639c; 42 U.S.C. 3535(d).

■ 2. Amend § 201.2 by revising the definition of ''Manufactured home'' to read as follows:

§ 201.2 Definitions.

* * * * *

Manufactured home means a transportable structure, comprised of one or more modules, each built on a permanent chassis, with or without a permanent foundation, designed for occupancy as a principal residence by a single family. For purposes of the annual adjustments to loan limits under this part, a manufactured home may be a single-section home comprised of one module, a double-section home comprised of two modules, or a multi-section home comprised of three or more modules. A new manufactured home shall comply with the minimum property standards prescribed by the Secretary to assure its livability and durability that are published as the Manufactured Home Construction and Safety Standards implementing the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5401–5426, at 24 CFR part 3280. To qualify for a manufactured home loan insured under this part, an existing manufactured home must have been constructed in accordance with standards published at 24 CFR part 3280 and must meet standards similar to the minimum property standards applicable to existing homes insured under title II of the Act, as prescribed by the Secretary.

* * * * *

■ 3. Amend § 201.10 as follows:

■ a. In paragraph (a)(1)(i), remove ''$17,500'' and add in its place ''$25,090'';

■ b. Revise the introductory texts of paragraphs (b)(1) and (2), paragraph (c), the introductory texts of paragraphs (d)(1) and (2), and the introductory text of paragraph (f)(5); and

■ c. Add paragraph (h).

The revisions and addition read as follows:

§ 201.10 Loan amounts.

* * * * *

(b) * * *

(1) The total principal obligation for a loan to purchase a new manufactured home shall not exceed the sum of the following itemized amounts, up to a maximum set according to an index established by HUD in paragraph (h)(1) of this section and updated through notice which shall establish separate loan limits for single-section homes and double-section or multi-section homes:

* * * * *

(2) The total principal obligation for a loan to purchase an existing manufactured home shall not exceed the lesser of the following amounts, up to a maximum set according to an index established by HUD in paragraph (h)(1) of this section and updated through notice which shall establish separate loan limits for double-section or multi-section homes:

* * * * *

(c) *Manufactured home lot loans.* The total principal obligation for a loan to purchase and, if necessary, develop a lot suitable for a manufactured home, including on-site water and utility connections, sanitary facilities, site improvements and landscaping, shall not exceed 95 percent of either the appraised value of the developed lot (as determined by a HUD-approved appraisal) or the total of the purchase price and development costs, whichever is less, up to a maximum set according to an index established by HUD in

paragraph (h)(2) of this section and updated through notice.

(d) * * *

(1) The total principal obligation for a loan to purchase a new manufactured home and a lot on which to place the home shall not exceed the sum of the following itemized amounts, up to a maximum set according to an index established by HUD in paragraph (h)(3) of this section and updated through notice which shall establish separate loan limits for single-section homes and double-section or multi-section homes:

* * * * *

(2) The total principal obligation for a Combination Loan, to purchase an existing manufactured home and lot, shall not exceed the lesser of the following amounts, up to a maximum set according to an index established by HUD in paragraph (h)(3) of this section and updated through notice which shall establish separate loan limits for single-section homes and double-section or multi-section homes:

* * * * *

(f) * * *

(5) When a borrower's existing manufactured home is being refinanced in connection with the purchase of a manufactured home lot, the total principal obligation of the combination loan shall not exceed the lesser of the following amounts, up to the maximum established in paragraph (h)(3) of this section:

* * * * *

(h) *Annual adjustments.* HUD shall adjust the following loan limits annually through notice:

(1) In paragraphs (b)(1) and (2) of this section, the single-section manufactured home loan limit shall be adjusted to reflect changes in the average price of single-section manufactured home sales and the double-section or multi-section manufactured home loan limit shall be increased to reflect changes in double-section manufactured home sales, according to data published by the Census Bureau, except that the loan limits shall not be set below $69,678.

(2) In paragraph (c) of this section, the manufactured home lot loan limit shall be increased to reflect changes in the average price of all single-family home sales according to data published by HUD, except that the loan limit shall not be set below $23,226.

(3) In paragraphs (d)(1) and (2) of this section, the combination manufactured home and lot loan limits shall be increased to be the sum of the applicable loan limit for the manufactured home loan in paragraph (b)(1) of this section and the lot loan limit in paragraph (c) of this section, except that the loan limit shall not be set below $92,904.

Julia R. Gordon,

Assistant Secretary for Housing, FHA Commissioner.

[FR Doc. 2022–22535 Filed 10–17–22; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R03–RCRA–2022–0351; FRL–9947–01–R3]

Virginia: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Commonwealth of Virginia has applied to Environmental Protection Agency (EPA) for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). By this action, EPA proposes to grant final authorization to Virginia. In the ''Rules and Regulations'' section of this issue of the **Federal Register**, EPA is authorizing the revisions by a direct final rule. EPA did not make a proposal prior to the direct final rule because EPA believes this action is not controversial and does not expect comments that oppose it. EPA has explained the reasons for this authorization in the preamble to the direct final rule. Unless EPA receives written adverse comments pertaining to this State revision during the comment period, the direct final rule will become effective on the date it establishes, and EPA will not take further action on this proposed rulemaking. However, if EPA receives adverse comments pertaining to this State revision, EPA will publish a timely withdrawal in the **Federal Register** and the direct final rule will not take effect. EPA will then respond to public comments in a later final rule based on this proposed rulemaking. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send written comments by November 17, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–RCRA–2022–0351, at *www.regulations.gov/*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*.

The EPA encourages electronic submittals, but if you are unable to submit electronically or need other assistance, please contact Jacqueline Morrison, the contact listed in the **FOR FURTHER INFORMATION CONTACT** provision below. Please also contact Jacqueline Morrison if you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you.

FOR FURTHER INFORMATION CONTACT: Jacqueline Morrison, RCRA Programs Branch; Land, Chemicals, and Redevelopment Division, U.S. Environmental Protection Agency Region 3, Four Penn Center, 1600 John F Kennedy Blvd. (Mail code 3LD30), Philadelphia, PA 19103–2852; phone: (215) 814–5664, email: *morrison.jacqueline@epa.gov@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has explained the reasons for this action in the preamble to the direct final rule. For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this issue of the **Federal Register**.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Adam Ortiz,

Regional Administrator, EPA Region III.

[FR Doc. 2022–22577 Filed 10–17–22; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 87, No. 200
Tuesday, October 18, 2022

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.

UNITED STATES AFRICAN DEVELOPMENT FOUNDATION

Public Quarterly Meeting of the Board of Directors

AGENCY: United States African Development Foundation.

ACTION: Notice of meeting.

SUMMARY: The U.S. African Development Foundation (USADF) will hold its quarterly meeting of the Board of Directors to discuss the agency's programs and administration. This meeting will occur at the USADF office.

DATES: The meeting date is Tuesday, October 18, 2022, 9 a.m. to 11 a.m.

ADDRESSES: The meeting location is USADF, 1400 I St. NW, Suite 1000, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Brandi James, (202) 233–8866.

Authority: Public Law 96–533 (22 U.S.C. § 290h).

Dated: October 11, 2022.

Solomon Chi,

Chief Information Officer, U.S. African Development Foundation.

[FR Doc. 2022–22551 Filed 10–17–22; 8:45 am]

BILLING CODE 6117–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 17, 2022 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Supplemental Nutrition Assistance Program—Supplemental Nutrition Assistance for Victims of Disasters.

OMB Control Number: 0584–0336.

Summary of Collection: The authority to operate the Disaster Supplemental Nutrition Assistance Program (D–SNAP) is found in section 5(h) of the Food and Nutrition Act of 2008, formerly the Food Stamp Act of 1977, as amended and the Disaster Relief Act of 1974, as amended by the Robert T. Stafford Disaster Relief and Assistance Act of 1988 authorizes the Secretary of Agriculture to establish temporary emergency standards of eligibility for victims of a disaster if the commercial channels of food distribution have been disrupted, and subsequently restored. D–SNAP is a program that is separate from the Supplemental Nutrition Assistance Program (SNAP) and is conducted for a specific period of time. In order for a State to request to operate a D–SNAP, an affected area in the State must have received a Presidential Declaration of ''Major Disaster'' with Individual Assistance.

Need and Use of the Information: This information collection concerns information obtained from State agencies seeking to operate D–SNAP. A State agency request to operate a D–SNAP must contain the following information: Description of incident; geographic area; application period; benefit period; eligibility criteria; ongoing household eligibility; affected population; electronic benefit card issuance process; logistical plans for Disaster SNAP rollout; staffing; public information outreach; duplicate participation check process; fraud prevention strategies; and employee application procedures. The Food and Nutrition Service reviews the request to ensure that all the necessary requirements to conduct a D–SNAP are met. If this collection is not conducted, D–SNAP would not be available to help meet the nutritional needs of disaster victims.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 5.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 112.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2022–22604 Filed 10–17–22; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Food Distribution Program on Indian Reservations Self-Determination Demonstration Project: Solicitation of Proposals for Additional Tribal Organizations To Participate

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: The Department of Agriculture (USDA) Food and Nutrition Service (FNS) is soliciting proposals from eligible Tribal Organizations to participate in a demonstration project to purchase agricultural commodities for the Food Distribution Program on Indian Reservations (FDPIR). This demonstration project is authorized

under the Agriculture Improvement Act of 2018. Response to this solicitation is available to Tribal Organizations that administer FDPIR and have not previously been awarded a contract. Tribal Organizations will be selected on a competitive basis and funding will be awarded through a self-determination contract. This is the second solicitation of proposals for participation in the demonstration project. USDA issued a first solicitation of proposals and awarded a first round of self-determination contracts for participation in the demonstration project in FY 2021.

DATES: Proposals will be accepted until 11:59 p.m. ET on January 31, 2023. See **ADDRESSES** section for submission details.

ADDRESSES: Email proposals to *FDPIR-RC@usda.gov* with subject line ''FDPIR Demonstration Project.'' Proposals received and date-stamped after the time listed in the **DATES** section of this notice will not be considered. FNS will accept proposals at any time before the deadline and will send a notification of receipt to the return email address on the proposal package, along with a determination of whether the proposal is complete.

FOR FURTHER INFORMATION CONTACT: Barbara Lopez (*barbara.lopez@usda.gov*) and Rachel Schoenian (*rachel.schoenian@usda.gov*), Supplemental Nutrition and Safety Programs, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, Alexandria, Virginia 22314, 703–305–2465 or email *FDPIR-RC@usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Program Background

The Food Distribution Program on Indian Reservations (FDPIR) is administered by the Food and Nutrition Service (FNS) of the USDA and provides a food package of 100 percent domestically grown foods to income-eligible households living on Indian reservations and to American Indian households residing in approved areas near reservations or in Oklahoma. FDPIR was authorized under the Food Stamp Act of 1977 (Pub. L. 95–113), which was later renamed the Food and Nutrition Act of 2008 (FNA). FDPIR is currently administered by 105 Tribal Organizations and three State agencies and provides benefits and nutrition education services to approximately 279 Federally recognized Tribes across the United States. In FY 2021, the program served approximately 48,000 individuals on an average monthly basis. Each month, participating FDPIR households receive a defined food package to help maintain a nutritionally balanced diet. The food package is based on FNS guidance and includes input from the FDPIR Food Package Review Work Group, a member-based work group made up of representatives from the Indian Tribal Organizations and State agencies that administer FDPIR across all regions nationally, Federal, and Tribal health professionals, and FNS staff that work directly with the program. FDPIR households may select from over 100 domestically grown and produced foods, including fresh fruits and vegetables, a variety of frozen and nonperishable items, and a selection of traditional foods.

Under national program operations, FDPIR administering agencies order foods from USDA (*i.e.,* USDA Foods), and the foods are purchased and shipped to Tribal Organizations and State agencies that administer FDPIR. These administering agencies store and distribute the foods, determine applicant eligibility, and provide nutrition education to participants. USDA provides the administering agencies with funds for program administrative costs.

II. 2018 Farm Bill: Demonstration Project for Tribal Organizations and Round One Self-Determination Contracts

The USDA Foods provided in the FDPIR food package under the national program are procured by USDA's Agricultural Marketing Service (AMS) in collaboration with FNS. USDA purchases and ships the USDA Foods to Tribal Organizations and State agencies that administer FDPIR. Tribal Organizations and State agencies store and distribute the foods, determine applicant eligibility, and provide nutrition education to recipients. Section 4003(b) of the Agriculture Improvement Act of 2018 (Pub. L. 115–334, the 2018 Farm Bill) establishes a demonstration project for one or more Tribal Organization(s) within FDPIR to enter into self-determination contracts for them to purchase foods for their Indian Tribe, instead of USDA, for inclusion in the FDPIR food package. Section 4003(b)(1)(E) of the 2018 Farm Bill defines self-determination contract as: *The term ''self-determination contract'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).* Under section 4003(b)(2), the 2018 Farm Bill further states that the ''*Secretary shall establish a demonstration project under which 1 or more tribal organizations may enter into self-determination contracts to purchase agricultural commodities under the food distribution program for the Indian reservation of that tribal organization.*'' Given the 2018 Farm Bill's specific reference to 25 U.S.C. 5304 and self-determination contracts only, Tribal Organizations selected to participate in this demonstration project would need to enter into a self-determination contract with FNS. No other type of funding agreement will be allowed.

Self-determination contracts, as defined under section 4 of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93–638 (25 U.S.C. 5304), as amended, allow a Tribal Organization to have more control over the governmental affairs of their Organizations, fostering further self-governance. The 2018 Farm Bill provision under section 4003(b) supports Tribal Organization self-governance by specifically allowing Tribal Organizations to procure FDPIR food instead of USDA. This provision also allows FNS to familiarize itself with these types of contracts and to assess how FDPIR could operate under a different food distribution program model.

The 2018 Farm Bill outlined the following criteria for Tribal Organization participation and procurement of agricultural commodities:

▪ *Selection of Tribal Organization (section 4003(b)(3)(B) of the 2018 Farm Bill):* The Secretary of USDA shall select for participation in the demonstration project Tribal Organizations that: are successfully administering FDPIR under section 4(b)(2)(B) of the Food and Nutrition Act of 2008 (7 U.S.C. 2013(b)(2)(B)); have the capacity to purchase agricultural commodities for their FDPIR program; and meet any other criteria determined by the Secretary of USDA after consultation with the Secretary of the Interior and Indian Tribes to participate in the demonstration project.

▪ *Procurement of Agricultural Commodities (section 4003(b)(4) of the 2018 Farm Bill):* Tribal Organizations

selected to participate in the demonstration project shall only purchase agricultural commodities that: are domestically produced; will supplant, not supplement, the type of agricultural commodities in the existing FDPIR food package; are of similar or higher nutritional value as the food(s) it is replacing in the existing food package; and meet any other criteria as determined by the Secretary of USDA.

During fiscal years (FY) 2019, 2020 and 2021, FNS engaged in six Tribal consultation meetings with Tribal leaders to receive input and feedback on the criteria for FDPIR Tribes to participate in the demonstration project. This feedback was incorporated into the criteria for the first solicitation of proposals for the demonstration project, which was published on January 14, 2021, at 86 FR 3112. Proposals were due on March 15, 2021. In total, FNS received seven proposals from eight Tribal organizations in response to the solicitation.

In October 2021, FNS awarded $3.5 million in self-determination contracts to all eight Tribal Organizations that submitted proposals. These organizations began implementation of self-determination contracting projects in FY 2022, with contracts expected to distribute selected foods for periods between six months and three years. In June 2022, FNS awarded another $2.2 million to six of the eight Tribal Organizations, for modifications and extensions to their self-determination contracts. These modifications, requested by the participating Tribal Organizations, increased the number of months that Tribal Organizations would distribute food through their previously awarded contracts, and brought all participating Tribal Organizations closer to a uniform number of distribution months.

The period of performance for round one self-determination contracts is ongoing and scheduled to conclude on September 30, 2024. Selected round one Tribal Organizations span several FNS regions and are testing the self-determination contracting model across FDPIR program size and with a variety of different foods.

III. Available Funding

Section 4003(b)(6)(B) of the 2018 Farm Bill states that only funds appropriated to the Secretary of Agriculture in advance to carry out section 4003(b) may be used to carry out this demonstration project. To date, FNS has received $9.0 million to support the demonstration project: $3 million was provided through the Further Consolidated Appropriations Act of 2020 (Pub. L. 116–94); $3 million was provided through the Consolidated Appropriations Act of 2021 (Pub. L. 116–260); and $3 million was provided through the FY 2022 Consolidated Appropriations Act (Pub. L. 117–103).

At the time the first solicitation of proposals for the demonstration project was published on January 14, 2021, at 86 FR 3112, Congress had appropriated $3 million in the FY 2020 full-year appropriations bill to carry out the demonstration project; and as per the statutory provision in section 4003(b)(6)(B) of the 2018 Farm Bill, the appropriated amount had to cover all costs associated with the demonstration project, including food procurement costs and contract support costs of any awarded self-determination contracts. To ensure that more than one Tribal Organization was able to participate, FNS limited initial individual proposals to participate in the first round of the demonstration project to no more than $1.5 million each.

Shortly after publication of 86 FR 3112, FNS received the additional $3.0 million for the demonstration project that was appropriated by Congress in the FY 2021 full-year appropriations bill, bringing total available funds for the demonstration project to $6.0 million. Using those funds, FNS awarded $3.5 million for seven round one self-determination contract proposals received in response to 86 FR 3112, in FY 2021; and awarded another $2.2 million in extensions and modifications to round one self-determination contract holders, in FY 2022. The extensions and modifications to the round one contracts aligned with the anticipated requirements outlined in this notice for new contracts. FNS also transferred $250,000 of the $6 million to the Department of the Interior, Bureau of Indian Affairs (BIA), which awarded the round one self-determination contracts and modifications and extensions on behalf of FNS.

In FY 2022, FNS received an additional $3 million to continue to support and/or expand the demonstration project. In consultation with Tribal leadership, FNS will use this amount to solicit new proposals to participate in the demonstration project and award self-determination contracts to eligible Tribal Organizations that are not currently participating.

Based on the availability of funds at the time of this notice, FNS will continue to limit initial individual proposals to participate in the second round of the demonstration project to no more than $1.5 million each. Should additional funding be appropriated by Congress for this demonstration project, FNS reserves the right to use this solicitation to select additional proposals or to modify or extend an existing contract awarded under the demonstration project.

IV. Eligibility and Criteria for Round Two Participation

In this second solicitation of proposals, FNS has made minor changes to the eligibility rules and criteria for participation in the demonstration project. These changes are a result of lessons learned from the first solicitation of proposals, feedback from current participants in the demonstration project, and comments from Tribal leaders received during Tribal consultation meetings. In FY 2022, FNS engaged in three Tribal consultation meetings with Tribal leaders to receive input and feedback on the demonstration at large and specifically on changes to criteria for FDPIR Tribes to participate in the demonstration project. The consultation meetings were held on December 7, 2021, March 29–30, 2022, and August 2, 2022. Tribal leaders' feedback has been incorporated into the criteria outlined below to the greatest extent possible.

In order to participate in the demonstration project, Tribal Organizations must meet the following criteria and requirements listed below and submit a complete proposal by the published due date. A proposal template is provided as part of this notice in section VI. The template is not mandatory; a proposal will be accepted for review as long as it meets all the applicable criteria in this notice.

A. Eligibility of Tribal Organization

1. Tribal Organization must administer FDPIR at the time a proposal is due, either under a direct agreement with FNS or under an agreement with a State agency. The self-determination contract will be between FNS and the Tribal Organization.

2. Tribal Organization must not already be participating in the FDPIR self-determination demonstration project.

3. Prior to contract negotiations, a Tribal Resolution from the Tribal Council authorizing the Tribal Organization to participate in this demonstration project must be submitted with the proposal. Tribal Organizations are encouraged to submit a Tribal Resolution with their proposals. However, if the Tribal Resolution is unavailable at the time the proposal is due, a Tribal Organization may alternatively submit a statement affirming that a Tribal Resolution with this authorization has been requested of

the Tribal Council and provide the date the Tribal Resolution is expected to be received in their proposal. Tribal Resolutions must be received no later than 30 days after notification of being selected or the proposal will be disqualified and will not be selected for funding.

4. Tribal Organization's FDPIR program director must attest their support for the demonstration project and attest that the FDPIR program is currently being administered successfully. Tribal Organization must submit with their proposal a signed self-attestation from its FDPIR program director that covers the following areas to be verified by FNS:

▪ FDPIR program director is supportive of participating in the demonstration project for the entire length of proposal and contract award period.

▪ Tribal Organization has a current Plan of Operation on file with FNS or with the State agency, if applicable, that meets the regulatory requirements of 7 CFR part 253;

▪ Tribal Organization is in compliance with regulatory inventory storage and inventory management requirements at 7 CFR 250.12; and

▪ Tribal Organization has no outstanding financial or inventory related FNS management evaluation findings. If any related management evaluation findings are currently open, FDPIR program director should provide a description and disposition for each in the signed letter.

5. Tribal Organization must provide a budget proposal and narrative with all associated costs that are reasonable, necessary, and allocable to carry out proposed contract activities. The budget proposal, including all contract support costs (CSC), may not exceed $1.5 million.

▪ Tribal Organizations may account for food cost fluctuations by including in their budget proposals inflationary factors for planned food purchases. To assist Tribal Organizations with estimating food cost inflation, FNS has provided suggested inflationary amounts below. These amounts are calculated by the Office of Management and Budget (OMB) based on the Consumer Price Index for food, and are similar to those used by FNS for planned food purchases. Of note, these estimates are based on a Federal fiscal year (October 1 through September 30):

Budget year	FY 2024 (%)	FY 2025 (%)	FY 2026 (%)
Inflationary Percentage for Food Purchases	3.75	2.42	2.26

▪ For example, in preparing a proposal to participate in the demonstration project, a Tribal Organization may receive a quote from a vendor that reflects the cost to purchase six months of tomatoes in FY 2023 (*e.g.,* $5,000 for six months, or $833.33 per month). If the Tribal Organization is proposing to provide six months of tomatoes within each of FYs 2024, 2025, and 2026, the Tribal Organization may adjust the quote in the submitted budget to reflect the above inflationary percentages. This means that the submitted budget would reflect a cost of $5,187.50 for purchasing six months of tomatoes in FY 2024 ($5,000 × 1.0375), a cost of $5,313.04 for purchasing six months of tomatoes in FY 2025 ($5,187.5 × 1.0242), and a cost of $5,433.11 for purchasing six months of tomatoes in FY 2026 ($5,313.04 × 1.0226). If any purchases were planned to take place in FY 2023, the original quoted price of $5,000 for six months, or $833.33 per month, would be utilized because the quoted price should reflect FY 2023 inflationary costs.

B. Agricultural Commodity Criteria

In addition to the information and documentation required under IV.A. of this notice, a Tribal Organization must also provide the following information in its proposal:

1. Identification of the current FDPIR food(s) the Tribal Organization intends to supplant (*i.e.,* replace) in the food package. All foods currently offered by USDA for the FDPIR program, including foods offered intermittently (*e.g.,* traditional foods, bonus foods), are eligible to be supplanted if proposed by the Tribal Organization.

▪ Tribal Organizations that choose to supplant a USDA bonus food (*e.g.,* catfish, wild rice, ham, etc.) will not receive a fair-share allocation of the USDA bonus food in each Federal fiscal year their Tribally-procured food is offered.

2. A description of the food(s) proposed for purchase and inclusion in the Tribal Organization's FDPIR program. In its description, Tribal Organization must provide the following:

▪ A description of the nutritional value of the proposed food(s), and an explanation of how the proposed food(s) is of similar or higher nutritional value and similar portion size as the food(s) being supplanted. Alternately, Tribal Organizations may describe how the proposed food(s) is nutritionally similar, or of similar portion size, as other items in the FDPIR food package category it is replacing. The proposed food(s) does not need to provide the same specific nutrient profile as the food it is replacing, nor the specific portion size as the food it is replacing. It is not necessary to provide a direct comparison to the specific food being supplanted.

○ For example: If a Tribal Organization proposes to supplant frozen blueberries in the FDPIR food package fruit category with a berry traditional to its culture, the Tribal Organization may explain how the traditional berry is nutritionally similar to other fruits currently offered in the fruit category, and explain how the traditional berry will be offered in household-sized cartons that would provide participants with a similar amount of fruit as other offerings in the fruit category. A comparison of the specific nutrients and portion size of the frozen blueberries versus the traditional berries is not required.

○ For FDPIR food package categories, please reference FNS Handbook 501, Exhibit O: Food Distribution Program on Indian Reservations Monthly Distribution Guide Rates by Household Size (Distribution Rates).

▪ The estimated number of months that each proposed food(s) will be distributed to Tribal Organization's existing FDPIR caseload. A minimum of twelve (12) unique months of food distribution across all offered foods is required (consecutive or non-consecutive). This means that—to meet the minimum requirement—a Tribal Organization could propose to distribute one food for 12 months, or could propose to rotate distribution of a number of foods for a total of 12 unique months (*e.g.,* distribute one food for 6 months and a different food for another 6 non-overlapping months).

○ This requirement represents an increase in the required minimum months of distribution, from 6 months in round one, to 12 months in round two. This change has been made to standardize self-determination contracts awarded under the demonstration project, to better measure and compare the results of individual contracts, and to minimize contract extension

paperwork. FNS determined that 12 months of distribution of one food is achievable for most FDPIR Tribal Organizations under the initial $1.5 million contract limitation. Of all 105 Tribal Organizations participating in the program at time of publication of this notice, 7 FDPIR programs have an average monthly caseload of 1,000 participants or more. If a Tribal Organization is unable to achieve 12 unique months of distribution due to a large caseload and the $1.5 million limitation, FNS will accept proposals to distribute proposed food(s) for less than 12 unique months. In such cases, Tribal Organizations should clearly state the number of distribution months they are able to achieve with the $1.5 million funding limit.

○ For each proposed food(s), FNS also encourages a minimum of at least three consecutive months of distribution for individual foods, but will consider proposals for distribution of individual foods for less than three months as long as the minimum requirement for 12 unique months of distribution is met.

○ FNS encourages Tribal Organizations to submit proposals that exceed the minimum requirement of 12 unique months of distribution for all foods, and suggested minimum distribution of at least three consecutive months for individual foods, if at all possible.

▪ An estimated timeline for distributing proposed food(s) within a 36-month contract period of performance. All self-determination contracts awarded under this solicitation will be structured with a period of performance of 36 months with the possibility of early completion or extension. The estimated period of performance for round two contracts is June 2023 through May 2026. The estimated period of performance is subject to change. A final timeline will be mutually agreed upon by the Tribal Organization and FNS and will be based upon the final period of performance and the date on which final proposed food(s) information from executed vendor contracts is received by FNS from Tribal Organization, for input into food reporting and inventory systems. The submitted timeline should take into account the depletion of inventory of supplanted USDA food(s) prior to distribution of proposed food(s) and planned distributions of proposed food(s) should not begin earlier than June 1, 2023, even though contracts may be awarded prior to that date.

▪ A description of Tribal Organization's capacity to obtain the proposed food(s) in a quantity that meets estimated participant demand. In its description, the Tribal Organization must confirm proposed food(s) will be offered to all participants served by its program. Alternatively, a Tribal Organization may submit documentation of capacity, such as a quote for purchasing the proposed foods from the vendor(s) that the Tribal Organization proposes to work with to purchase the proposed food(s), in a quantity that would meet participant demand.

3. Letter(s) of Support from vendor(s) which will supply the food(s). Letter(s) should certify that vendor(s) sells food(s) commercially and offers food(s) that is a product grown, processed, and otherwise prepared for sale or distribution in the United States. For purposes of the demonstration project, ''commercially available'' means that the food(s) is presently being sold through commercial channels to the public by the vendor(s) from which the Tribal Organization is proposing to procure the food(s).

V. Review, Selection and Evaluation

A. Review and Selection Process

Funding, under this solicitation, will be provided via self-determination contracts, as defined by Section 4 of the ISDEAA, to at least two Tribal Organizations that meet the eligibility criteria established under section IV. above. As part of the selection process, FNS will pre-screen and review all proposals to ensure they contain the required documents and information. Upon receiving a proposal, FNS will determine whether the proposal is complete within 7 calendar days. If a proposal is received before the deadline but is determined to be incomplete, the applicant will be notified and given the opportunity to submit missing items within 7 calendar days of being notified. If there are less than 7 calendar days from the date of notification and the deadline or the notification occurs after the deadline has passed, the applicant will still be given 7 calendar days to submit the missing items, but this is only available to proposals that were initially received before the deadline. Any initial proposals, whether complete or incomplete, received after the deadline will not be considered.

Timely, complete proposals will be given to the FNS review panel to be evaluated and scored against the ranking criteria. Proposals will be evaluated using the four ranking criteria listed below, under section V.B. Evaluation Criteria, with a maximum achievable total of 100 points. The FNS review panel may ask applicants for additional clarification prior to final selection.

Final award selections will be approved by the FNS Administrator. Tribal Organizations not selected for award will be notified in writing. FNS reserves the right to use this solicitation to select additional proposals or extend an existing contract already awarded under the demonstration project should additional funds be made available through future appropriations.

B. Evaluation Criteria

The following selection criteria will be used to evaluate proposals for this demonstration project. FNS reserves the right to select proposals to meet geographical representation or project diversity notwithstanding the points awarded to each proposal. To the extent possible, FNS will ensure that the selected proposals, when considered as a group, test a range of geographic location, program size, and diversity in food selection. Tribal leaders, during consultation, also requested FNS consider selecting proposals that test a range of programs as much as possible.

Program Administration: 10 points. A proposal will be evaluated under this criterion for applicant's effectiveness in successfully administering FDPIR. Evaluation will be based on the factors listed under section IV.A. 1–5 of this notice.

Project Viability: 30 points. A proposal will be evaluated on its strength in demonstrating Tribal Organization capacity to purchase agricultural commodities for the FDPIR program. The panel will evaluate the project viability by examining: (1) the applicant's ability to obtain the proposed food(s) in a quantity that meets estimated participant demand; (2) the applicant's ability to obtain the proposed food(s) for a minimum twelve unique distribution months (consecutive or non-consecutive); and (3) the vendor letter(s) of support included with proposal.

Agricultural Commodity Description: 30 points. A proposal will be evaluated under this criterion for the agricultural commodity it proposes to introduce to the FDPIR program and the degree to which the proposed food meets project requirements, including that: (1) the proposed food(s) is a product grown, processed, and otherwise prepared for sale or distribution in the United States; and (2) the proposed food(s) is of similar or higher nutritional value and of similar portion size than the food(s) being supplanted.

Budget: 30 points. A proposal will be evaluated under this criterion for the degree to which its proposed budget is

reasonable, necessary, and allocable to costs associated with this demonstration project during the period of performance. The budget narrative should correspond with the proposed line-item budget and must justify and support the bona fide needs of the budget's line-item costs. Proposal budgets must not exceed $1.5 million, including contract support costs.

VI. Proposal Template

The following proposal template is provided for the convenience of applicants. The use of this template is recommended but not mandatory. A proposal will be accepted for review as long as it meets all the applicable criteria in this notice. Email completed proposals to *FDPIR-RC@usda.gov* with subject line ''FDPIR Demonstration Project''. Proposals will be accepted until 11:59 p.m. ET on January 31, 2023.

Template Proposal To Participate in FDPIR Self-Determination Demonstration Project

Please provide the following information:

1. Full name, address, and telephone number of Tribal Organization proposing to contract.

2. Full name, address, telephone number, and email of Tribal Organization's main point of contact for this proposal.

3. Signed self-attestation from FDPIR program director attesting their support for participation in the demonstration project and that FDPIR program is currently being administered successfully. The self-attestation must cover the following areas:

- FDPIR program director is supportive of participating in the demonstration project for the entire length of its proposal.
- Tribal Organization has a current Plan of Operation on file with FNS or with the State agency, if applicable, that meets the regulatory requirements of 7 CFR part 253;
- Tribal Organization is in compliance with regulatory inventory storage and inventory management requirements at 7 CFR 250.12; and
- Tribal Organization has no outstanding financial or inventory related FNS management evaluation findings. If any related management evaluation findings are currently open, FDPIR program director should provide a description and disposition for each in the signed letter.

4. A Tribal Resolution(s) from the Tribal Council authorizing the Tribal Organization to participate in this demonstration project or a statement affirming that a Tribal Resolution(s) with this authorization has been requested of the Tribal Council and will be submitted prior to contract negotiations and within 30 days, if selected.

5. List of food(s) from the current FDPIR food package the Tribal Organization intends to supplant (*i.e.,* replace), and the corresponding food(s) proposed to be purchased to replace that food(s) in the FDPIR program by Tribal Organization. The total number of months that the proposed food(s) will be distributed to FDPIR participants should also be indicated. Please note that a minimum of 12 unique months of food distribution is required across all proposed foods (consecutive or non-consecutive) in most cases.

Proposed food	USDA supplanted food	Total number of distribution months for proposed food, over 36 month period of performance	Summary timeline of distribution of proposed food, over 36 month period of performance
E.g.—Fresh cabbage	*E.g.—Lettuce*	*E.g. —18 months*	*E.g.—1 month in FY 2023, 6 months in each of FY 2024 and 2025, and 5 months in 2026.*
E.g.—Fresh collard greens	*E.g.—Lettuce*	*E.g. —15 months*	*E.g.—3 months in FY 2023, 6 months each in FY 2024 and 2025, and 3 months in FY 2026.*
E.g.—Bison	*E.g.—Bison*	*E.g.—6 months*	*E.g.—3 months in each of FY 2024, 2025 and 2026.*

6. A timeline for distribution of each of the proposed food(s), with a minimum of 12 unique months of food distribution across all proposed foods (consecutive or non-consecutive) incorporated. The timeline for all food distributions should occur during the estimated period of performance (June 2023—May 2026) and should take into account the depletion of inventory of supplanted food on hand. Planned food distributions should begin no earlier than June 1, 2023. If your Tribal Organization is selected to participate in the demonstration project, you will be able to make any changes necessary to this timeline before and after award.

	Foods offered and (supplanted) in FY 2023	Foods offered and (supplanted) in FY 2024	Foods offered and (supplanted) in FY 2025	Foods offered and (supplanted) in FY 2026
October		*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce).*
November		*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce).*
December		*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*
January		*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*
February		*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*	*E.g.—Cabbage (lettuce); Bison (bison).*
March		*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce).*
April		*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce).*
May		*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce).*
June	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	
July	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	
August	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	*E.g.—Collard greens (lettuce)*	
September	*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce)*	*E.g.—Cabbage (lettuce)*	

7. A description of the nutritional value of the proposed food(s) and explanation of how the proposed food(s) is of similar or higher nutritional value and similar portion size as the food(s) being supplanted. Alternately, Tribal Organizations may describe how the proposed food(s) is nutritionally similar, and of similar portion size, as other items in the FDPIR food package category of the food it is replacing rather than drawing a direct nutritional comparison to the specific food being supplanted.

- For example: If a Tribal Organization proposes to supplant frozen blueberries in the FDPIR food package fruit category (Exhibit O) with a berry traditional to its culture, the Tribal Organization may explain how the traditional berry is nutritionally

similar to other fruits currently offered in the fruit category, and how the traditional berry will provide FDPIR participants with similar amounts of fruit as other fruit offerings in the fruit category. A comparison of the specific nutrients and portion size of the frozen blueberries vs. the traditional berries is not required.

8. A description of Tribal Organization's capacity to obtain the proposed food(s) in a quantity that meets estimated participant demand. In the description, Tribal Organization must confirm proposed food(s) will be offered to all FDPIR participants served by its program. In lieu of a description, a Tribal Organization may submit documentation of capacity, such as a quote for purchasing the proposed foods from the vendor(s) that the Tribal Organization proposes to work with to purchase the proposed food(s), in a quantity that would meet participant demand.

9. Letter(s) of Support from vendor(s) which will supply the food(s). Letter(s) should certify that vendor(s):

- Sells proposed food(s) commercially (*i.e.,* presently sells the proposed food(s) to the public through commercial channels); and
- Offers food(s) that is a product grown, processed, and otherwise prepared for sale or distribution in the United States.

10. A proposed budget and narrative of estimated costs to carry out the proposed contract activities. All costs must be reasonable, necessary, and allocable to the contract. Budget proposal, including all contract support costs, may not exceed $1.5 million. The proposed budget must include the following:

a. The total amount of funds requested.

b. A breakout of the amount of funds requested by the following categories:

- Food purchases
- Personnel
- Equipment
- Materials and supplies
- Travel
- Other allowable costs such as contract support costs.

c. A budget narrative that describes all major line-item expenditures that are proposed, including inflationary percentages.

Cynthia Long,

Administrator, Food and Nutrition Service.

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BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board (NFAB) will hold a public meeting according to the details shown below. The committee is authorized under the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, the Federal Lands Recreation Enhancement Act, and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the committee is to provide advice and recommendations on a broad range of forest issues such as forest plan revisions or amendments, forest health including fire, insect and disease, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications. General information can be found at the following website: *https://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees.*

DATES: The meeting will be held on November 16, 2022, 1 p.m.–4:30 p.m., mountain standard time.

All committee meetings are subject to cancellation. For the status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting is open to the public and will be held at the U.S. Forest Service, Mystic Ranger District Office, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. The public may also join virtually via telephone and/or video conference. Virtual meeting participation details can be found on the website listed under **SUMMARY** or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.**

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Scott Jacobson, NFAB Committee Coordinator, by phone at 605–440–1409 or email at *scott.j.jacobson@usda.gov.*

Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The meeting agenda will include:

1. Forest Plan Revision update;
2. Jenny Gulch Gold Exploration Drilling Project update;
3. Fish Fire—after the fire update; and
4. Winter recreation program on the forest.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days before the meeting to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Scott Jacobson, NFAB Committee Coordinator, Mystic Ranger District Office, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702 or by email to *scott.j.jacobson@usda.gov.* Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have considered the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: October 12, 2022.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2022–22601 Filed 10–17–22; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

North Central Idaho Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The North Central Idaho Resource Advisory Committee (RAC) will hold a public meeting according to the details shown below. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act as well as to make recommendations on recreation fee proposals for sites on the Nez Perce-Clearwater National Forests, consistent with the Federal Lands Recreation Enhancement Act. General information and meeting details can be found at the following website: *https://www.fs.usda.gov/main/nezperceclearwater/workingtogether/advisorycommittees.*

DATES: The meeting will be held on November 9 and 10, 2022, 9 a.m.–5 p.m., Pacific standard time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting is open to the public and will be held at the Nez Perce-Clearwater National Forests Supervisor's Office, located at 1008 Highway 64, Kamiah, Idaho 83536. The public may also join virtually via telephone and/or video conference. Virtual meeting participation details can be found on the website listed under **SUMMARY** or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: Martin Mitzkus, Designated Federal Officer (DFO), by phone at 208–935–4257 or email at *martin.mitzkus@usda.gov* or Lisa Canaday, RAC Coordinator, at 208–983–8917 or email at *lisa.canaday@usda.gov.*

Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Elect a Chairperson;
2. Hear from Title II project proponents and discuss title II project proposals; and
3. Make funding recommendations on title II projects.

The meeting is open to the public. The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Lisa Canaday, 104 Airport Road, Grangeville, ID 83530 or by email to *lisa.canaday@usda.gov.* Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: October 12, 2022.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2022–22595 Filed 10–17–22; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The Shasta County Resource Advisory Committee (RAC) will hold three public meetings in November 2022 according to the details shown below. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act as well as to make recommendations on recreation fee proposals for sites on the Shasta-Trinity National Forest within Trinity County, consistent with the Federal Lands Recreation Enhancement Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/stnf/workingtogether/advisorycommittees.*

DATES: The meetings will be held on the following dates/times:

- November 2, 2022, 9:30 a.m.–11:30 a.m., Pacific daylight time.
- November 9, 2022, 9:30 a.m.–11:30 a.m., Pacific daylight time.
- November 16, 2022, 9:30 a.m.–11:30 a.m., Pacific daylight time.

All RAC meetings are subject to cancellation. For status of the meetings prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meetings are open to the public and will be held virtually via telephone and/or video conference. Virtual meeting participation details can be found on the website listed under **SUMMARY** or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Weaverville Ranger Station. Please call ahead at 530–623–2121 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Monique Rea, RAC Coordinator, by phone at 916–580–5651 or via email at *monique.rea@usda.gov.*

Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours per day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meetings are to cover the following:

1. Roll call;
2. Comments from the Designated Federal Officer (DFO);
3. Discuss, recommend, approve projects;
4. Public comment period; and
5. Closing comments from the DFO.

The meetings are open to the public. The agendas will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing at least three days prior to the particular meeting to be scheduled on the agenda for that meeting. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meetings. Written comments and requests for time for oral comments must be sent to Monique Rea, RAC Coordinator, 360 Main Street, Weaverville, California 96093 or by email to *monique.rea@usda.gov.* Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: October 12, 2022.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2022–22600 Filed 10–17–22; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Agendas and Notices of Public Meetings of the Maine Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of a public 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 Maine Advisory Committee to the Commission will hold virtual meetings for briefing planning on the following Thursdays at 12:00 p.m. (ET): November 10, 2022, and December 8, 2022. The Committee will also convene virtual briefings to continue hearing from experts on indigent legal services in Maine on the following dates: Tuesday, November 15, 2022, and Thursday, December 15, 2022; both at 12:00 p.m. (ET).

Business Meeting Dates:

- November 10, 2022, Thursday; 12:00 p.m.–1:00 p.m. ET.

Zoom Link (audio and video): https://tinyurl.com/mt6ahce9; password: USCCR–ME.

If joining by phone only: 1–551–285–1373; Meeting ID: 160 500 3847#.

- December 8, 2022, Thursday; 12:00 p.m.–1:00 p.m. ET.

Zoom Link: https://tinyurl.com/mt6ahce9; password: USCCR–ME.

If joining by phone only: 1–551–285–1373; Meeting ID: 160 500 3847#.

Briefing Dates:

- *Briefing Panel II:* November 15, 2022, Tuesday; 12:00 p.m.–2:00 p.m. ET.

Zoom Link: https://tinyurl.com/2vdbxb8h; password: USCCR–ME.

If joining by phone only: 1–551–285–1373; Meeting ID: 160 968 6548#.

- *Briefing Panel III:* December 15, 2022, Thursday; 12:00–2:00 p.m. ET.

Zoom Link: https://tinyurl.com/ymkdct4v; password: USCCR–ME.

If joining by phone only: 1–551–285–1373; Meeting ID: 160 320 9879#.

FOR FURTHER INFORMATION CONTACT: Liliana Schiller at *lschiller@usccr.gov* or via phone at 312–353–8311.

SUPPLEMENTARY INFORMATION: These meetings are 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 these meetings.

Members of the public are entitled to make comments during the open period at the end of the meetings. 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 Liliana Schiller at *lschiller@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 539–8246. Records and documents discussed during the meetings will be available for public viewing as they become available at *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Business Meeting Agendas

Thursdays at 12:00 p.m.: Nov. 10 and Dec. 8, 2022

I. Welcome & Roll Call
II. Briefing Discussions
III.
IV.
V. Public Comment
VI. Adjournment

Briefing Agendas

Tuesday, Nov. 15 and Thursday, Dec. 15, 2022; both at 12:00 p.m. ET

I. Welcome & Roll Call

II. Briefing on Indigent Legal Services in Maine: Panels II and III
III.
IV.
V. Public Comment
VI. Adjournment

Dated: October 13, 2022.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2022–22606 Filed 10–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 2134]

Reorganization and Expansion of Foreign-Trade Zone 164 Under Alternative Site Framework; Muskogee, Oklahoma

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:

Whereas, the Foreign-Trade Zones (FTZ) Act provides for ''. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Muskogee City-County Port Authority, grantee of Foreign-Trade Zone 164, submitted an application to the Board (FTZ Docket B–22–2022, docketed May 31, 2022) for authority to reorganize and expand under the ASF with a service area of Muskogee County, Oklahoma, adjacent to the Tulsa Customs and Border Protection port of entry, FTZ 164's existing Sites 1, 2 and 3 would be categorized as magnet sites, and the grantee proposes a subzone (Subzone 164A);

Whereas, notice inviting public comment was given in the **Federal Register** (87 FR 34240, June 6, 2022) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize and expand FTZ 164 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including section 400.13, to the Board's standard 2,000-acre activation limit for the zone, to an ASF sunset provision for magnet sites that would terminate authority for Sites 2 and 3 if not activated within five years from the month of approval, and to an ASF sunset provision for subzone/usage-driven sites that would terminate authority for the site of Subzone 164A if no foreign-status merchandise is admitted for a *bona fide* customs purpose within three years from the month of approval.

Dated: October 12, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance, Alternate Chairperson, Foreign-Trade Zones Board.

[FR Doc. 2022–22621 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–26–2022]

Foreign-Trade Zone (FTZ) 189—Kent/Ottawa/Muskegon Counties, Michigan; Authorization of Production Activity; GHSP, Inc. (Automotive Products); Grand Haven, Hart and Holland, Michigan

On June 15, 2022, GHSP, Inc., submitted a notification of proposed production activity to the FTZ Board for its facilities within Subzone 189F, in Grand Haven, Hart and Holland, Michigan.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (87 FR 38057, June 27, 2022). On October 13, 2022, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: October 13, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–22622 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on November 2 and 3, 2022, at 9 a.m., Eastern Standard Time, in the Herbert C. Hoover Building, Room 48019, 14th Street between Constitution and Pennsylvania Avenues NW, Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, November 2

Open Session

1. Welcome and Introductions
2. Working Group Reports
3. Old Business

Thursday, November 3

Closed Session

4. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than October 26, 2022.

A limited number of seats will be available for the public session. Reservations are not accepted.

To the extent time permits, members of the public may present oral statements to the Committee.

The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 7, 2022, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (l0)(d)), that the portion of the meeting concerning trade secrets and commercial or financial information deemed privileged or confidential as described in 5 U.S.C. 552b(c)(4) and the portion of the meeting concerning matters the disclosure of which would

be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and l0(a)(3). The remaining portions of the meeting will be open to the public.

For more information, contact Ms. Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2022–22540 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–890]

Quartz Surface Products From India: Final Results of Countervailing Duty Administrative Review; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Divyashakti Granites Ltd., a producer/exporter of quartz surface products from India, received countervailable subsidies during the period of review October 11, 2019, through December 31, 2020.

DATES: Applicable October 18, 2022.

FOR FURTHER INFORMATION CONTACT: Jolanta Lawska, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–8362.

SUPPLEMENTARY INFORMATION:

Background

On June 15, 2022, Commerce published the preliminary results of this review and invited interested parties to comment.[1] We received no comments from interested parties on the *Preliminary Results.* Commerce conducted this administrative review in accordance section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [2]

Quartz surface products consist of slabs and other surfaces created from a mixture of materials that includes predominately silica (*e.g.,* quartz, quartz powder, cristobalite, glass powder) as well as a resin binder (*e.g.,* an unsaturated polyester). The incorporation of other materials, including, but not limited to, pigments, cement, or other additives does not remove the merchandise from the scope of the *Order.* However, the scope of the *Order* only includes products where the silica content is greater than any other single material, by actual weight. Quartz surface products are typically sold as rectangular slabs with a total surface area of approximately 45 to 60 square feet and a nominal thickness of one, two, or three centimeters. However, the scope of the *Order* includes surface products of all other sizes, thicknesses, and shapes. In addition to slabs, the scope of the *Order* includes, but is not limited to, other surfaces such as countertops, backsplashes, vanity tops, bar tops, work tops, tabletops, flooring, wall facing, shower surrounds, fireplace surrounds, mantels, and tiles. Certain quartz surface products are covered by the *Order* whether polished or unpolished, cut or uncut, fabricated or not fabricated, cured or uncured, edged or not edged, finished or unfinished, thermoformed or not thermoformed, packaged or unpackaged, and regardless of the type of surface finish.

In addition, quartz surface products are covered by the *Order* whether or not they are imported attached to, or in conjunction with, non-subject merchandise such as sinks, sink bowls, vanities, cabinets, and furniture. If quartz surface products are imported attached to, or in conjunction with, such non-subject merchandise, only the quartz surface product is covered by the scope.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise fabricated in a third country, including by cutting, polishing, curing, edging, thermoforming, attaching to, or packaging with another product, or any other finishing, packaging, or fabrication that would not otherwise remove the merchandise from the scope of the *Order* if performed in the country of manufacture of the quartz surface products.

The scope of the *Order* does not cover quarried stone surface products, such as granite, marble, soapstone, or quartzite. Specifically excluded from the scope of the *Order* are crushed glass surface products. Crushed glass surface products must meet each of the following criteria to qualify for this exclusion: (1) the crushed glass content is greater than any other single material, by actual weight; (2) there are pieces of crushed glass visible across the surface of the product; (3) at least some of the individual pieces of crushed glass that are visible across the surface are larger than 1 centimeter wide as measured at their widest cross-section ('Glass Pieces'); and (4) the distance between any single Glass Piece and the closest separate Glass Piece does not exceed three inches.

The products subject to the scope are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheading: 6810.99.0010. Subject merchandise may also enter under subheadings 6810.11.0010, 6810.11.0070, 6810.19.1200, 6810.19.1400, 6810.19.5000, 6810.91.0000, 6810.99.0080, 6815.99.4070, 2506.10.0010, 2506.10.0050, 2506.20.0010, 2506.20.0080, and 7016.90.1050. The HTSUS subheadings set forth above are provided for convenience and U.S. Customs purposes only. The written description of the scope is dispositive.

Final Results of Review

We received no comments from interested parties on the *Preliminary Results* and, therefore, have made no changes in the final results of this review. Accordingly, we determine the following net countervailable subsidy rates exist for Divyashakti Granites Ltd., the sole mandatory respondent, for the period October 11, 2019, through December 31, 2020:

Company	Subsidy rate 2019 (percent *ad valorem*)	Subsidy rate 2020 (percent *ad valorem*)
Divyashakti Granites Ltd	1.98	1.18

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with the final results of review within five days of a public announcement or, if there is no public announcement, within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because we have made no changes from the *Preliminary Results,* there are no calculations to disclose.

Assessment Rates

Consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), upon completion of the administrative review, Commerce shall determine, and U.S. Customs and Border Protection

[1] *See Quartz Surface Products from India: Preliminary Results and Rescission in Part of Countervailing Duty Administrative Review; 2019–2020,* 87 FR 36109, 36110 (June 15, 2022) (*Preliminary Results*).

[2] *See Certain Quartz Surface Products from India and the Republic of Turkey: Countervailing Duty Orders,* 85 FR 37431 (June 22, 2020) (*Order*).

(CBP) shall assess, countervailing duties on all appropriate entries covered by this review for the period October 11, 2019, through December 31, 2019, and January 1, 2020, through December 31, 2020. 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).

Cash Deposit Instructions

In accordance with section 751(a)(2)(C) of the Act, Commerce also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amount shown above, for the company listed above for the year 2020, for shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, Commerce will instruct CBP to continue to collect cash deposits at the all-others rate or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction 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 sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 12, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–22623 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–854]

Certain Steel Nails From Taiwan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain steel nails from Taiwan were sold in the United States at less than normal value during the period of review (POR), July 1, 2020, through June 30, 2021. Commerce also determines that certain companies under review made no shipments of certain steel nails from Taiwan during the POR.

DATES: Applicable October 18, 2022.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the *Preliminary Results* of the administrative review of certain steel nails from Taiwan on June 13, 2022.[1] The review covers 69 companies, including three mandatory respondents,[2] six companies claiming no shipments of subject merchandise during the POR, and 59 companies not selected for individual examination.

Scope of the Order [3]

The merchandise covered by this *Order* is certain steel nails from Taiwan. The certain steel nails subject to the *Order* are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Certain steel nails subject to this *Order* also may be classified under HTSUS subheadings 7907.00.60.00, 8206.00.00.00 or other HTSUS subheadings. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this *Order* is dispositive. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[4]

Analysis of Comments Received

We addressed all issues raised in parties' case and rebuttal briefs in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is included in Appendix I of this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade/gov/public/FRNoticesListLayout.aspx.*

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that the following companies had on shipments of subject merchandise during the POR: Astrotech Steels Private Limited; Geekay Wires Limited; Region Industries Co., Ltd.; and Region System Sdn. Bhd.[5] As we have not received any information to contradict this determination, consistent with our practice, we will instruct U.S. Customs and Border Protection (CBP) to liquidate any existing entries of subject merchandise produced by these four companies, but exported by other parties, at the rate for the intermediate reseller, if available, or at the all-others rate.

Further, in the *Preliminary Results,* Commerce determined that resellers

[1] *See Certain Steel Nails from Taiwan: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Partial Rescission of Review; 2020–2021,* 87 FR 35734 (June 13, 2022) (*Preliminary Results*).

[2] The mandatory respondents are: King Chuang Wen Trading Co., Ltd. (King Chuang); the single entity comprising Liang Chyuan Industrial Co., Ltd. and Integral Building Products Inc. (collectively, Liang Chyuan); and Liang Kai Co.

[3] *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 80 FR 39994 (July 13, 2015) (*Order*).

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results and Final Determination of No Shipments in the Antidumping Duty Administrative Review: Certain Steel Nails from Taiwan; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[5] *See Preliminary Results,* 87 FR at 35736.

Create Trading Co., Ltd. (Create Trading) and Wiresmith Industrial Co., Ltd. (Wiresmith) had no shipments of subject merchandise during the POR.[6] As we find that there is no evidence on the record of this review which warrants a different determination, we continue to find that Create Trading and Wiresmith had no shipments during the POR. As discussed further in the ''Assessment Rates'' section below, we will instruct CBP to liquidate any existing entries of subject merchandise produced by Create's and Wiresmith's respective unaffiliated suppliers and attributed to Create and Wiresmith at the rate applicable to the unaffiliated producers, which, as discussed below, in this case is the all-others rate.[7]

Rate for Non-Selected Companies

As we stated in the *Preliminary Results,* in accordance with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle,*[8] we preliminarily applied a review-specific rate to the companies not selected for individual examination based on the individual rates preliminarily applied to the three mandatory respondents in this administrative review (*i.e.,* 78.17 percent). This determination is unchanged for the final results.

Final Results of Review

We have determined the following dumping margins for the firms listed below for the period July 1, 2020, through June 30, 2021:

Exporter/producer	Weighted-average dumping margin (percent)
King Chuang Wen Trading Co., Ltd	78.17
Liang Chyuan Industrial Co., Ltd./Integral Building Products Inc	78.17
Liang Kai Co	78.17
Review-Specific Average Rate Applicable to Companies Under Review Not Selected for Individual Examination	
See Appendix II for the 59 companies under review subject to the review-specific rate	78.17

Disclosure

Normally, Commerce will disclose the calculations performed in connection with the final results of review to parties to the proceeding in accordance with 19 CFR 351.224(b). However, as there were no margin calculations performed in the instant review, there are no calculations to disclose for the final results of this review.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b)(1), Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For these final results, we will instruct CBP to apply an *ad valorem* assessment rate of 78.17 percent to all entries of subject merchandise during the POR which were produced and/or exported by the mandatory respondents, King Chuang, Liang Chyuan, and Liang Kai Co., and the 59 companies which were not selected for individual examination.

As indicated above, for each company which we determined had ''no shipments'' of the subject merchandise during the POR, we will instruct CBP to liquidate all POR entries associated with these companies at the all-others rate [9] if there is no rate for the intermediate company(ies) involved in the transaction, consistent with Commerce's reseller policy.[10]

Finally, with respect to the two resellers, as discussed in the *Preliminary Results,*[11] consistent with our reseller policy, we find it appropriate in this case to instruct CBP to liquidate any existing entries of subject merchandise produced by Create Trading's and Wiresmith's respective unaffiliated suppliers and attributed to Create Trading and Wiresmith at the rate applicable to the unaffiliated producer(s).[12] Because none of the producer(s) have their own rates, we will instruct CBP to liquidate entries at the all-others rate from the investigation, as revised, of 2.16 percent, in accordance with the reseller policy.

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).

Cash Deposit Requirements

The following cash deposit requirements will be in effect 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 King Chuang, Liang

[6] *See* Create Trading's Letter, ''Statement of No Sales to the United States,'' dated October 7, 2021; *see also* Wiresmith Letter, ''Statement of No Sales to the United States,'' dated October 7, 2021. Specifically, both companies certified that all of their exports of subject merchandise were produced by unaffiliated producers that had knowledge of final destination to the United States; thus, both companies certified that they had no shipments or sales for this POR.

[7] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954, 23954 (May 6, 2003) (*Assessment of Antidumping Duties*); *see also Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 23974, 23977 (April 29, 2011), unchanged in *Pasta from Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review,* 76 FR 68399 (November 4, 2011).

[8] *See Preliminary Results,* 87 FR at 35736; *see also Albemarle Corp.* v. *United States,* 821 F.3d 1345 (Fed. Cir. 2016) (*Albemarle*); *Primesource Building Products Inc., et al.* v. *United States,* Slip Op. 22–73 (CIT June 16, 2022).

[9] The all-others rate from the underlying investigation was revised to 2.16 percent in *Certain Steel Nails from Taiwan: Notice of Court Decision Not in Harmony with Final Determination in Less than Fair Value Investigation and Notice of Amended Final Determination,* 82 FR 55090, 55091 (November 20, 2017).

[10] *See, e.g., Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989 (September 17, 2010). For a full discussion of this practice, *see Assessment of Antidumping Duties.*

[11] *See Preliminary Results,* 87 FR at 35737.

[12] *See Assessment of Antidumping Duties; see also Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 77610, 77612 (December 19, 2008); *Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 23974, 23977 (April 29, 2011), unchanged in *Pasta from Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review,* 76 FR 68399 (November 4, 2011).

Chyuan, and Liang Kai Co. and the companies listed in Appendix II will be equal to the dumping margin established in the final results of this administrative review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which they were reviewed; (3) if the exporter is not a firm covered in this review, a prior review, or in the investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 2.16 percent, the all-others rate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. 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.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: October 11, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

Appendix II—List of Companies Under Review Not Selected for Individual Examination

1. Acu-Transport Co., Ltd.
2. Allwin Architectural Hardware Inc.
3. Alsons Manufacturing India LLP
4. An Chen Fa Machinery Co., Ltd.
5. Bollore Logistics India Private Ltd.
6. Bon Voyage Logistics Inc.
7. Boss Precision Works Co., Ltd.
8. C.H. Robinson Freight Services Ltd.
9. C.H.Robinson World Wide India Pvt. Ltd.
10. Casia Global Logistics Co., Ltd.
11. Chief Ling Entreprise Co., Ltd
12. China Intl. Freight Co., Ltd.
13. China Sea Forwarders Co., Ltd.
14. Crane Worldwide Logistics LLC
15. De Well Container Shipping Inc.
16. DHL Global Forwarding Sg. Pte. Ltd.
17. Diversified Freight System Corporation
18. Eusu Logistics Co., Ltd.
19. Evergreen Logistics Corp.
20. Everise Global Logistics Co., Ltd.
21. Grandlink Logistics Co., Ltd.
22. Honour Lane Logistics Company Ltd.
23. Honour Lane Shipping Ltd.
24. Houseware Taiwan Industries Ltd.
25. Inmax Industries Sdn. Bhd.
26. K.E. & Kingstone Co., Ltd.
27. Kay Guay Entreprises Co., Ltd.
28. Kerry Indev Logistics Private Limited
29. King Compass Logistics Limited
30. King Freight International Corp.
31. Lien Bin Industries Co., Ltd.
32. New Marine Consolidator Co., Ltd.
33. NMC Logistics International Co., Ltd.
34. Oceanlink/Topair International Co.
35. OEC Freight Worldwide Co., Ltd.
36. Orient Containers Sdn., Bhd.
37. Orient Express Container Co., Ltd.
38. Orient Star International Logistics Co., Ltd.
39. Orient Star Transport International Ltd.
40. Oriental Vanguard Logistics Co., Ltd.
41. Pacific Concord International Ltd.
42. Pacific Star Express Corp.
43. Panda Logistics Co., Ltd.
44. Ray Fu Entreprise Co., Ltd.
45. SAR Transport Systems Pvt. Ltd.
46. Schenker (H.K.) Ltd.
47. Storeit Services LLP.
48. Success Progress International Tran
49. T.H.I. Logistics Co., Ltd.
50. T.V.L. Container Line Limited
51. The Ultimate Freight Management (Taiwan) Ltd.
52. Topocean Consolidation Service (Taiwan) Ltd.
53. Trans Luck Global Logistics Co., Ltd.
54. Trans Wagon International Co., Ltd.
55. Transwell Logistics Co., Ltd.
56. Transworld Transportation Co., Ltd.
57. UPS Supply Chain Solutions (Taiwan) Co., Ltd.
58. Valuemax Products Co., Ltd.
59. Worldwide Logistics Co., Ltd.

[FR Doc. 2022–22619 Filed 10–17–22; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC464]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold meetings throughout the main Hawaiian Islands to solicit public input and comments on management alternatives for non-commercial fishing in the Northwestern Hawaiian Islands (NWHI) Monument Expansion area.

DATES: The meetings will be held between November 1 and November 10, 2022. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meetings will be held at the Cafeteria, Elise H. Wilcox Elementary School at 4319 Hardy St., Lihue, Kauai, HI 96766; University of Hawaii Maui College at 310 W Kaahumanu Ave., Kahului, Maui, HI 96732; Grand Naniloa Hotel at 93 Banyan Dr. Hilo, Hawaii Island, HI 96720; Royal Kona Resort at 75–5852 Alii Dr. Kailua-Kona, Hawaii Island, HI 96740; Lanikeha Community Center in 2200 Farrington Ave. Hoolehua, Molokai, HI 96729; and Ala Moana Hotel at 410 Atkinson Dr. Honolulu, Oahu, HI 96814.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522–8220.

SUPPLEMENTARY INFORMATION: All times shown are in Hawaii Standard Time. Kauai, November 1, 2022, 6 p.m.–9 p.m.; Maui, November 3, 2022, 6 p.m.–9 p.m.; Hilo, November 4, 2022, 6 p.m.–9 p.m.; Kona, November 5, 2022, 10 a.m.–1 p.m.; Molokai, November 8, 2022, 6 p.m.–9 p.m.; and Honolulu, November 10, 2022, 6 p.m.–9 p.m.

Please note that the evolving public health situation regarding COVID–19 may affect public participation requirements and conduct at these public meetings.

Background documents for these meetings will be available at *www.wpcouncil.org*. Written public comments should be sent to Kitty M. Simonds, Executive Director; Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813, phone: (808) 522–8220 or fax: (808) 522–8226; or email: *info@wpcouncil.org*. Instructions for providing oral public comments during the meeting will be posted on the Council website.

Agenda for All Meetings

1. Welcome and Introductions
2. Subsistence fishing in the NWHI Monument Expansion Area
   a. History of NWHI Fishing
   b. Monument and Expansion
   c. Proposed Fishing Regulations
   d. Public Comments
3. Other Business

Special Accommodations

These meetings are accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: October 13, 2022.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2022–22633 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC413]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Parallel Thimble Shoal Tunnel Project in Virginia

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

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

SUMMARY: NMFS received a request from Chesapeake Tunnel Joint Venture (CTJV) for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to the Parallel Thimble Shoal Tunnel Project (PTST) in Virginia Beach, Virginia. These activities are nearly identical to those covered in the current authorization, and include a subset of the initial work. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than November 2, 2022.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.Hotchkin@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Cara Hotchkin, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

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 such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the

Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).

2. The request for renewal must include the following:

• An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

• A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.* Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

History of Request

On November 16, 2021, NMFS issued an IHA to CJTV to take marine mammals incidental to the Parallel Thimble Shoal Tunnel Project in Virginia Beach, Virginia (86 FR 67024, November 24, 2021), effective from November 16, 2021 through November 15, 2022. On August 24, 2022, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal IHA, the activities for which incidental take is requested are nearly identical to, and a subset of, those covered in the initial authorization. The project has experienced delays and a portion of the work covered in the initial IHA will not be completed by the time it expires. As required, the applicant also provided a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

CTJV's planned activities include construction associated with the PTST project. Specifically, the location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the initial IHA. The precise details of the work planned under the renewal IHA are nearly identical to that described in the initial IHA; the planned work includes a subset of the initial activities, as well as some additional work that involves additional piles of identical type and driving methods as initially proposed. Details of the additional work are described below. The project consists of the construction of a two-lane parallel tunnel to the west of the existing Thimble Shoal Tunnel, connecting Portal Islands Nos. 1 and 2 of the Chesapeake Bay Bridge Tunnel (CBBT) facility which extends across the mouth of the Chesapeake Bay near Virginia Beach, Virginia. The PTST project will address existing constraints to regional mobility based on current traffic volume along the facility. Planned construction associated with the initial IHA included the driving of 764 piles over 252 days as shown below:

• 722 36-inch steel pipe piles;

• 42 42-inch steel pipe piles.

Of these planned activities, under the initial IHA CTJV installed a total of 423 36-inch pipe piles and 26 42-inch pipe piles, a total of 449 piles. The remaining 16 42-inch piles have been eliminated from the construction plan due to a change in design. This change includes the use of 163 additional 36-inch piles instead of the originally requested 42-inch piles. Remaining piles will be installed using impact driving, vibratory driving and drilling with down-the-hole (DTH) hammers. Some piles will be removed via vibratory hammer. Accounting for work conducted under the initial IHA and the design change resulting in an increase in total piles, CTJV plans to drive 462 piles over an estimated 206 days under this proposed renewal IHA.

The anticipated impacts are identical to those described in the initial IHA. NMFS anticipates the take of the same five species of marine mammal (harbor seal, gray seal, bottlenose dolphin, harbor porpoise, and humpback whale) by Level A and Level B harassment incidental to underwater noise resulting from construction associated with the proposed activities.

The following documents are referenced in this notice and include important supporting information:

• Initial final IHA (86 FR 67024, November 24, 2021);

• Initial proposed IHA (86 FR 56902, October 13, 2021); and

• 2021 IHA application, references cited, and previous public comments received (available at *www.fisheries.noaa.gov/national/*

marine-mammal-protection/incidental-take-authorizations-construction-activities).

Detailed Description of the Activity

The PTST project entails construction of a two lane parallel tunnel to the west of the existing Thimble Shoal Tunnel. In-water pile driving to create vessel moorings, temporary work trestles (Temporary dock on Portal Island 1, Roadway Trestle on Portal Island 1 and 2 and Omega Trestles on both Island to support Berm construction) and Support Of Excavation (SOE) walls on both islands will take place during the construction process. The 6,525 linear feet (ft.) (1,990 meters (m)) of new tunnel will be constructed with a top of tunnel depth/elevation of 100 ft. (30.5m) below Mean Low Water (MLW) within the width of the 1,000-ft (305 m)-wide navigation channel. Remaining proposed in-water activities to be covered under this Renewal include the following:

- *Mooring Piles and Dolphins:* 8 of 28 36-inch steel pipe piles remain to be installed at Portal Island No. 1. 16 of 16 36-inch steel pipe piles remain to be installed on Portal Island No. 2. Installation will be by vibratory hammer with a bubble curtain.
- *Two engineered berms:* A project design change has increased the number of piles installed on the East sides of both Portal Islands. On Portal Island No. 1 (East side), three 36-inch pipe piles remain to be installed. The number of 36-inch piles requested for this section has changed from 107 to 163 due to the project design change. On Portal Island No. 2 (East side), the number of requested 36-inch piles has changed from 134 to 201; no piles have yet been installed for this segment. There has been no change to the requested number of piles for the West side of either Portal Island. On the West side for Portal Island No. 1, 27 of 209 piles remain to be installed. On Portal Island No. 2 (West side) 188 of 204 36-inch steel pipe piles remain to be installed. Installation will be through impact and DTH methods with a specialized bubble curtain (see initial IHA application Appendix A).
- *Two temporary Omega trestles:* On Portal Island No. 1, all piles have been installed under the initial IHA. On Portal Island No. 2, a project design change has increased the number of requested 36-inch steel pipe piles from 24 to 37, and eliminated the need for 42-inch pipe piles. Nineteen of 37 36-inch steel pipe piles remain to be installed.

Some in-water construction activities would occur simultaneously. A detailed description of the construction activities for which authorization of take is proposed here may be found in the **Federal Register** notice of proposed IHA for the 2021 authorization (86 FR 56902, October 13, 2021). Location, timing (*e.g.,* seasonality), and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those analyzed in the initial IHA. The proposed IHA Renewal would be effective for a period of 1 year from the date of expiration of the initial IHA.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice for the proposed IHA for the initial authorization (86 FR 56902, October 13, 2021). Updated information regarding stock abundance was provided in the **Federal Register** notice announcing issuance of the initial IHA (86 FR 67024, November 24, 2021). NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. The 2021 Stock Assessment Report states that estimated abundance has decreased for the Western North Atlantic stock of harbor seals, from 75,834 (CV = 0.15) to 61,336 (CV = 0.08), based on an updated survey done in 2018.NMFS has preliminarily determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is proposed here may be found in the Notice of the Proposed IHA (86 FR 56902, October 13, 2021) for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** notice for the proposed and final initial IHAs (86 FR 56902, October 13, 2021; 86 FR 67024, November 24, 2021). Specifically, the source levels and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. CTJV conducted approximately 50 percent of the planned work and has replaced all remaining 42-inch piles with additional 36-inch piles. The approximate total number of operational days for this proposed renewal IHA is lower than the initial IHA. However, because the take numbers developed for most species for which take is proposed for authorization involve qualitative elements and because the reduction in total days would not result in a substantive decrease in the take number for bottlenose dolphin (*i.e.,* the only species for which a density-based approach to estimating take is used), we carry forward the take numbers unchanged for this proposed renewal IHA. The stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 1.

TABLE 1—ESTIMATED TAKE PROPOSED FOR AUTHORIZATION AND PROPORTION OF POPULATION POTENTIALLY AFFECTED

Species	Stock	Level A takes	Level B takes
Humpback whale	Gulf of Maine		12
Harbor porpoise	Gulf of Maine/Bay of Fundy	5	7
Bottlenose dolphin	WNA [1] Coastal, Northern Migratory		43,203
	WNA Coastal, Southern Migratory		43,203
	NNCES [2]		250
Harbor seal	Western North Atlantic	1,154	1,730

TABLE 1—ESTIMATED TAKE PROPOSED FOR AUTHORIZATION AND PROPORTION OF POPULATION POTENTIALLY AFFECTED—Continued

Species	Stock	Level A takes	Level B takes
Gray seal	Western North Atlantic	16	24

[1] Western North Atlantic;
[2] Northern North Carolina Estuarine System.

Preliminary monitoring data from November 16, 2021 to August 1, 2022 indicate that significantly fewer animals than predicted have been observed at the PTST location. Table 2 indicates the number of animals of each species sighted and the number recorded within the respective estimated harassment zones.

TABLE 2—SIGHTINGS AND RECORDED TAKES BY LEVEL A AND LEVEL B HARASSMENT BETWEEN NOVEMBER 16, 2021 AND AUGUST 1, 2022

	Total sightings	Within Level A zone	Within Level B zone
Humpback whale	2	0	0
Harbor porpoise	0	0	0
Bottlenose dolphin	419	0	166
Harbor seal	11	0	4
Gray seal	0	0	0

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (86 FR 67024, November 24, 2021), and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

- Avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions;
- Conduct training between construction supervisors and crews and the marine mammal monitoring team and relevant CTJV staff prior to the start of all pile driving and DTH activity and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood;
- 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;
- CTJV will establish and implement the shutdown zones indicated in Table 3. 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 typically vary based on the activity type and marine mammal hearing group;
- Employ Protected Species Observers (PSOs) and establish monitoring locations as described in the Marine Mammal Monitoring Plan and Section 5 of the initial IHA. The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all pile driving and removal, at least one PSO must be used. The PSO will be stationed as close to the activity as possible;
- The placement of the PSOs during all pile driving and removal and DTH activities will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone will not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected;
- Monitoring must take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine the shutdown zones clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made;
- If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal;
- CTJV must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must 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; and
- Use a bubble curtain during impact and vibratory pile driving and DTH in water depths greater than 3 m and ensure that it is operated as necessary to achieve optimal performance, and that no reduction in performance may be attributable to faulty deployment. At a minimum, CTJV must adhere to the following performance standards: The bubble curtain must distribute air bubbles around 100 percent of the piling circumference for the full depth of the water column. The lowest bubble ring must be in contact with the substrate for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent substrate contact. No parts of the ring or other objects shall prevent full substrate contact. Airflow to the bubblers must be balanced around the circumference of

the pile. For work with interlocking pipe piles for the berm construction a special three-sided bubble curtain will be used (see initial IHA Application Appendix A).

TABLE 3—SHUTDOWN ZONES (METERS) FOR EACH METHOD

Method and piles/day	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocids
DTH (3/day)	1230	50	200	150
DTH (6/day)	1950	70	200	150
Impact (4/day)	1010	40	200	150
Impact (6/day)	1320	50	200	150
Vibratory (4/day)	20	10	20	10
Impact + DTH	Use zones for each source alone			
DTH + Vibratory	1230	50	200	150
Impact + Vibratory	1320	50	200	150
Impact + DTH + DTH	1320	50	200	150
DTH + DTH+ Vibratory	1950	70	200	1050
DTH + Vibratory + Impact	1320	50	200	710
Impact + Impact + DTH	Use zones for each source alone			

Public Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (86 FR 56902, October 13, 2021) and solicited public comments on both our proposal to issue the initial IHA for CTJV's construction activities and on the potential for a renewal IHA, should certain requirements be met.

A single public comment was received and addressed in the notice announcing the issuance of the initial IHA (86 FR 67024, 24 November 2021) and did not specifically pertain to the renewal of the 2021 IHA.

Preliminary Determinations

The construction activities proposed by CTJV are nearly identical to those analyzed in the initial IHA, as are the method of taking and the effects of the action. The planned number of days of activity will be reduced given the completion of a substantial portion (approximately 50 percent) of the originally planned work. Additionally, the work at Portal Island No. 1 is nearly complete, with an estimated 11 days of work remaining. This significantly reduces the likelihood of three drills operating concurrently for the duration of the Renewal period, thus reducing the number of days where the largest impact zones would be present. The potential effects of CTJV's activities are limited to Level A and Level B harassment in the form of auditory injury and behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMFS determined that CTJV's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than one-third of the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) CTJV's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

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 IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to CTJV for conducting pile driving activities at the Thimble Shoal Tunnel in Virginia Beach, Virginia between 16 November 2022 and 15 November 2023, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: October 13, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–22620 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Weather.gov Visitor Experience Survey

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on July 19, 2022 (87 FR 43007) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic & Atmospheric Administration (NOAA), Commerce.

Title: Weather.gov Visitor Experience Survey.

OMB Control Number: 0648–XXXX.

Form Number(s): None.

Type of Request: Regular submission (new information collection).

Number of Respondents: 14,750.

Average Hours per Response: 10 Minutes.

Total Annual Burden Hours: 2,508.

Needs and Uses: The data collection is sponsored by DOC/NOAA/National Weather Service (NWS)/Office of Dissemination (DISS) in consultation with the NWS Communications Division. *Weather.gov* is the main entry point to National Weather Service (NWS) forecasts, warnings, and other information for a diverse user community, including the public, partners and emergency managers, academia, researchers, and employees. The user interface is intended to serve many purposes for these audiences.

The *Weather.gov* Survey is permitted under 15 U.S.C. ch. 111, Weather Research and Forecasting Information. It also advances the NWS Strategic Plan (2019–2022) ''Transformative Impact-Based Decision Support Services (IDSS) and Research to Operations and Operations to Research (R2O/O2R). The Survey also addresses the NWS Weather Ready Nation (WRN) Roadmap (2013) sections 1.1.1, 1.1.2, 1.1.3, 1.1.8, and 3.1.4.

The purpose of this collection is to help determine the appropriate web content for *Weather.gov* so the customer experience can be improved and the content can be better accessed and used. NWS is looking to improve functionality, ease of use, and formatting but feedback on any other areas of *Weather.gov* that NWS should consider updating is welcome as well. The collection will create a high-level data requirements document that identifies a set of high-priority NWS products, services, and observations that provide mission-critical, timely, and reliable information to make decisions with when seconds count. The document will also identify high-level partner requirements for accessibility (mobile versus desktop), timeliness, and reliability.

This information would be collected on a one-off basis and analyzed by Forrester Research, who has assisted NWS in creating a survey instrument and would provide NWS with a summary of findings, raw data and access to interactive ''dashboards'', or tools, to visualize the aggregated data. Respondents include the general public, defined as (adults ages 18+) who reside in the United States, as well as NWS partners. Forrester will oversee recruitment of U.S. adults by an online market research company that aggregates large panels of people who sign up to complete internet surveys. Respondents will be asked questions about their preferred way of getting weather information (including weather on regular days and during severe/hazardous weather), their use of *Weather.gov* and other weather websites, interest in different types of weather information on a website, priorities and preferences in accessing weather-related information online, and preferred format of receiving weather information. This data collection serves many purposes, including gaining a better understanding of the online weather information needs (including information about hazardous weather) of different customer groups, including historically underserved and socially vulnerable communities, how they prefer to receive this information, how they would like the main page of *Weather.gov* to be organized, what additional functionality they expect that would make them feel better prepared for hazardous weather, and has the potential to explore possible correlations and causal relationships with other observed variables of interest. This data will be used by the OSTI in NWS to develop a set of website content requirements to improve the structure and navigation on *Weather.gov*.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

Legal Authority: 15 U.S.C. ch. 111, Weather Research and Forecasting Information.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering the title of the collection.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2022–22624 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–KE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Solicitation for Members of the Ocean Exploration Advisory Board

AGENCY: Office of Oceanic and Atmospheric Research, (OAR) National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice; correction.

SUMMARY: NOAA is soliciting nominations for Indigenous, Tribal, Native American, Alaska Native, or Native Hawaiian stakeholders from the Alaska or Pacific Ocean basin regions to join the Ocean Exploration Advisory Board (OEAB). The purpose of the OEAB is to advise the NOAA Administrator on matters pertaining to ocean exploration including (1) priority areas for survey and discovery; (2) development of a five-year strategic plan for the fields of ocean, marine, and Great Lake science, (3) exploration and discovery; and, (4) the annual review of the NOAA Ocean Exploration Competitive Grants Program process.

DATES: The closing date for soliciting members for the notice published on

August 19, 2022 at 87 FR 51061 has been extended to November 18, 2022. Nominations should be sent to the email address specified below and must be received by November 18, 2022.

ADDRESSES: Applications should be submitted via email to Joanne Flanders: *joanne.flanders@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: David Turner, Ocean Exploration Advisory Board, Designated Federal Officer: (859) 327–9661; *david.turner@noaa.gov.*

SUPPLEMENTARY INFORMATION: The OEAB functions as an advisory board in accordance with the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. app., with the exception of section 14. It reports to the NOAA Administrator, as directed by 33 U.S.C. 3405 and is provided staffing and other support by the NOAA Office of Ocean Exploration and Research.

At this time, NOAA is soliciting applications to fill up to two vacancies on the OEAB from individuals demonstrating expertise and experience in areas that include scientific research relevant to ocean exploration, ocean engineering, data science, deep ocean biology, geology, oceanography, marine archaeology, or ocean-science education and communication. NOAA will give particular consideration to applications from Indigenous, Tribal, Native American, Alaska Native, or Native Hawaiian stakeholders from the Alaska or Pacific Ocean basin regions, as such stakeholders' input will be valuable in generating advice specific to those regions and stakeholders. Individuals with expertise in other NOAA ocean exploration areas are also welcome to apply, as well as representatives of other federal agencies involved in ocean exploration. The OEAB members will serve a three-year term with the possibility of one renewal for an additional three-year term. The Board meets two to three times a year.

Composition and Points of View: The OEAB consists of approximately 10 members, including a chair and co-chair(s), designated by the NOAA Administrator in accordance with FACA requirements and the terms of the approved OEAB *Charter* and *Balance Plan.* OEAB members represent government agencies, the private sector, academic institutions, not-for-profit, and other institutions involved in all facets of ocean exploration—from advanced technology to citizen exploration. As a Federal Advisory Committee, OEAB membership is required to be balanced in terms of viewpoints represented and the functions to be performed as well as including the interest of geographic regions of the country and the diverse sectors of our society.

The OEAB was established: To advise the NOAA Administrator on priority areas for survey and discovery; assist the program in the development of a five-year strategic plan for the fields of ocean, marine, and Great Lakes science, exploration, and discovery; annually review the quality and effectiveness of the proposal review process established under section 12003(a)(4); and provide other assistance and advice as requested by the Administrator. In addition to advising NOAA leadership, NOAA expects the OEAB to help to define and develop a national program of ocean exploration—a network of U.S. stakeholders and partnerships advancing national priorities for ocean exploration.

OEAB members are appointed as Special Government Employees (SGEs) and will be subject to the ethical standards applicable to SGEs. Members are reimbursed for actual and reasonable expenses incurred in performing such duties, including travel costs, but will not be reimbursed for their time. All OEAB members serve at the discretion of the NOAA Administrator.

For more information about the OEAB, visit *https://oeab.noaa.gov.*

Although the OEAB reports directly to the NOAA Administrator, it is provided staffing and other support from the NOAA Office of Ocean Exploration and Research which is part of the Office of Oceanic and Atmospheric Research (OAR). NOAA Ocean Exploration and Research is the only U.S. federal organization dedicated to exploring the deep ocean and the program:

- Explores the ocean to make discoveries of scientific, economic, and cultural value, with priority given to the U.S. Exclusive Economic Zone and Extended Continental Shelf;
- Promotes technological innovation to advance ocean exploration;
- Provides public access to data and information;
- Encourages the next generation of ocean explorers, scientists, and engineers; and
- Expands the national ocean exploration program through partnerships.

For more information about the NOAA Office of Ocean Exploration and Research, visit *https://oceanexplorer.noaa.gov.*

Nominations: Interested persons may nominate themselves or third parties.

Applications: An application is required to be considered for Board 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 including mailing address, email address, and telephone number; (2) a resume (maximum length four [4] pages); and (3) a cover letter that includes a description of their qualifications relative to the kinds of advice being solicited by NOAA in this Notice.

Privacy Act Statement

Authority. The collection of information concerning nominations to the OEAB is authorized under the FACA, as amended, 5 U.S.C. app. and its implementing regulations, 41 CFR part 102–3, and in accordance with the Privacy Act of 1974, as amended, (Privacy Act) 5 U.S.C. 552a.

Purpose. The collection of names, contact information, resumes, professional information, and qualifications is required in order for the Under Secretary to appoint members to the OEAB.

Routine Uses. NOAA will use the nomination information for the purpose set forth above. The Privacy Act of 1974 authorizes disclosure of the information collected to NOAA staff for work-related purposes and for other purposes only as set forth in the Privacy Act and for routine uses published in the Privacy Act System of Records Notice COMMERCE/DEPT–11, Candidates for Membership, Members, and Former Members of Department of Commerce Advisory Committees, available at *https://www.osec.doc.gov/opog/PrivacyAct/SORNs/dept-11.htm,* and the System of Records Notice COMMERCE/DEPT–18, Employees Personnel Files Not Covered by Notices of Other Agencies, available at *https://www.osec.doc.gov/opog/PrivacyAct/SORNs/DEPT-18.htm.*

Disclosure. Furnishing the nomination information is voluntary; however, if the information is not provided, the individuals would not be considered for appointment as a member of the OEAB.

David Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2022–22574 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2022–0027]

Expanding Admission Criteria for Registration To Practice in Patent Cases Before the United States Patent and Trademark Office

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments.

SUMMARY: This request for comments seeks public input on the scientific and technical requirements to practice in patent matters before the United States Patent and Trademark Office (USPTO or Office). Specifically, the Office seeks input on whether it should revise the scientific and technical criteria for admission to practice in patent matters to require the USPTO to periodically review certain applicant degrees on a predetermined timeframe, and make certain modifications to the accreditation requirement for computer science degrees. This request for comments also seeks input on whether the creation of a separate design patent practitioner bar would be beneficial to the public and the Office, whether to add clarifying instructions to the General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United States Patent and Trademark Office (GRB) for limited recognition applicants, and whether the Office should make any additional updates to the scientific and technical requirements for admission to practice in patent matters. The USPTO is undertaking this effort as part of its continual review of the admission criteria for sitting for the registration examination.

DATES: Comment Deadline: Written comments must be received on or before January 17, 2023.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov*. To submit comments via the portal, one should enter docket number PTO–P–2022–0027 on the homepage and click ''Search.'' The site will provide search results listing all documents associated with this docket. Commenters can find a reference to this notice and click on the ''Comment'' icon, complete the required fields, and enter or attach their comments. Attachments to electronic comments will be accepted in portable document format (PDF) or DOCX format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of and access to comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Will Covey, Deputy General Counsel and Director, Office of Enrollment and Discipline (OED), at 571–272–4097 or *oed@uspto.gov*.

SUPPLEMENTARY INFORMATION:

Summary

In this request for comments, the USPTO seeks feedback and information on revising the scientific and technical criteria to practice in patent matters before the Office, whether the instructions to applicants for limited recognition should be clarified, and whether the Office should establish a separate design patent practitioner bar.

Background

The Director of the USPTO has statutory authority to require a showing by patent practitioners that they possess ''the necessary qualifications to render applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.'' 35 U.S.C. 2(b)(2)(D). Courts have determined that the USPTO Director bears the primary responsibility for protecting the public from unqualified practitioners. *See Hsuan-Yeh Chang* v. *Kappos,* 890 F. Supp. 2d 110, 116–17 (D.D.C. 2012) (''Title 35 vests the [Director of the USPTO], not the courts, with the responsibility to protect [US]PTO proceedings from unqualified practitioners.'') (quoting *Premysler* v. *Lehman,* 71 F.3d 387, 389 (Fed. Cir. 1995)), aff'd sub nom., *Hsuan-Yeh Chang* v. *Rea,* 530 F. App'x 958 (Fed. Cir. 2013).

Pursuant to that authority and responsibility, the USPTO has promulgated regulations, administered by OED, that provide that registration to practice in patent matters before the USPTO requires a practitioner to demonstrate possession of ''the legal, scientific, and technical qualifications necessary for him or her to render applicants valuable service.'' 37 CFR 11.7(a)(2)(ii).[1] The Office determines whether an applicant possesses the legal qualification by administering a registration examination, which applicants must pass before being admitted to practice. *See* 37 CFR 11.7(b)(ii). To take the registration exam, applicants must first demonstrate they possess specific scientific and technical qualifications. The USPTO sets forth guidance for establishing possession of these scientific and technical qualifications in the GRB, which is available at *www.uspto.gov/sites/default/files/documents/OED_GRB.pdf*. The GRB also contains the ''Application for Registration to Practice before the United States Patent and Trademark Office.''

The criteria for practicing before the Office are based in part on a determination of the types of scientific and technical qualifications and legal knowledge that are essential for practitioners to possess. This helps ensure that only competent practitioners who understand the applicable rules and regulations and have the background necessary to describe inventions in a full and clear manner are permitted to practice.

Presently, there is only one patent bar that applies to those who practice in patent matters before the Office, including in the utility and design patent areas. The same scientific and technical requirements for admission to practice apply regardless of the type of patent application (*i.e.,* whether the application is a utility patent application or a design patent application).

Request for Public Comments

The USPTO seeks written comments from the public on the scientific and technical requirements for admission to practice in patent matters, including whether there should be separate requirements for practitioners who intend to only prosecute design patent applications (*i.e.,* whether the Office should establish a separate design patent bar). In addition, the Office seeks comments on whether the instructions to applicants for limited recognition in patent matters should be clarified.

The USPTO welcomes any comments from the public on the proposals covered in this notice as well as responses to specific questions posed at the end of this notice. The Office also

[1] Legal representation before Federal agencies is generally governed by the provisions of 5 U.S.C. 500. However, that statute provides a specific exception for representation in patent matters before the USPTO. 5 U.S.C. 500(e). *See* 35 U.S.C. 2(b)(2)(D) (formerly 35 U.S.C. 31).

welcomes any other comments related to the subject matter of this notice.

Request 1: Require the USPTO To Periodically Review Applicant Degrees and Add Commonly Accepted Category B Degrees to Category A on a Predetermined Timeframe

The USPTO has evaluated, and continues to evaluate, the scientific and technical qualifications set forth in the GRB. These evaluations seek to clarify guidance on what will satisfy the scientific and technical qualifications and to identify possible areas of improved administrative efficiency.

The GRB lists three categories of scientific and technical qualifications that typically make one eligible for admission to the registration examination: (1) Category A, for specified bachelor's, master's, and Ph.D. degrees; (2) Category B, for other bachelor's, master's, and Ph.D. degrees with technical and scientific training; and (3) Category C, for individuals who rely on practical engineering or scientific experience and have passed the Fundamentals of Engineering test. If an applicant for registration does not qualify under any of the categories listed in the GRB, the USPTO will conduct an independent review for compliance with the scientific and technical qualifications.

Starting in early 2020, the Office undertook a review of Category B applications to identify bachelor's degrees that are routinely accepted as demonstrating the requisite scientific and technical qualifications. In September 2021, the Office added 14 of these degrees, which were previously evaluated under the criteria listed in Category B, to Category A. The review of degrees is ongoing and is currently based on applicant data from those applying for the registration exam. Category A is not an exhaustive list of all degrees that would qualify, and the USPTO's current practice is to accept degrees when the accompanying transcript demonstrates equivalence to a Category A degree (for example, molecular cell biology may be equivalent to biology).

The Office is considering whether, given the fast pace at which technology and related teachings evolve, it should periodically review commonly accepted Category B degrees and add them to Category A. These reviews would seek to clarify guidance on what would satisfy the scientific and technical qualifications, would improve administrative efficiency, and would simplify the application process for aspiring practitioners. For example, the USPTO could conduct such reviews on a three-year cycle. This timeframe would provide adequate time for the USPTO to gather, review, and analyze the degree data from a sufficient number of applicants for the registration exam. The Office invites comments on the proposed predetermined timeframe and whether the review should be based on any other criteria. If other criteria are suggested, the Office requests detailed information on why the specific criteria are recommended and any data that would be relied on in analyzing the criteria.

Request 2: Modify the Accreditation Requirement for Computer Science Degrees Under Category A To Accept Bachelor of Science Computer Science Degrees

Currently, under Category A, the USPTO accepts computer science degrees accredited by the Computer Science Accreditation Commission (CSAC) of the Computing Sciences Accreditation Board (CSAB), or by the Computing Accreditation Commission (CAC) of the Accreditation Board for Engineering and Technology (ABET), on or before the date the degree was awarded. Computer science degrees that are so accredited may be found on the internet (*www.abet.org*).

The USPTO requests input on whether the accreditation requirement for computer science degrees should be modified to accept under Category A Bachelor of Science degrees in computer science awarded by an accredited United States college or university, regardless of the ABET accreditation status of the program. Under this modification, Bachelor of Arts degrees in computer science may still qualify an applicant to sit for the examination under Category B. The Office requests that any commenters also include the rationale, data, and/or reasons for modifying the requirement.

Request 3: Possible Creation of a Separate Design Patent Practitioner Bar

The USPTO is considering whether a separate design patent practitioner bar would be beneficial to the public and the Office, along with possible options for creating and implementing it. To that end, the Office requests input on whether a design patent practitioner bar, in which admitted design practitioners would practice solely in design patent matters, should be established. The potential creation of a design patent practitioner bar would not impact the ability of those already registered to practice in any patent matters, including design patent matters, before the USPTO. It would also not impact the ability of applicants who meet the current criteria, including qualifying for and passing the current registration exam, to practice in any patent matters before the Office.

Options for implementing a design patent practitioner bar include requiring design patent practitioner bar applicants to:

(1) take the current registration examination, but with modified scientific and technical requirements;

(2) be a U.S. attorney (*i.e.,* an active member in good standing of the bar of the highest court of any State); or

(3) take a separate design bar examination instead of the current registration examination.

The USPTO seeks input on which of the three options, or combinations of the three options, would be most appropriate for establishing a design patent practitioner bar, including any rationale, data, and specific criteria associated with the recommended option(s). For example, if a commenter recommends a particular option, the Office seeks input on why that option was recommended over the other options; what data the commenter relied on in selecting that option, if any; and what criteria would be appropriate in executing the option. Furthermore, the Office notes that design patent examiners typically have one of the following degrees: industrial design, product design, architecture, applied arts, graphic design, fine/studio arts, or art teacher education. The Office seeks input on whether design bar applicants should have one of these degrees, or other particular degrees.

Any of the three options presented above could require regulatory, Manual of Patent Examining Procedure (MPEP) and GRB changes; training of the examining corps; updates to information technology systems; and workflow changes within the Office. Depending on the option(s) chosen, timing and costs could vary significantly. Additionally, option (3) would require the creation of an entirely new examination.

The USPTO also requests any additional comments that would be useful in deciding whether to create and implement a design patent practitioner bar, and if so, how it should be implemented. For example, the Office is interested in any additional options not described above, as well as how such options could potentially be implemented, the reasoning for such options, and any data or research the commenter relied on in postulating the options.

Request 4: Clarifying Instructions in the GRB for Limited Recognition Applicants

The USPTO requests input on whether the following instructions should be added to the GRB to aid limited recognition applicants in applying for recognition. These instructions would not change the process by which applicants for limited recognition apply for recognition. Rather, the Office seeks to clarify the process for applicants. These instructions would be inserted on page 7 of the GRB, under Section E.

E. ELIGIBILITY OF ALIENS: No grant of registration except under 37 CFR 11.6(c). An applicant who is not a United States citizen and does not reside in the U.S. is not eligible for registration except as permitted by 37 CFR 11.6(c). Presently, the Canadian Intellectual Property Office is the only patent office recognized as allowing substantially reciprocal privileges to those admitted to practice before the USPTO. The registration examination is not administered to aliens who do not reside in the United States.

Limited recognition to practice before the Office in patent matters. An alien residing in the United States may apply for limited recognition to practice before the Office in patent matters pursuant to 37 CFR 11.9(b). To be admitted to take the examination, an applicant must fulfill the requirements as stated above in Section III and 37 CFR 11.9(b), which includes that establishing that such recognition is consistent with the capacity of employment authorized by United States immigration authorities, for example the United States Citizenship and Immigration Services (USCIS), United States Department of State, U.S. Customs and Border Patrol, and the U.S. Department of Labor. The evidence establishing such consistency must demonstrate: (1) the applicant's authorization to reside in the United States, and (2) the applicant's authorization to work or be trained in the United States. It must include a copy of both sides of any work or training authorization and copies of *all* documents submitted to and received from the immigration authorities regarding admission to the United States, and a copy of any documentation submitted to the U.S. Department of Labor. This may include a complete copy of the application for a particular immigration status, the application for a work or training permit, and/or any approved notices related thereto.

Qualifying documentation should specifically show that the immigration authorities have authorized the applicant to be employed or trained in the capacity of representing patent applicants before the USPTO by preparing and prosecuting their patent applications. Any approval that is pending at the time the application is submitted will result in the applicant being denied admission to the examination.

A qualifying alien within the scope of 8 CFR 274a.12(b) or (c) is not registered upon passing the examination. Therefore, such qualifying aliens will not be patent attorneys or patent agents. Rather, such an applicant will be given limited recognition under 37 CFR 11.9(b) if recognition is consistent with the capacity of employment or training authorized by immigration authorities. Documentation establishing an applicant's qualification to receive limited recognition must be submitted with the applicant's application.

Request 5: General Request for Additional Suggestions on Updating the Scientific and Technical Requirements for Admission To Practice in Patent Matters

Lastly, the USPTO invites any additional comments on updating the scientific and technical requirements for admission to practice in patent matters. For example, the Office is interested in any additional suggestions not described above, as well as how such suggestions could potentially be implemented, the reasoning for such suggestions, and any data or research the commenter relied on in postulating the suggestions. When offering suggestions, please reference the applicable rules and/or section in the GRB that may be impacted.

Questions Regarding Admission Requirements To Practice in Patent Matters Before the USPTO

As noted above, the USPTO welcomes comments from the public on proposed updates to the scientific and technical requirements for admission to practice in patent matters. The Office is particularly interested in the public's input on the questions below; commenters can address any or all of the questions or provide additional comments:

1. Should the Office review applicant degrees and add commonly accepted Category B degrees to Category A on a predetermined timeframe, *e.g.,* every three years?

2. Should the Office accept Bachelor of Science degrees in computer science under Category A from an accredited United States college or university regardless of whether the degree program is ABET accredited?

3. Should the Office create a separate design patent practitioner bar, and if so, which option(s) and what criteria should be implemented for its creation?

4. Should the Office add clarifying instructions to the GRB for limited recognition applicants?

5. Should the Office implement any additional updates to the scientific and technical requirements for admission to practice in patent matters, and if so, what should those include?

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2022–22569 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Cooperation Treaty

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on June 7, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: Patent Cooperation Treaty.

OMB Control Number: 0651–0021.

Needs and Uses: This collection of information is required by the provisions of the Patent Cooperation Treaty (PCT), which became operational in June 1978 and is administered by the International Bureau (IB) of the World Intellectual Property Organization (WIPO) in Geneva, Switzerland. The provisions of the PCT have been implemented by the United States in Part IV of Title 35 of the U.S. Code (Chapters 35–37) and Subpart C of Title 37 of the Code of Federal Regulations (37 CFR 1.401–1.499). The purpose of the PCT is to provide a standardized

filing format and procedure that allows an applicant to seek protection for an invention in several countries by filing one international application in one location, in one language, and paying one initial set of fees.

The information in this collection is used by the public to submit a patent application under the PCT and by the United States Patent and Trademark Office (USPTO) to fulfill its obligation to process, search, and examine the application as directed by the treaty. The filing, search, written opinion, and publication procedures are provided for in Chapter I of the PCT. Additional procedures for a preliminary examination of PCT international applications are provided for in optional PCT Chapter II. Under Chapter I, an applicant can file an international application in the national or home office (Receiving Office (RO)) or the IB. The USPTO acts as the United States Receiving Office (RO/US) for international applications filed by residents and nationals of the United States. These applicants send most of their correspondence directly to the USPTO, but they may also file certain documents directly with the IB. The USPTO serves as an International Searching Authority (ISA) to perform searches and issues an international search report (ISR) and a written opinion (WOISA) on international applications. The USPTO also issues an international preliminary report on patentability (IPRP Chapter II) when acting as an International Preliminary Examining Authority (IPEA).

The RO reviews the application and, if it contains all of the necessary information, assigns a filing date to the application. The RO maintains the home copy of the international application and forwards the record copy of the application to the IB and the search copy to the ISA. The IB maintains the record copy of all international applications and publishes them 18 months after the earliest priority date, which is the earliest date for which a benefit is claimed. The ISA performs a search to determine whether there is any prior art relevant to the claims of the international application and will issue an international search report and written opinion as to whether each claim is novel, involves an inventive step, and is industrially applicable. The ISA then forwards the international search report and written opinion to the applicant and the IB. The IB will normally publish the application and search report 18 months after the priority date, unless early publication is requested by the applicant. Until international publication, no third person or national or regional office is allowed access to the international patent application unless so requested or authorized by the applicant. If the applicant wishes to withdraw the application (and does so before international publication), international publication does not take place.

Under optional Chapter II of the Treaty, an applicant who has filed an international application in a RO must file a demand for an international preliminary examination of the application by an IPEA, such as the USPTO. The filing of a Demand must be filed within a prescribed time period. It involves filing a form and paying certain fees. A Demand is usually filed with amendments and/or arguments under PCT Article 34 addressing objections raised in the WOISA. The International preliminary examination is a second evaluation of the potential patentability of the claimed invention (usually the claims have been amended), using the same standards on which the written opinion of the ISA was based. A copy of the examination report is sent to the applicant and to the IB. The IB then forwards a copy of the examination report to each Office elected by the applicant.

Form Number(s): (IB = International Bureau; IPEA = International Preliminary Examination; RO = Receiving Office; SB = Specimen Book).

- PCT/IB/372 (Notice of Withdrawal)
- PCT/IPEA/401 (Demand and Fee Calculation Sheet)
- PCT/RO/101 (Request and Fee Calculation Sheet)
- PCT/RO/134 (Indications Relating to Deposited Microorganism or Other Biological Material)
- PTO–1382 (Transmittal Letter to the United States Receiving Office (RO/US))
- PTO–1390 (Transmittal Letter to the United States Designated/Elected Office (DO/E.O./US) Concerning a Filing Under 35 U.S.C. 371)
- PTO/SB/64/PCT (Petition for Revival of an International Application for Patent Designating the U.S. Abandoned Unintentionally Under 37 CFR 1.137(b))

Type of Review: Extension and revision of a currently approved information collection.

Affected Public: Private sector; individuals or households.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Estimated Number of Annual Respondents: 420,816 respondents.

Estimated Number of Annual Responses: 420,816 responses.

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public between approximately 0.25 hours (15 minutes) and 4 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 358,269 hours.

Estimated Total Annual Respondent Non-Hourly Cost Burden: $367,468,923.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Commerce, USPTO information collections currently under review by OMB.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0021.

Further information can be obtained by:

- *Email: InformationCollection@uspto.gov.* Include ''0651–0021 information request'' in the subject line of the message.
- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Justin Isaac,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2022–22566 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2022–0032]

Expanding Opportunities To Appear Before the Patent Trial and Appeal Board

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments.

SUMMARY: In this request for comments, the United States Patent and Trademark Office (USPTO or Office) seeks public input on the requirements to practice before the Patent Trial and Appeal Board (PTAB or Board). The Office

seeks to ensure quality representation in PTAB proceedings under the Leahy-Smith America Invents Act (AIA) without creating undue restrictions or barriers to entry for practitioners wishing to appear before the PTAB. The Office's goal is to expand the admission criteria to practice before the PTAB so more Americans, including those from traditionally under-represented and under-resourced communities, can participate in Office practice, while maintaining the Office's high standards necessary for the issuance and maintenance of robust and reliable intellectual property rights.

DATES: Comment Deadline: Written comments must be received on or before January 17, 2023.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, one should enter docket number PTO–P–2022–0032 on the homepage and click ''Search.'' The site will provide a search results page listing all documents associated with this docket. Commenters can find a reference to this notice and click on the ''Comment'' icon, complete the required fields, and enter or attach their comments. Attachments to electronic comments will be accepted in portable document format (PDF) or DOCX format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of and access to comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Michael Tierney, Vice Chief Administrative Patent Judge; Scott Moore, Lead Administrative Patent Judge; and/or Jamie Wisz, Lead Administrative Patent Judge; at 571–272–9797.

SUPPLEMENTARY INFORMATION:

Summary

In this request for comments, the USPTO seeks feedback and information on revising the criteria to practice before the PTAB in proceedings under the AIA. The Office is also exploring changes or improvements to training and development programs, such as the PTAB's Legal Experience and Advancement Program (LEAP), to increase opportunities for practitioners who wish to appear before the PTAB.

Background

Rules Currently Governing Practice Before the PTAB in AIA Proceedings

The Director of the USPTO has statutory authority to require a showing by patent practitioners that they possess ''the necessary qualifications to render applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.'' 35 U.S.C. 2(b)(2)(D). Thus, courts have determined that the USPTO Director bears the primary responsibility for protecting the public from unqualified practitioners. *See Hsuan-Yeh Chang* v. *Kappos,* 890 F. Supp. 2d 110, 116–17 (D.D.C. 2012) (''Title 35 vests the [Director of the USPTO], not the courts, with the responsibility to protect [US]PTO proceedings from unqualified practitioners.'') (quoting *Premysler* v. *Lehman,* 71 F.3d 387, 389 (Fed. Cir. 1995)), aff'd sub nom., *Hsuan-Yeh Chang* v. *Rea,* 530 F. App'x 958 (Fed. Cir. 2013).

Pursuant to that authority and responsibility, the USPTO has promulgated regulations, administered by the Office of Enrollment and Discipline (OED), that provide that registration to practice in patent matters before the USPTO requires a practitioner to demonstrate possession of ''the legal, scientific, and technical qualifications necessary for him or her to render applicants valuable service.'' 37 CFR 11.7(a)(2)(ii).[1] The USPTO determines whether an applicant possesses the legal qualification by administering a registration examination, which applicants must past before being admitted to practice. *See* 37 CFR 11.7(b)(ii). The USPTO sets forth guidance for establishing possession of scientific and technical qualifications in the General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United States Patent and Trademark Office (GRB). The GRB is available at *www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.* The GRB also contains the ''Application for Registration to Practice before the United States Patent and Trademark Office.''

The rules that currently govern practice before the PTAB in AIA proceedings differ somewhat from the rules that govern other types of USPTO proceedings. In an AIA proceeding, 37 CFR 42.10(a) requires that each represented party designate a lead counsel and at least one back-up counsel. The regulation requires that the lead counsel be a registered practitioner. The regulation allows non-registered practitioners to be back-up counsel, but only ''where the lead counsel is a registered practitioner'' and when ''a motion to appear *pro hac vice* by counsel who is not a registered practitioner [is] granted upon showing that counsel is an experienced litigating attorney and has an established familiarity with the subject matter at issue in the proceeding.'' *Id.*

The Board typically requires that *pro hac vice* motions be filed in accordance with the ''Order Authorizing Motion for *Pro Hac Vice* Admission'' in *Unified Patents, Inc.* v. *Parallel Iron, LLC,* IPR2013–00639, Paper 7 (PTAB Oct. 15, 2013) (the *Unified Patents* Order). The *Unified Patents* Order requires that a motion for *pro hac vice* admission must:

a. Contain a statement of facts showing there is good cause for the Board to recognize counsel *pro hac vice* during the proceeding[; and]

b. Be accompanied by an affidavit or declaration of the individual seeking to appear attesting to the following:

i. Membership in good standing of the Bar of at least one State or the District of Columbia;

ii. No suspensions or disbarments from practice before any court or administrative body;

iii. No application for admission to practice before any court or administrative body ever denied;

iv. No sanctions or contempt citations imposed by any court or administrative body;

v. The individual seeking to appear has read and will comply with the Office Patent Trial Practice Guide and the Board's Rules of Practice for Trials set forth in part 42 of 37 CFR;

vi. The individual will be subject to the USPTO Rules of Professional Conduct set forth in 37 CFR 11.101 *et. seq.* and disciplinary jurisdiction under 37 CFR 11.19(a);

vii. All other proceedings before the Office for which the individual has applied to appear *pro hac vice* in the last three years; and

viii. Familiarity with the subject matter at issue in the proceeding.

Id. at 3. If the affiant or declarant is unable to provide any of the information

[1] Legal representation before Federal agencies is generally governed by the provisions of 5 U.S.C. 500. However, that statute provides a specific exception for representation in patent matters before the USPTO. 5 U.S.C. 500(e). *See* 35 U.S.C. 2(b)(2)(D) (formerly 35 U.S.C. 31).

requested above or make any of the required statements or representations under oath, the *Unified Patents* Order requires that the individual provide a full explanation of the circumstances as part of the affidavit or declaration. *Id.* at 4.

The PTAB's Legal Experience and Advancement Program

LEAP is an existing PTAB program developed by the USPTO to provide training and oral advocacy opportunities for less experienced advocates to gain practical experience in proceedings before the PTAB. LEAP is open to both registered and non-registered practitioners who have had three or fewer substantive oral arguments in any federal tribunal, including the PTAB. LEAP encourages parties to offer opportunities to LEAP practitioners by offering up to 15 minutes of additional oral argument time to parties that allow a LEAP practitioner to present substantive arguments at a PTAB oral hearing. To further incentivize parties and ensure high-quality representation, LEAP allows more experienced counsel to assist a LEAP practitioner during oral arguments, or clarify statements made by the LEAP practitioner, if needed. The PTAB also offers additional training and development opportunities to LEAP practitioners, including oral argument training and the opportunity to participate in a mock oral hearing before a panel of PTAB judges.

Request for Public Comments

The USPTO seeks written comments from the public on whether and how the PTAB's rules and procedures should be modified to expand eligibility to appear as the lead or back-up counsel in AIA proceedings. The USPTO also seeks written comments on whether and how changes should be made to PTAB training and development programs, such as LEAP, in order to expand opportunities for practitioners who seek to appear before the PTAB.

The USPTO welcomes any comments from the public on the proposals covered in Requests 1–4 in this notice. The USPTO also poses specific questions below and invites public feedback on them.

Request 1: Expanding Opportunities To Practice Before the PTAB by Allowing Non-Registered Practitioners To Be Admitted To Practice Before the PTAB

The PTAB's current rules and procedures seek to ensure quality representation in AIA proceedings by requiring that any non-registered practitioners be admitted *pro hac vice* in each AIA proceeding in which they appear, and demonstrate good cause (*e.g.,* that they are experienced litigation attorneys who have established familiarity with the subject matter at issue in an AIA proceeding). The USPTO is considering changes to PTAB rules and procedures that maintain the quality of representation while removing undue restrictions and actual or perceived barriers for practitioners who wish to appear before the PTAB in AIA trial proceedings.

Under current PTAB rules, a non-registered practitioner can only appear in an AIA proceeding if the PTAB grants a *pro hac vice* motion. *See* 37 CFR 42.10(c) (''The Board may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause, subject to the condition that lead counsel be a registered practitioner and to any other conditions as the Board may impose.''). For example, if a party desired to be represented in an AIA proceeding by a non-registered litigation attorney, the party would file a *pro hac vice* motion. The motion would typically include a statement of facts demonstrating good cause. For example, the statement of facts might demonstrate that the individual seeking admission *pro hac vice* was an experienced litigation attorney who had an established familiarity with the subject matter at issue in the proceeding. The motion would also typically be accompanied by a declaration or affidavit of the type described in the *Unified Patents* Order. If the non-registered attorney were admitted *pro hac vice,* PTAB rules would limit that individual to serving as back-up counsel and require that a registered practitioner serve as the lead counsel.

The USPTO is considering an additional procedure by which non-registered practitioners could be admitted to practice before the PTAB, much like the procedure in which certain district courts allow both *pro hac vice* admissions and general admissions to the court. The USPTO invites input on whether a non-registered practitioner should be required to satisfy only the fitness-to-practice standards set forth in the *Unified Patents* Order (*e.g.,* no prior suspensions or disbarments, no prior sanctions or contempt citations, familiarity with the PTAB's rules and Trial Practice Guide) or additional standards for admission to practice before the PTAB. The USPTO also invites comments on whether a non-registered practitioner, such as one without a certain level of experience in AIA proceedings, should be required to undergo additional training before being admitted to practice before the PTAB. Additionally, the USPTO invites comments on whether a non-registered practitioner should be required to have experience beyond that required to demonstrate good cause for *pro hac vice* admission (*e.g.,* having served as back-up counsel in a certain number of prior AIA proceedings) before being admitted to practice before the PTAB. To the extent that additional training and/or experience is suggested, the USPTO requests detailed information regarding the benefits of requiring such training and/or experience, as well as the impacts of that requirement.

Request 2: Expanding Opportunities for Non-Registered Practitioners To Appear as the Lead Counsel

Under current PTAB rules, non-registered practitioners can only serve as back-up counsel; a registered practitioner must serve as the lead counsel. *See* 37 CFR 42.10(c) (''The Board may recognize counsel *pro hac vice* during a proceeding upon a showing of good cause, subject to the condition that lead counsel be a registered practitioner and to any other conditions as the Board may impose.'').

The USPTO invites comments on whether and how the USPTO should revise the PTAB's rules and procedures to permit a non-registered practitioner who is admitted to practice before the PTAB under Request 1, or is admitted *pro hac vice* in an AIA proceeding, to serve as the lead counsel in that proceeding. The USPTO invites input on whether a non-registered practitioner, who wishes to serve at the lead counsel, should be required to satisfy not only the fitness-to-practice standards set forth in the *Unified Patents* Order (*e.g.,* no prior suspensions or disbarments, no prior sanctions or contempt citations, familiarity with the PTAB's rules and Trial Practice Guide), but should be required to undergo additional training. In addition, the USPTO invites comments on whether a non-registered practitioner should be required to have experience beyond that required to demonstrate good cause for *pro hac vice* admission (*e.g.,* having served as back-up counsel in a certain number of prior AIA proceedings) before being permitted to serve as the lead counsel in an AIA proceeding. To the extent that additional training and/or experience is suggested, the USPTO requests detailed information regarding the benefits that would result from requiring such training and/or experience, as well as any impacts.

Request 3: Other Considerations Regarding Non-Registered Practitioners

Requests 1 and 2 above are directed to potential modifications to PTAB rules and procedures related to non-registered practitioners. Such non-registered practitioners may have less familiarity than registered practitioners with certain matters that may arise during AIA proceedings. For example, a non-registered practitioner may have less familiarity with issues that may arise in a motion to amend, and may not be aware of specific reissue and reexamination options that might be available to a patent owner. Accordingly, the USPTO invites comments on whether any rule permitting a non-registered practitioner to be admitted to practice before the PTAB and/or to appear as the lead counsel in an AIA proceeding should also require that the non-registered practitioner be accompanied by a registered practitioner as back-up counsel. The USPTO also invites comments on the impact on the costs of an AIA proceeding that would result from requiring that the lead or back-up counsel be a registered practitioner.

The USPTO also recognizes that circumstances may change during the course of an AIA proceeding in a way that might create a need for the services of a registered practitioner. For example, the assistance of a registered practitioner might be valuable if the patent owner contemplates or files a motion to amend. Therefore, the USPTO invites comments on whether any rule that permits a party to be represented solely by a non-registered practitioner in an AIA proceeding should require that party to subsequently retain a registered practitioner as back-up counsel upon the occurrence of certain circumstances or events.

The types of changes discussed and contemplated above may represent notable modifications to the rules and procedures that currently govern practice before the PTAB in AIA proceedings. The impacts of these types of changes may be difficult to anticipate beforehand, and may not be apparent to the USPTO or the public until well after any such changes are implemented. Accordingly, it may be desirable for the USPTO to retain flexibility to modify or refine any of the changes contemplated in this notice before they become permanent. Therefore, the USPTO invites comments on whether any of the changes to PTAB rules and procedures discussed in this notice should, if adopted, be implemented initially as a pilot program.

Request 4: Training and Development Programs and Potential Changes to LEAP

The USPTO is interested in offering training and development programs that will expand opportunities for practitioners desiring to practice before the PTAB, and thereby further the USPTO's goal of enabling more Americans to participate in the innovation ecosystem. The PTAB's LEAP is an example of such a program. As discussed above, LEAP practitioners benefit from specialized training and are given the opportunity to present mock oral arguments before a panel of PTAB judges. LEAP also incentivizes parties in AIA proceedings to allow LEAP practitioners to present substantive arguments during PTAB oral hearings. The USPTO is considering whether other types of training or development options might further expand opportunities for those wishing to practice before the PTAB. Accordingly, the USPTO invites comments on whether there are additional training and/or development options that the USPTO should offer to increase opportunities for less-experienced practitioners to appear as counsel in AIA proceedings and/or serve as the lead counsel in AIA proceedings.

Initially, LEAP was open only to practitioners who had three or fewer substantive oral arguments in any Federal tribunal and seven or fewer years of experience as a licensed attorney or patent agent. The PTAB recently eliminated the requirement that LEAP practitioners have seven or fewer years of experience in order to expand the pool of eligible practitioners. The USPTO is considering whether there are other changes to LEAP that might further its goals. Accordingly, the USPTO invites comments on whether it should make any changes to LEAP to increase opportunities for candidates to appear before the PTAB in AIA proceedings and/or serve as the lead counsel in AIA proceedings.

Questions on Expanding Opportunities To Appear Before the PTAB

As noted above, the USPTO welcomes comments on potential proposals for expanding eligibility to appear before the PTAB in AIA proceedings and/or serve as the lead counsel in AIA proceedings in ways that would further the USPTO's goals. The USPTO also welcomes comments on whether additional training or development programs should be offered, and whether changes to LEAP should be made, to increase opportunities. The USPTO is particularly interested in the public's input on the questions below; commenters are welcome to address any or all of the questions:

1. Are there any changes to PTAB rules or procedures that the Office or the PTAB should make to increase opportunities to appear and/or serve as counsel and/or the lead counsel in AIA proceedings, such as any discussed in Requests 1–3 above?

1.1. If you answered ''yes'' to question 1 as to the lead counsel, should the rules require that a non-registered practitioner have prior experience in AIA proceedings and/or have completed training before being designated as the lead counsel? What level of experience and/or type of training should be required?

2. Should any rule or procedure revised by the Office that permits a non-registered practitioner to be designated as the lead counsel in an AIA proceeding also require that any such non-registered practitioner be accompanied by a registered practitioner as back-up counsel? If not, are there any circumstances or events that might occur during the course of an AIA proceeding (*e.g.,* the contemplated or actual filing of a motion to amend) that might warrant requiring a registered practitioner to then appear as back-up counsel?

3. Would a rule requiring that the lead counsel or back-up counsel in an AIA proceeding be a registered practitioner have a significant impact on the costs of such a proceeding? If so, what would the impact be, and would the impact be justified?

4. Should any of the changes discussed above, if adopted, be implemented as a pilot program?

5. Are there additional training and/or development programs the Office should offer to increase opportunities for less-experienced practitioners to appear as counsel and/or serve as the lead counsel in AIA proceedings?

6. Are there any changes to LEAP that the Office should make to increase opportunities to appear and/or serve as the lead counsel in AIA proceedings?

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2022–22572 Filed 10–17–22; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection 3038–0023, Registration Under the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is announcing an opportunity for public comment on the proposed renewal of a collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice solicits comments on the extension of information collection requirements relating to registration under the Commodity Exchange Act, OMB Control No. 3038–0023 (Registration under the Commodity Exchange Act).

DATES: Comments must be submitted on or before December 19, 2022.

ADDRESSES: You may submit comments, identified by ''Registration under the Commodity Exchange Act,'' Collection Number 3038–0023, by any of the following methods:

- The Agency's website, at *https://comments.cftc.gov/.* Follow the instructions for submitting comments through the website.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher W. Cummings, Market Participants Division, Commodity Futures Trading Commission, (202) 418–5445 or *ccummings@cftc.gov,* and refer to OMB Control No. 3038–0023.

SUPPLEMENTARY INFORMATION: Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the Commission is publishing notice of the proposed collection of information listed below. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Title: Registration under the Commodity Exchange Act (OMB Control No. 3038–0023). This is a request for an extension of a currently approved information collection.

Abstract: The information collected under is gathered through the use of forms for registration of firms and individuals who are required by the Commodity Exchange Act (''CEA'') to register with the Commission. The CEA requires commodity interest market intermediaries and participants to register, including: Futures commission merchants and introducing brokers (7 U.S.C. 6d); Commodity pool operators and commodity trading advisors (7 U.S.C. 6m(1)); Retail foreign exchange dealers (7 U.S.C. 2(c)); Associated persons (7 U.S.C. 6k); Floor traders or floor brokers (7 U.S.C. 6e); and Swap dealers and major swap participants (7 U.S.C. 6s(a)). The CFTC uses various forms for registration (and withdrawal therefrom) (the ''Registration Forms''). OMB Control No. 3038–0023 applies to the Registration Forms for registration of persons other than swap dealers and major swap participants.[1]

With respect to the collection of information, the Commission invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[2]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the information collection request will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement: The Commission is revising its estimate of the burden for this collection to reflect changed circumstances as described below.

Respondents/Affected Entities: Users of Commission registration forms that are futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, floor trader firms, leverage transaction merchants, associated person, and principals of registrants.

Estimated number of respondents: 78,055.

Estimated total annual burden on respondents: 7,852 hours.

Frequency of responses: Periodically.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

[1] Forms for registration of swap dealers and major swap participants are the subject of a separate information collection (OMB Control Number 3038–0072).

[2] 17 CFR 145.9.

Dated: October 13, 2022.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2022–22605 Filed 10–17–22; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN–2022–HQ–0029]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 19, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Office of the Department of the Navy Information Management Control Officer, 2000 Navy Pentagon, Rm. 4E563, Washington, DC 20350, or call Ms. Sonya Martin at 703–614–7585.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Prospective Studies of US Military Forces and Their Families: The Millennium Cohort Program; OMB Control Number 0703–0064.

Needs and Uses: The information collection requirement is necessary to respond to recommendations by Congress and by the Institute of Medicine to perform investigations that systematically collect population-based demographic and health data so as to track and evaluate the health of military personnel throughout the course of their careers and after leaving military service. The Millennium Cohort Family Study also evaluates the impact of military life on military families. The study team will also deploy on-line market research surveys to study participants to better understand their preferences and motivations and inform outreach strategies.

Affected Public: Individuals or households.

Annual Burden Hours: 133,333.33.

Number of Respondents: 200,000.

Responses per Respondent: 1.

Annual Responses: 200,000.

Average Burden per Response: 40 minutes.

Frequency: On occasion.

Dated: October 12, 2022.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–22562 Filed 10–17–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Membership of the Performance Review Board

AGENCY: Office of Finance and Operations, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary publishes a list of persons who may be named to serve on the Performance Review Board that oversees the evaluation of performance appraisals for Senior Executive Service members of the Department of Education (Department).

DATES: These appointments are effective on October 18, 2022.

FOR FURTHER INFORMATION CONTACT: Jennifer Geldhof, Director, Executive Resources Division, Office of Human Resources, Office of Finance and Operations, U.S. Department of Education, 400 Maryland Avenue SW, Room 210–00, LBJ, Washington, DC 20202–4573. Telephone: (202) 580–9669. Email: *Jennifer.Geldhof@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Membership

Under the Civil Service Reform Act of 1978, Public Law 95–454 (5 U.S.C. 4314(c)(4)), the Department must publish in the **Federal Register** a list of persons who may be named to serve on the Performance Review Board that oversees the evaluation of performance appraisals for Senior Executive Service members of the Department. The following persons may be named to serve on the Performance Review Board:

BYRD-JOHNSON, LINDA E.
CHANG, LISA E.
HARRIS, ANTONIA T.
LOPEZ, LUIS RONALDO
LUCAS, RICHARD J.
MALAWER, HILARY E.
SANTY, ROSS C. JR.

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.* 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.* Specifically, through the advanced search feature at this site, you can limit

your search to documents published by the Department.

Miguel A. Cardona,

Secretary of Education.

[FR Doc. 2022–22576 Filed 10–17–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0129]

Agency Information Collection Activities; Comment Request; Accrediting Agencies Reporting Activities for Institutions and Programs—Database of Accredited Postsecondary Institution and Programs (DAPIP)

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 19, 2022.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2022–SCC–0129. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Herman Bounds, 202–453–6128.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Accrediting Agencies Reporting Activities for Institutions and Programs—Database of Accredited Postsecondary Institution and Programs (DAPIP).

OMB Control Number: 1840–0838.

Type of Review: An extension without change of a currently approved collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 9,014.

Total Estimated Number of Annual Burden Hours: 751.

Abstract: Sections 496(a)(7), (a)(8), (c)(7), and (c)(8) of the Higher Education Act (HEA), and federal regulations at 34 CFR; 34 CFR 602.26 and 602.27 contain certain requirements for reporting by recognized accrediting agencies to the Department on the institutions and programs the agencies accredit. This collection specifies the required and requested reporting. It also discusses the channel for reporting this information, and reporting information the accrediting agency may wish to submit voluntarily to ensure that the Department's Database of Accredited Postsecondary Institutions and Programs is accurate and comprehensive.

Dated: October 12, 2022.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–22542 Filed 10–17–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Reopening; Application for Selection as a Performance Partnership Pilot; Performance Partnership Pilots for Disconnected Youth (P3)

AGENCY: Office of Career, Technical, and Adult Education, Department of Education.

ACTION: Notice.

SUMMARY: On August 8, 2022, the Department of Education (Department) published in the **Federal Register** a notice inviting applications (NIA) for selection as a performance partnership pilot for fiscal year (FY) 2022 under the Performance Partnership Pilots for Disconnected Youth (P3) authority. The NIA established a deadline date of October 7, 2022, for transmittal of applications. For eligible applicants that are affected applicants (as defined in Eligibility below) located in Puerto Rico, portions of Alaska with declared disaster designations caused by ex-Typhoon Merbok, and areas covered by a Presidential major disaster or emergency declaration resulting from Hurricane Ian, which includes Florida, the Seminole Tribe of Florida, North Carolina, and South Carolina, this notice reopens this competition to allow more time for the preparation and submission of applications by eligible applicants. The Department also extends the deadline for intergovernmental review until December 21, 2022.

DATES:

Deadline for Transmittal of Applications for Affected Applicants: October 21, 2022.

Deadline for Intergovernmental Review: December 21, 2022.

FOR FURTHER INFORMATION CONTACT: Braden Goetz, U.S. Department of Education, 400 Maryland Avenue SW, Room 10401, Potomac Center Plaza, Washington, DC 20202. Telephone: (202) 245–7405. Email: *DisconnectedYouth@ed.gov.* Or Corinne Sauri, U.S. Department of Education, 400 Maryland Avenue SW, Room 10362, Potomac Center Plaza, Washington, DC 20202. Telephone: (202) 245–6412.

If you are deaf, hard of hearing, or have a speech disability and wish to

access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION: On August 8, 2022, we published the NIA for selection as a performance partnership pilot for fiscal year (FY) 2022 under the Performance Partnership Pilots for Disconnected Youth (P3) authority in the **Federal Register** (87 FR 48168). Under the NIA, applications are due on October 7, 2022. We are reopening this competition for affected applicants, which are applicants from: Puerto Rico due to a declared disaster caused by Hurricane Fiona (*https://www.fema.gov/disaster/4671*); the portions of Alaska with declared disaster designations caused by ex-Typhoon Merbok (*https://www.fema.gov/disaster/4672*); and areas under a Presidential major disaster or emergency declaration resulting from Hurricane Ian, which include Florida (*https://www.fema.gov/disaster/4673*), the Seminole Tribe of Florida (*https://www.fema.gov/disaster/4675*), North Carolina (*https://www.fema.gov/disaster/3586*), and South Carolina (*https://www.fema.gov/disaster/3585*) in order to allow applicants from these jurisdictions more time to prepare and submit their applications.

Eligibility: The reopening of this competition applies to eligible applicants under the P3 authority that are affected applicants. An eligible applicant for this competition is defined in the NIA. To qualify as an affected applicant, the applicant must have a mailing address that is located in one of the areas listed below and must provide appropriate supporting documentation, if requested.

The affected areas are those in which assistance to individuals or public assistance has been authorized under the following FEMA declarations:

- Puerto Rico (*https://www.fema.gov/disaster/4671*);
- Portions of Alaska covered by a Presidential major disaster declaration (*https://www.fema.gov/disaster/4672*);
- Florida (*https://www.fema.gov/disaster/4673*);
- The Seminole Tribe of Florida (*https://www.fema.gov/disaster/4675*);
- North Carolina (*https://www.fema.gov/disaster/3586*); and
- South Carolina (*https://www.fema.gov/disaster/3585.*

Affected applicants that have already timely submitted applications under FY 2022 P3 authority competition may submit a new application on or before the new application deadline of October 21, 2022, but they are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that is last submitted and timely received by 11:59:59 p.m., eastern time, on October 21, 2022. Any application submitted by an affected applicant under the reopened deadline must contain evidence (*e.g.,* the applicant organization mailing address) that the applicant is located in one of the applicable areas and, if requested, must provide appropriate supporting documentation.

The application period is not reopened for all applicants. Applications from applicants that are not affected, as defined above, will not be accepted past the original October 7, 2022 deadline.

Note: All information in the notice inviting applications remains the same, except for the deadline date for affected applicants and the deadline for intergovernmental review.

Program Authority: Section 523 of title III, division H of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103).

Accessible Format: On request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this notice, the NIA and a copy of the application package 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 any other 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.* 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.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Amy Loyd,

Assistant Secretary for Career, Technical, and Adult Education.

[FR Doc. 2022–22636 Filed 10–17–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0127]

Agency Information Collection Activities; Comment Request; State and Local Educational Agency Record and Reporting Requirements Under Part B of the Individuals With Disabilities Education Act

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before December 19, 2022.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2022–SCC–0127. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208C, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Diana Yu, 202–245–6061.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize

the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: State and Local Educational Agency Record and Reporting Requirements under Part B of the Individuals with Disabilities Education Act.

OMB Control Number: 1820–0600.

Type of Review: An extension without change of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 75,476.

Total Estimated Number of Annual Burden Hours: 362,649.

Abstract: OMB Information Collection 1820–0600 reflects the provisions in the Act and the part B regulations requiring States and/or local educational agencies (LEAs) to collect and maintain information or data and, in some cases, report information or data to other public agencies or to the public. However, such information or data are not reported to the Secretary. Data are collected in the areas of private schools, parentally placed private school students, State high cost fund, notification of free and low cost legal services, early intervening services, notification of hearing officers and mediators, State complaint procedures, and the LEA application under part B.

Dated: October 13, 2022.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–22637 Filed 10–17–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of partially-closed virtual meeting.

SUMMARY: This notice announces an open meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Wednesday, November 9, 2022; 11:15 a.m.–4:10 p.m.

ADDRESSES: Information to participate virtually can be found on the PCAST website closer to the meeting at: *www.whitehouse.gov/PCAST/meetings.* Due to the COVID–19 pandemic, this meeting will be held virtually for members of the public and in-person for PCAST members.

FOR FURTHER INFORMATION CONTACT: Dr. Sarah Domnitz, Designated Federal Officer, PCAST, Phone (202) 881–6399 or email: *PCAST@ostp.eop.gov.*

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at *whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Sarah Domnitz. Information about PCAST can be found at: *www.whitehouse.gov/PCAST.*

Tentative Agenda

Open Portion of the Meeting: PCAST will hear from invited speakers on and discuss cyber resilience and the economic impacts of extreme weather. There will also be discussion and consideration for approval of a report from the Advanced Biomanufacturing Sub-Committee. Additional information and the meeting agenda, including any changes that arise, will be posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Public Participation: The meeting is open to the public. The meeting will be held virtually for members of the public.

It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on November 9, 2022, at a time specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *PCAST@ostp.eop.gov*, no later than 12 p.m. eastern time on Nov. 2, 2022. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will select speakers on a first-come, first-served basis from those who registered. Those not able to present oral comments may file written comments with the council.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to *PCAST@ostp.eop.gov* no later than 12 p.m. eastern time on Nov. 2, 2022, so that the comments can be made available to the PCAST members for their consideration prior to this meeting.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Minutes: Minutes will be available within 45 days at: *www.whitehouse.gov/PCAST/meetings.*

Signing Authority

This document of the Department of Energy was signed on October 13, 2022, by Shena Kennerly, Acting Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 13, 2022.

Treena V. Garrett,

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

[FR Doc. 2022–22626 Filed 10–17–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2452–236]

Consumers Energy Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-capacity Amendment of License and Request for Temporary Variance.

b. *Project No:* 2452–236.

c. *Date Filed:* September 2, 2022, as supplemented on September 16, 2022.

d. *Applicant:* Consumers Energy Company.

e. *Name of Project:* Hardy Hydroelectric Project.

f. *Location:* The project is located on the Muskegon River in Newaygo County, Michigan.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* David McIntosh, Senior Licensing Engineer, Consumers Energy Company, 330 Chestnut Street, Cadillac, MI 49601, *DAVID.MCINTOSH@cmsenergy.com,* Phone: (800) 477–5050.

i. *FERC Contact:* Elizabeth Moats, (202) 502–6632, *Elizabeth.OsierMoats@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* November 11, 2022.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2452–236. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee requests a non-capacity amendment of its license to upgrade the project's auxiliary spillway with: (1) a new 320-foot-wide labyrinth crested control section; (2) a new converging chute section; (3) a stilling basin; (4) a section of articulated concrete blocks; and (5) a terminal structure that extends to the Muskegon River. The licensee proposes to begin construction during summer 2023 and construction activities would last approximately 3 years. The licensee's proposal would require replacing and widening the road on the dam crest and temporary closure of several recreation sites (*e.g.,* Hardy Dam Nature Trail, Hardy Dam Marina, and Operator's Village Fishing Pier).

To complete the construction described above, the licensee proposes to extend the already permitted temporary variance from Article 401, approved by the Commission on September 6, 2022. Article 401 allows the licensee to, among other things, drawdown the reservoir elevation 12 feet below the normal operating elevation from January 1 to April 30. The temporary variance approved on September 6, 2022, allows the winter drawdown to occur from November 1 until the Friday before Memorial Day from September 2022 through December 10, 2025. On September 16, 2022, the licensee requested to extend the temporary variance to incorporate drawdown periods from September 1, 2023, to July 31, 2024; from November 1, 2024, to the end of May 2025; and from November 1, 2025, to July 31, 2026; and resume the licensed winter drawdown period on January 1, 2027.

l. *Locations of the Application:* This application may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: October 12, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–22602 Filed 10–17–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP22–514–000]

Corpus Christi Liquefaction, LLC; Notice of Application and Establishing Intervention Deadline

Take notice that on September 29, 2022, Corpus Christi Liquefaction, LLC (CCL), 700 Milam Street, Suite 1900, Houston, Texas 77002, filed in Docket No. CP22–514–000, an application under section 3(a) of the Natural Gas Act (NGA), and Part 153 of the Commission's regulations requesting authority to acquire and reclassify approximately 3,700 feet of 48-inch and 36-inch diameter pipeline segment and ancillary facilities (Terminal Supply Line) located near the City of Gregory in San Patricio County, Texas. The Terminal Supply Line connects the outlet of the existing Cheniere Corpus Christi Pipeline L.P. (CCPL) pipeline and metering and regulating station to the existing feed gas inlet for the CCL liquefied natural gas terminal. CCPL plans to abandon the Terminal Supply Line by sale to CCL under CCPL's blanket certificate automatic authorization, pursuant to Section 7(b) of the NGA. The proposed changes will have the result that the Terminal Supply Line would no longer be part of CCPL's interstate pipeline system behind the meter, but instead would be part of CCL's integrated feed gas header facilities within the LNG Terminal.

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* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Karri Mahmoud, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, Texas 77002, ph. (713) 375–5000, or email: *karri.mahmoud@cheniere.com.* Or Janna Chesno, Cheniere Energy, Inc., 701 8th Street, Suite 810, Washington, DC 20001, ph. (202) 442–3064, or email: *janna.chesno@cheniere.com.*

Pursuant to Section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are two ways to become involved in the Commission's review of this project: you can file comments on the project, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on November 4, 2022.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please submit your comments on or before November 4, 2022.

There are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number CP22–514–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address below.[2] Your written comments must reference the Project docket number (CP22–514–000). Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[3] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and

[1] 18 CFR (Code of Federal Regulations) 157.9.

[2] Hand delivered submissions in docketed proceedings should be delivered to Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[3] 18 CFR 385.102(d).

Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is November 4, 2022. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP22–514–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf.;* or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below.[6] Your motion to intervene must reference the Project docket number CP22–514–000. Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served to the applicant either by mail or email (with a link to the document) at: Karri Mahmoud, Cheniere Energy, Inc., 700 Milam Street, Suite 1900, Houston, Texas 77002, ph. (713) 375–5000, or email: *karri.mahmoud@cheniere.com.* Or Janna Chesno, Cheniere Energy, Inc., 701 8th Street, Suite 810, Washington, DC 20001, ph. (202) 442–3064, or email: *janna.chesno@cheniere.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

All timely, unopposed [7] motions to intervene are automatically granted by operation of Rule 214(c)(1).[8] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[9] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *http://www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on November 4, 2022.

Dated: October 12, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–22596 Filed 10–17–22; 8:45 am]

BILLING CODE 6717–01–P

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Hand delivered submissions in docketed proceedings should be delivered to Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[7] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[8] 18 CFR 385.214(c)(1).

[9] 18 CFR 385.214(b)(3) and (d).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–16–000.
Applicants: LA Storage, LLC.
Description: § 4(d) Rate Filing: Filing of Negotiated Rate, Conforming IW Agreement 10.7.22 to be effective 10/7/2022.
Filed Date: 10/7/22.
Accession Number: 20221007–5077.
Comment Date: 5 p.m. ET 10/19/22.

Docket Numbers: RP23–17–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing—Macquarie Energy LLC to be effective 11/1/2022.
Filed Date: 10/12/22.
Accession Number: 20221012–5000.
Comment Date: 5 p.m. ET 10/24/22.

Docket Numbers: RP23–18–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing—Mercuria Energy America, LLC to be effective 11/1/2022.
Filed Date: 10/12/22.
Accession Number: 20221012–5001.
Comment Date: 5 p.m. ET 10/24/22.

Docket Numbers: RP23–19–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Filing—Morgan Stanley Capital Group Inc. to be effective 11/1/2022.
Filed Date: 10/12/22.
Accession Number: 20221012–5002.
Comment Date: 5 p.m. ET 10/24/22.

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 p.m. eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests,

service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 12, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–22588 Filed 10–17–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2544–051]

Hydro Technology System, Inc.; Notice of Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Minor License.

b. *Project No.:* 2544–051.

c. *Date filed:* December 27, 2021.

d. *Applicant:* Hydro Technology System, Inc.

e. *Name of Project:* Meyers Falls Project.

f. *Location:* On the Colville River, Stevens County, Washington. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Ben Hendrickson, Hydro Technology System, Inc., PO Box 245, Kettle Falls, WA 99141; (509) 993–7629 or email at *hydrotechnologysystems@gmail.com.*

i. *FERC Contact:* Maryam Zavareh at (202) 502–8474, or email at *maryam.zavareh@ferc.gov.*

j. *Deadline for filing scoping comments:* November 11, 2022.

The Commission strongly encourages electronic filing. Please file scoping comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Meyers Falls Hydroelectric Project (P–2544–051).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. *The project consists of the following existing facilities:* (1) a 10-acre reservoir; (2) a 24.5-foot-high, 306-foot-long, concrete and earth-fill embankment dam;(3) a 100-foot-long concrete spillway section containing five 20 feet 3.5 inch wide, 6 feet high bulkheads; (3) a 46-foot-wide, 20-foot-deep, 360-foot-long intake channel with a 19-foot-wide and 11-foot-deep trashrack at the entrance point; (4) a 4-foot- diameter, 323-foot-long steel penstock conveying flow from intake to powerhouse; (5) a 31.5-foot-wide, 55.5-foot-long, 15.5-foot-high steel reinforced concrete powerhouse containing two generating units with a total installed capacity of 1.2 megawatts; (7) a 4,600-foot-long, 13.8-kilovolt transmission line; and (8) appurtenant facilities. The Meyers Falls Project is operated in a run-of-river mode with an average annual generation of 7,883 megawatt-hours per year.

Hydro Technology Systems Inc proposes to continue to operate the project in a run-of-river mode.

m. 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 via the internet through the Commission's Home Page (*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, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or TYY, (202) 502–8659.

n. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. *Scoping Process:* Commission staff will prepare either an environmental assessment (EA) or an Environmental Impact Statement (EIS) that describes and evaluates the probable effects of the licensee's proposed action and alternatives. The EA or EIS will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action. The Commission's scoping process will help determine the required level of analysis and satisfy the National Environmental Policy Act (NEPA) scoping requirements, irrespective of whether the Commission prepares an EA or an EIS.

At this time, we do not anticipate holding on-site scoping meetings. Instead, we are soliciting written comments and suggestions on the preliminary list of issues and alternatives to be addressed in the NEPA document, as described in scoping document 1 (SD1), issued October 12, 2022.

Copies of the SD1 outlining the subject areas to be addressed in the NEPA document were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of SD1 may be viewed on the web 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, call 1–866–208–3676 or for TTY, (202) 502–8659.

Dated: October 12, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–22599 Filed 10–17–22; 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: EC23–5–000.

Applicants: Energy Harbor Generation LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Energy Harbor Generation LLC, et al.

Filed Date: 10/11/22.

Accession Number: 20221011–5392.

Comment Date: 5 p.m. ET 11/1/22.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–8–000.

Applicants: EnerSmart Mesa Heights BESS LLC.

Description: EnerSmart Mesa Heights BESS LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/11/22.

Accession Number: 20221011–5361.

Comment Date: 5 p.m. ET 11/1/22.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–1394–006.

Applicants: 83WI 8me, LLC.

Description: Triennial Market Power Analysis for Southwest Region and Notice of Non-Material Change in Status of 83WI 8me, LLC.

Filed Date: 10/7/22.

Accession Number: 20221007–5203.

Comment Date: 5 p.m. ET 12/6/22.

Docket Numbers: ER21–1111–000; ER21–1112–000; ER21–1114–000; ER21–1115–000; ER21–1116–000; ER21–1117–000; ER21–1118–000; ER21–1119–000; ER21–1120–000; ER21–1121–000; ER21–1125–000; ER21–1128–000.

Applicants: Dominion Energy South Carolina, Inc., Alabama Power Company, Mississippi Power Company, Kentucky Utilities Company, Georgia Power Company, Louisville Gas and Electric Company, Duke Energy Progress, LLC, Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Duke Energy Carolinas, LLC, Louisville Gas and Electric Company, Dominion Energy South Carolina, Inc., Alabama Power Company.

Description: The Southeast Energy Exchange Market Members notify the Federal Energy Regulatory Commission of the commencement of operations of the Southeast Energy Exchange Market, which will occur on November 9, 2022.

Filed Date: 10/7/22.

Accession Number: 20221007–5208.

Comment Date: 5 p.m. ET 10/28/22.

Docket Numbers: ER22–1697–001.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Response to August 12 Letter—Order No. 2222 Compliance Filing to be effective N/A.

Filed Date: 10/12/22.

Accession Number: 20221012–5036.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–66–000.

Applicants: Baron Winds LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate Authorization to be effective 12/5/2022.

Filed Date: 10/11/22.

Accession Number: 20221011–5371.

Comment Date: 5 p.m. ET 11/1/22.

Docket Numbers: ER23–67–000.

Applicants: Fluent Energy Corporation.

Description: Notice of Cancellation of Market Based Rate Tariff of New York Industrial Energy Buyers, LLC.

Filed Date: 10/7/22.

Accession Number: 20221007–5204.

Comment Date: 5 p.m. ET 10/28/22.

Docket Numbers: ER23–68–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 1949; Queue No. NQ16 (amend) to be effective 4/17/2008.

Filed Date: 10/12/22.

Accession Number: 20221012–5034.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–69–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Lincoln Electric System Revisions to Formula Rate Protocols to be effective 12/12/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5035.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–70–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Amendment to Service Agreement FERC No. 826 to be effective 9/13/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5064.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–71–000.

Applicants: Buena Vista Energy Center, LLC.

Description: Baseline eTariff Filing: Buena Vista Energy Center LLC—Application for Market-Based Rate Authorization to be effective 10/31/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5080.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–72–000.

Applicants: Omaha Public Power District, Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Omaha Public Power District submits tariff filing per 35.13(a)(2)(iii: Omaha Public Power District Revisions to Formula Rate Protocols to be effective 12/12/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5099.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–73–000.

Applicants: Nassau Energy, LLC.

Description: Tariff Amendment: Notice of Cancellation of FERC Electric Market-Based Rate Tariff to be effective 10/13/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5151.

Comment Date: 5 p.m. ET 11/2/22.

Docket Numbers: ER23–74–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: ISO–NE/NEPOOL; Change to Defer and Modify FCM Parameters Recalculation Schedule to be effective 12/12/2022.

Filed Date: 10/12/22.

Accession Number: 20221012–5152.

Comment Date: 5 p.m. ET 11/2/22.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene 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 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: October 12, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–22586 Filed 10–17–22; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–66–000]

Baron Winds LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Baron Winds LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 1, 2022.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) 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* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: October 12, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–22587 Filed 10–17–22; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2022–0544; FRL–9988–02–OCSPP]

Pesticide Registration Maintenance Fee: Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 of Unit III, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

DATES: The cancellations are effective October 18, 2022.

FOR FURTHER INFORMATION CONTACT: Brenda Minnema, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2840; email address: *minnema.brenda@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2022–0544, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

II. Background

This cancellation order follows a notice that published in the **Federal Register** of August 12, 2022 (87 FR 49822 (FRL–9988–01–OCSPP) that announced the receipt of requests from the registrants listed in Table 2 of Unit III. to voluntarily cancel these product registrations. In that notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments by the end of the comment period (September 12, 2022). Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

FIFRA section 4(i)(5) (7 U.S.C. 136a–1(i)(5)) requires that all pesticide registrants pay an annual registration maintenance fee, due by January 15 of each year, to keep their registrations in effect. This requirement applies to all registrations granted under FIFRA section 3 (7 U.S.C. 136a) as well as those granted under FIFRA section 24(c) (7 U.S.C. 136v(c)) to meet special local needs. Registrations for which the fee is not paid are subject to cancellation by order and without a hearing.

Under FIFRA, the EPA Administrator may reduce or waive maintenance fees for minor agricultural use pesticides when it is determined that the fee would be likely to cause significant impact on the availability of the pesticide for the use.

In fiscal year 2022, maintenance fees were collected in one billing cycle. On December 10, 2021, all holders of either FIFRA section 3 registrations or FIFRA section 24(c) registrations were sent lists of their active registrations, along with forms and instructions for responding. They were asked to identify which of their registrations they wished to maintain in effect, and to calculate and remit the appropriate maintenance fees. Most responses were received by the statutory deadline of January 18, 2022. A notice of intent to cancel was sent in May of 2022 to companies who did not respond and to companies who responded but paid for less than all their registrations.

In fiscal year 2022, the Agency has waived the fees for 307 minor agricultural use registrations at the

request of the registrants. Maintenance fees have been paid for about 17,593 FIFRA section 3 registrations, or about 98% of the registrations on file in October 2021. Fees have been paid for about 1,878 FIFRA section 24(c) registrations, or about 90% of the total on file in October 2021. Cancellations for non-payment of the maintenance fee affect 124 FIFRA section 3 registrations and 15 FIFRA section 24(c) registrations. These cancellations can be found in Table 3 below. Cancellations for companies paying the fee at one of the capped payment amounts are considered voluntary cancellations since the registration could be maintained without an additional fee payment. These cancellations are subject to a 30-day comment period and are listed in Table 1 below.

The cancellation orders generally permit registrants to continue to sell and distribute existing stocks of the canceled products until one (1) year after the date on which the fee was due. Existing stocks already in the hands of dealers or users, however, can generally be distributed, sold, or used legally until they are exhausted. Existing stocks are defined as those stocks of a registered pesticide product which are currently in the United States, and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation order.

The exceptions to these general rules are cases where more stringent restrictions on sale, distribution, or use of the products have already been imposed, through special reviews or other Agency actions. These general provisions for disposition of stocks should serve in most cases to cushion the impact of these cancellations while the market adjusts.

III. What action is the Agency taking?

This notice announces the cancellation of products registered under FIFRA section 3 (7 U.S.C. 136a). Table 1 of this unit lists the product cancellations, as requested by registrants, in sequence by registration number (or company number and 24(c) number).

TABLE 1—PRODUCT CANCELLATIONS

Registration No.	Company No.	Product name	Active ingredient
100–1230	100	Lambda-Cyhalothrin 5 CS Manufacturing Use Product.	lambda-Cyhalothrin.
100–1238	100	Scimitar GR Insecticide	lambda-Cyhalothrin.
100–1239	100	Lambda-CY 0.045% H&G Granule Insecticide	lambda-Cyhalothrin.
100–1273	100	A14796 Insecticide	lambda-Cyhalothrin.
100–1274	100	A 14797 Insecticide	lambda-Cyhalothrin.
100–1279	100	Revus OPTI	Chlorothalonil; Mandipropamide Technical.
100–1304	100	Thiamethoxam 0.20/Lambda-Cyhalothrin 0.04 L&G GR.	Thiamethoxam; lambda-Cyhalothrin.
100–1334	100	Thiamethoxam 0.40/Lambda-cyhalothrin 0.16 ME Concentrate.	Thiamethoxam; lambda-Cyhalothrin.
100–1336	100	Thiamethoxam 0.010/Lambda-cyhalothrin 0.004 ME RTU.	Thiamethoxam; lambda-Cyhalothrin.
100–1545	100	Force 10CS Insecticide	Tefluthrin.
100–1546	100	Force 15CS Insecticide	Tefluthrin.
100–1569	100	Force CS MUP	Tefluthrin.
239–2657	239	Ortho Groundclear Total Vegetation Killer	Glyphosate-isopropylammonium; Imazapyr, isopropylamine salt.
239–2686	239	Ground Clear RTU	Glyphosate-isopropylammonium; Imazapyr, isopropylamine salt.
239–2735	239	Groundclear Concentrate	Glyphosate-isopropylammonium; Imazapyr, isopropylamine salt.
239–2736	239	Groundclear W RTU	Glyphosate-isopropylammonium; Imazapyr, isopropylamine salt.
241–331	241	Pursuit Plus EC Herbicide	Imazethapyr; Pendimethalin.
241–404	241	Standout Herbicide	Glyphosate-isopropylammonium; Imazethapyr.
241–414	241	Onestep Herbicide	Glyphosate-isopropylammonium; Imazapyr, isopropylamine salt.
352–556	352	Dupont Matrix Herbicide	Rimsulfuron.
352–571	352	Dupont Basis Herbicide	Rimsulfuron; Thifensulfuron.
352–589	352	Dupont Canopy XL Herbicide	Chlorimuron; Sulfentrazone.
352–608	352	Dupont Steadfast Herbicide	Nicosulfuron; Rimsulfuron.
352–649	352	Dupont DPX–E9636 25DF Corn Herbicide	Rimsulfuron.
352–869	352	Dupont Diligent Herbicide	Chlorimuron; Flumioxazin; Rimsulfuron.
432–1550	432	Velpar ULW Herbicide	Hexazinone.
499–502	499	TC 241	lambda-Cyhalothrin.
499–503	499	TC 240	lambda-Cyhalothrin.
524–657	524	MON 88702 X MON 15985 X COT102 SI	Bacillus thuringiensis Cry2Ab protein and the genetic material necessary for its production (vector GHBK11) in cotton; Bacillus thuringiensis Vip3Aa19 protein and the genetic material necessary for its production (vector pCOT1) in Event COT102 cotton (SYN–IR102–7); Bacillus thuringiensis var. kurstaki delta endotoxin protein as produced by the Cry1A(c) gene and its controlling sequences; Bacillus thuringiensis mCry51Aa2 protein and the genetic material necessary for its production (vector PV–GHIR508523) in MON 88702 cotton.
2792–79	2792	Trupick 0.7	1-Methylcyclopropene.

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Company No.	Product name	Active ingredient
2792–83	2792	Trupick 2.0	1-Methylcyclopropene.
3432–56	3432	Scorch II	Lithium hypochlorite.
3432–64	3432	Sildate	Nanosilver 004.
3432–71	3432	Silspa Disinfectant	Nanosilver 004.
3862–104	3862	Hospital Surface Disinfectant and Deodorizer	o-Phenylphenol (No Inert Use); 4-tert-Amylphenol.
3862–177	3862	TEK-TROL Disinfectant Cleaner Concentrate	o-Phenylphenol (No Inert Use); 2-Benzyl-4-chlorophenol; 4-tert-Amylphenol.
3862–180	3862	Pheno-Tek II	o-Phenylphenol (No Inert Use); 2-Benzyl-4-chlorophenol; 4-tert-Amylphenol.
4822–352	4822	Raid Liquid Control Tip Ant and Roach Killer	Cyfluthrin.
4822–375	4822	Raid Max Home Barrier Insecticide Concentrate	Cyfluthrin.
4822–376	4822	Raid Powder Keg for Roaches	Cyfluthrin.
4822–383	4822	Raid Fumigator G	Cyphenothrin.
4822–393	4822	Raid Yard Guard Concentrate	Cyfluthrin.
4822–481	4822	Raid Max BB	Cyfluthrin.
4822–492	4822	Rysn Formula 1 Insecticide	Cyfluthrin.
4822–493	4822	Rysn Formula 2 Insecticide	Cyfluthrin.
4822–494	4822	Rysn Formula 3 Insecticide	Cyfluthrin.
4822–495	4822	Rysn Formula 4	Cyfluthrin.
4822–496	4822	Rysn Formula 5	Cyfluthrin.
4822–497	4822	Rysn Formula 6 Insecticide	Cyfluthrin.
4822–581	4822	RWH 34	Cyfluthrin; Prallethrin.
4822–582	4822	AK2C	Cyfluthrin; Piperonyl butoxide; Pyrethrins.
4822–598	4822	Peduncle KMP	Esfenvalerate.
4822–600	4822	New Orleans Aerosol	Cypermethrin; Imiprothrin.
5383–113	5383	Polyphase CST–1	Carbamic acid, butyl-, 3-iodo-2-propynyl ester.
7969–144	7969	Frontier Herbicide	Dimethenamid.
7969–147	7969	Frontier 6.0 Herbicide	Dimethenamid.
7969–254	7969	BAS 756 00 H Herbicide	Glyphosate-isopropylammonium; Pendimethalin.
7969–264	7969	BAS 555 SL Fungicide	Metconazole.
7969–287	7969	Triticonazole HL Fungicide Seed Treatment	Triticonazole.
7969–295	7969	Charter F2 Fungicide Seed Treatment	Metalaxyl; Triticonazole.
7969–377	7969	Diamir TTZ Fungicide Seed Treatment	Triticonazole.
7969–386	7969	Charter Fungicide Seed Treatment	Triticonazole.
7969–387	7969	Charter PB Fungicide Seed Treatment	Thiram; Triticonazole.
8033–1	8033	Granular HI Chlon	Calcium hypochlorite.
8033–2	8033	HI-Chlon Tablet	Calcium hypochlorite.
8033–7	8033	HI-Chlon 65 EU	Calcium hypochlorite.
8033–20008	8033	HI-Chlon 65	Calcium hypochlorite.
8329–39	8329	BTI Granules	Bacillus thuringiensis subspecies israelensis strain AM 65–52 solids, spores and insecticidal toxins.
9198–60	9198	Easy Weeder Flower and Garden Weed Preventer	Trifluralin.
9198–175	9198	Anderson's Turf Fertilizer Plus Southern Weedgrass Control.	Pendimethalin.
9198–199	9198	TGR Winter Overseeding Enhancer	Paclobutrazol.
9688–215	9688	Chemsico Herbicide Granules DN	Dithiopyr.
9688–216	9688	Chemsico Herbicide Granules DN2	Dithiopyr.
9688–234	9688	Pursell 3 Deep M & B Granular	Dithiopyr.
9688–267	9688	Chemsico Herbicide Granules Formula D–20	Dithiopyr.
10324–99	10324	Maquat 10–PD	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 30%C16, 5%C18, 5%C12); Alkyl* dimethyl ethylbenzyl ammonium chloride *(68%C12, 32%C14).
10324–142	10324	Maquat MQ2525M–14	Alkyl* dimethyl benzyl ammonium chloride *(60%C14, 30%C16, 5%C18, 5%C12); Alkyl* dimethyl ethylbenzyl ammonium chloride *(68%C12, 32%C14).
33270–26	33270	Simazine 90DF	Simazine.
33270–27	33270	Simazine 4L	Simazine.
51036–312	51036	Glyphosate 4 Herbicide	Glyphosate-isopropylammonium.
51036–331	51036	Gly-Flo Plus	Glyphosate-isopropylammonium.
51036–332	51036	Gly-Flo Aquatic	Glyphosate-isopropylammonium.
51036–333	51036	Gly-Flo Reduced Tillage	Glyphosate-isopropylammonium.
51036–334	51036	Gly-Flo Sugarcane	Glyphosate-isopropylammonium.
51036–336	51036	Gly-Flo Forestry	Glyphosate-isopropylammonium.
51036–347	51036	Gly-Flo 62% SC AG	Glyphosate-isopropylammonium.
91234–147	91234	Glyphosate Plus	Glyphosate-isopropylammonium.
93930–5	93930	Avalaire PPZ 41.8 EC	Propiconazole.
93930–11	93930	Avalaire Diflu 2 L	Diflubenzuron.

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Company No.	Product name	Active ingredient
AZ070002	524	Bollgard II	Bacillus thuringiensis Cry2Ab protein and the genetic material necessary for its production (vector GHBK11) in cotton; Bacillus thuringiensis var. kurstaki delta endotoxin protein as produced by the Cry1A(c) gene and its controlling sequences.
AZ110001	12455	Contrac All-Weather Blox	Bromadiolone.
CA170003	5481	K-Salt Fruit Fix 800	Potassium 1-naphthaleneacetate.
CA170010	66222	Nevado 4F	Iprodione.
CO050004	100	Beacon	Primisulfuron-methyl.
CO180001	5481	Parazone 3SL	Paraquat dichloride.
CO180002	5481	Parazone 3SL	Paraquat dichloride.
FL030010	432	Dupont Escort XP Herbicide	Metsulfuron.
FL040002	432	Dupont Escort Herbicide	Metsulfuron.
GA130003	10163	Malathion 8	Malathion (No Inert Use).
GA130004	10163	Malathion 8	Malathion (No Inert Use).
HI060004	432	Dupont Escort XP Herbicide	Metsulfuron.
HI140002	100	Provaunt	Fenamiphos.
ID000009	5481	Amvac AZA 3% EC	Azadirachtin.
ID070003	66222	Diazinon AG600	Diazinon.
ID130005	66222	Fanfare 2 ES Insecticide/Miticide	Bifenthrin.
ID990007	100	Beacon Herbicide	Primisulfuron-methyl.
ID990024	10163	Imidan 70–WP Agricultural Insecticide	Phosmet.
IL060002	100	Beacon	Primisulfuron-methyl.
IL150001	100	Reflex Herbicide	Sodium salt of fomesafen.
IN110003	5481	Dupont Assure II Herbicide	Quizalofop-p-ethyl.
KS030004	432	Dupont Escort Herbicide	Metsulfuron.
KY140001	10163	Malathion 8	Malathion (No Inert Use).
LA131001	81880	GWN–3061	Halosulfuron-methyl.
LA170004	66222	Fluensulfone 480EC	Fluensulfone.
ME140001	81880	GWN–1715–0	Halosulfuron-methyl.
ME160003	60063	Echo ZN	Chlorothalonil.
ME161001	81880	Sandea Herbicide	Halosulfuron-methyl.
MI170001	66222	Fluensulfone 480EC	Fluensulfone.
MN040002	100	Dual Magnum Herbicide	S-Metolachlor.
MN080006	100	Dual Magnum	S-Metolachlor.
MN080010	81880	Nexter	Pyridaben.
MN180004	100	Beacon Herbicide	Primisulfuron-methyl.
MN200005	100	Dual Magnum Herbicide	S-Metolachlor.
MN200006	100	Reflex Herbicide	Sodium salt of fomesafen.
MO100005	67690	Natrix	Copper carbonate, basic.
NE060002	100	Reflex Herbicide	Sodium salt of fomesafen.
NJ080001	100	Beacon	Primisulfuron-methyl.
NJ130010	10163	Malathion 8	Primisulfuron-methyl.
NM110002	524	Bollgard II Cotton	Bacillus thuringiensis Cry2Ab protein and the genetic material necessary for its production (vector GHBK11) in cotton; Bacillus thuringiensis var. kurstaki delta endotoxin protein as produced by the Cry1A(c) gene and its controlling sequences.
NM170001	524	COT102 X MON 15985	Bacillus thuringiensis Cry2Ab protein and the genetic material necessary for its production (vector GHBK11) in cotton; Bacillus thuringiensis Vip3Aa19 protein and the genetic material necessary for its production (vector pCOT1) in Event COT102 cotton (SYN–IR102–7); Bacillus thuringiensis var. kurstaki strain HD73(Cry1AC (synpro)) insecticidal crystal protein and the genetic material necessary for its production in cotton.
NY080015	100	Beacon	Primisulfuron-methyl.
OK190004	5481	Parazone 3SL Herbicide	Paraquat dichloride.
OR110006	7969	Finale Herbicide	Glufosinate.
PA070003	10163	Nexter	Pyridaben.
PR150002	100	Warrior II With Zeon Technology	lambda-Cyhalothrin.
SC100003	67690	Natrix	Copper carbonate, basic.
TX070009	10163	Nexter	Pyridaben.
TX120010	100	Gramoxone SL 2.O	Paraquat dichloride.
TX120013	241	Prowl H2O Herbicide	Pendimethalin.

TABLE 1—PRODUCT CANCELLATIONS—Continued

Registration No.	Company No.	Product name	Active ingredient
TX170003	524	COT102 X MON 15985	Bacillus thuringiensis Cry2Ab protein and the genetic material necessary for its production (vector GHBK11) in cotton; Bacillus thuringiensis Vip3Aa19 protein and the genetic material necessary for its production (vector pCOT1) in Event COT102 cotton (SYN–IR102–7); Bacillus thuringiensis var. kurstaki strain HD73(Cry1AC (synpro)) insecticidal crystal protein and the genetic material necessary for its production in cotton.
TX170004	10163	Treflan HFP	Trifluralin.
TX170005	10163	Treflan TR–10	Trifluralin.
UT180010	5481	Parazone 3SL Herbicide	Paraquat dichloride.
WA010004	5481	K-Salt Fruit Fix 200	Potassium 1-naphthaleneacetate.
WA040022	10163	Onager Miticide	Hexythiazox.
WA060019	7173	Rozol Pellets	Chlorophacinone.
WA090017	81880	GWN–1715	Halosulfuron-methyl.
WA130004	10163	Malathion 8	Primisulfuron-methyl.
WA960002	100	Beacon Herbicide	Primisulfuron-methyl.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS OF THE VOLUNTARILY CANCELLED PRODUCTS

EPA company No.	Company name and address
100	Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419.
239	The Scotts Company, P.O. Box 190, Marysville, OH 43040.
241	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709.
352	Corteva Agrosciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268.
432	Bayer Environmental Science, 700 Chesterfield Parkway West, Chesterfield, MO 63017.
499	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709.
524	Bayer CropScience LP, 800 N Lindbergh Blvd., St. Louis, MO 63141.
2792	Decco US Post-Harvest Inc., 1713 South California Avenue, Monrovia, CA 91016.
3432	N. Jonas & Co., Inc., 4520 Adams Circle, P.O. Box 425, Bensalem, PA 19020.
3862	ABC Compounding Co., Inc. P.O. Box 16247, Atlanta, GA 30321.
5383	Troy Chemical Corp., c/o. Troy Corporation, 8 Vreeland Road, Florham Park, NJ 07932.
5481	AMVAC Chemical Corporation, 4695 MacArthur Court, Suite 1200, Newport Beach, CA 92660.
7173	Liphatech, Inc., 3600 W Elm Street, Milwaukee, WI 53209.
7969	BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709.
8033	Nippon Soda Co., Ltd., 379 Thornall Street, 5th Floor, Edison, NJ 08837.
8329	Clarke Mosquito Control Products, Inc., 675 Sidwell Court, St. Charles, IL 60174.
9198	The Andersons, Inc., 1947 Briarfield Blvd, P.O. Box 119, Maumee, OH 43537.
9688	Chemsico, A Division of United Industries Corp., P.O. Box 142642, St. Louis, MO 63114.
10163	Gowan Company, 370 S Main Street, Yuma, AZ 85366.
10324	Mason Chemical Company, 9075 Centre Pointe Drive, Suite 400, West Chester, OH 45069.
12455	Bell Laboratories, Inc., 3699 Kinsman Blvd., Madison, WI 53704.
33270	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164.
51036	BASF Sparks LLC, P.O. Box 13528, Research Triangle Park, NC 27709.
60063	SIPCAM Agro USA, Inc., 2525 Meridian Pkwy., Suite 350, Durham, NC 27713.
66222	Makhteshim Agan of North America, Inc., D/B/A ADAMA, 3120 Highwoods Blvd., Suite 100, Raleigh, NC 27604.
67690	SEPRO Corporation, 11550 N Meridian Street, Suite 600, Carmel, IN 46032.
80289	Isagro S.P.A., D/B/A Isagro USA, Inc., 1005 Slater Road, Suite 212, Durham, NC 27703.
81880	Canyon Group LLC, 370 S Main Street, Yuma, AZ 85360.
91234	Atticus, LLC, 5000 Centregreen Way, Suite 100, Cary, NC 27513.
93930	Avalaire, LLC, 1204 Village Market Place, #173, Morrisville, NC 27560.

Table 3 of this unit lists all the FIFRA sections 3 and 24(c) registrations that were canceled for non-payment of the 2022 maintenance fee. These registrations were canceled by order on August 11, 2022, without a hearing.

TABLE 3—REGISTRATIONS CANCELLED FOR NON-PAYMENT OF 2022 MAINTENANCE FEE

Registration No.	Company No.	Product name	Active ingredient
3–19	3	Harris Flea & Tick Killer Carpet Powder	Phenothrin.
3–20	3	Happy Horse	Pyrethrins; MGK 326.
3–22	3	Davis Flea & Tick Mist	MGK 264; Piperonyl butoxide; Pyrethrins; MGK 326.
550–20003	550	Liquichlor 9.2% Solution	Sodium hypochlorite.
833–72	833	AFCO 4334	Phosphoric acid.
1157–43	1157	Moorman's Special PHOS IGR Minerals	S-Methoprene.
2568–99	2568	Antifouling Seaforce 300 AV Dark Red	Cuprous oxide; 3(2H)-Isothiazolone, 4,5-dichloro-2-octyl-.
2568–102	2568	Antifouling Seaforce 100 AV Dark Red 3GCDRD	Cuprous oxide.
2693–18	2693	Viny-Lux Vinyl-Base 340 Antifouling Blue	Cuprous oxide.
2693–70	2693	Latenac Antifouling Red	Cuprous oxide.
2693–180	2693	Interviron BRA740-Red Antifouling	Cuprous oxide; 3(2H)-Isothiazolone, 4,5-dichloro-2-octyl-.
2935–539	2935	Potato Seed Treater PS	Mancozeb.
2935–541	2935	Potato Seed Treater 6%	Mancozeb.
3487–29	3487	Eagles-7 Dust	Deltamethrin.
4959–21	4959	Clean Sanitizer	Nonylphenoxypolyethoxyethanol—iodine complex; Phosphoric acid.
7946–11	7946	Mauget Inject-A-Cide B	Dicrotophos.
7946–36	7946	Tebuject 16 HP	Tebuconazole.
8596–33	8596	Grain Shield	Propionic acid.
10250–56	10250	Hempel's Antifouling Globic 81920 Red 51110	Cuprous oxide; 3(2H)-Isothiazolone, 4,5-dichloro-2-octyl-.
10350–56	10350	Sodium Pyrithione	Sodium pyrithione.
11411–22	11411	Crystal Care Pro Grade Granular Trichlor	Trichloro-s-triazinetrione.
35936–1	35936	Elm Fungicide	Carbamic acid, 1H-benzimidazol-2-yl-, methyl ester, phosphate (1:1).
44891–22	44891	Smart Solution Antifouling Spray	1H-Pyrrole-3-carbonitrile,4-bromo-2-(4-chlorophenyl)-5-(trifluoromethyl)-.
44891–26	44891	Aquagard II Waterbase Antifouling Paint for Aluminum Hulls.	Cuprous oxide.
49158–1	49158	Rug Doctor Antibacterial Carpet Cleaner	Hydrogen peroxide.
54705–5	54705	Weed Stopper	Oryzalin.
57787–35	57787	Proteam Power Magic AC Superoxidizer	Boron sodium oxide (B4Na2O7), pentahydrate; Calcium hypochlorite.
58185–31	58185	Duosan WSB Wettable Powder Turf and Ornamental Fungicide.	Mancozeb; Thiophanate-methyl.
58616–6	58616	3024	Sodium bromide.
58866–13	58866	Cinnacure Ready to Use	Cinnamaldehyde.
59657–2	59657	Color Ripe/Witchaway	Ethylene.
61463–2	61463	Binab T Wettable Powder Biorational Fungicide	Trichoderma polysporum (ATCC 20475); Trichoderma viride (ATCC 20476).
62577–15	62577	Ecopco WP/X	Oil of thyme; Pyrethrins; Propionic acid, phenethyl ester.
63761–2	63761	Ultra-Kleen CW–502	Alkyl* dimethyl benzyl ammonium chloride *(95%C14, 3%C12, 2%C16).
63761–5	63761	Sterilex Ultra Powder	Alkyl* dimethyl benzyl ammonium chloride *(95%C14, 3%C12, 2%C16); Sodium percarbonate.
66397–4	66397	MCP Trichlor Granular	Trichloro-s-triazinetrione.
67071–50	67071	Acticide LA 2605–F	Bronopol; 2-Methyl-3(2H)-isothiazolone; 5-Chloro-2-methyl-3(2H)-isothiazolone.
67071–66	67071	Acticide IPS 40	Carbamic acid, butyl-, 3-iodo-2-propynyl ester.
67071–101	67071	Acticide ZP 100–F	Zinc pyrithione.
67071–107	67071	Acticide BWS 10–F	1,2-Benzisothiazolin-3-one.
67503–2	67503	Medachieve Multi-Purpose 10% E.C	Permethrin.
67572–20	67572	R & M Aloe Repellent Treatment #11	MGK 264; Piperonyl butoxide; Pyrethrins; MGK 326.
68086–11	68086	Synergy Labs Groomer's Blend Flea Shampoo	Permethrin.
68086–12	68086	First Defense Premise Treatment	Boric acid.
69340–1	69340	Anprolene AN–71/73	Ethylene oxide.
69470–2	69470	CDB–63 Dry Chlorinated Compound Coarse	Sodium dichloro-s-triazinetrione.
69470–3	69470	CDB–63 Dry Chlorinated Compound Medium	Sodium dichloro-s-triazinetrione.
69470–23	69470	CDB Sani Fizz 50 LT	Sodium dichloro-s-triazinetrione.
69470–29	69470	Clearon Dichlor 63	Sodium dichloro-s-triazinetrione.
69470–31	69470	Yellow Algae Remover	Sodium bromide.
69470–34	69470	Bromine Shock	Sodium bromide; Sodium dichloro-s-triazinetrione.
69625–2	69625	Silver Nitrate	Silver nitrate.
70529–1	70529	Chlorine Gas	Chlorine.
70529–2	70529	Aqua Chlor Chlorinating Solution	Sodium hypochlorite.
70908–4	70908	Phos Pro Fungicide	Dipotassium phosphite (K2HPO3).

TABLE 3—REGISTRATIONS CANCELLED FOR NON-PAYMENT OF 2022 MAINTENANCE FEE—Continued

Registration No.	Company No.	Product name	Active ingredient
71049–1	71049	KT–30 Plant Growth Regulator	Forchlorfenuron.
71771–7	71771	HARP-N-TEK	Harpin alpha beta protein.
71771–10	71771	Mighty Plant with Messenger Gold	Harpin protein.
74229–1	74229	Magna CIDE D	Nabam 15; Sodium dimethyldithiocarbamate.
74779–20	74779	Trimtect 3.0	Ethephon; Paclobutrazol.
74831–20005	74831	Super-Chlor	Calcium hypochlorite.
75748–1	75748	Borer-Stop Ecotab	Acephate.
81402–2	81402	Traveler's Supply Inc. Permethrin Clothing & Gear Insect Repellent Concentrate.	Permethrin.
81927–28	81927	Alligare Cody Herbicide	2,4-D, triisopropanolamine salt; Clopyralid, monoethanolamine salt.
81927–75	81927	PD 2	Dicamba; 2,4-D, triisopropanolamine salt; Picloram, triisopropanolamine salt.
83402–1	83402	Zestat A–100	Cetyl pyridinium chloride.
83402–2	83402	Zestat Preservative	Cetyl pyridinium chloride.
84069–1	84069	Summerset Alldown Concentrate	Citric acid; Vinegar.
84069–2	84069	Summerset Alldown Herbicide	Citric acid; Vinegar.
84316–1	84316	Moss Buster	Oregano oil.
84846–13	84846	Arcus FS	Complex Polymeric Polyhydroxy Acid (CPPA).
85678–9	85678	Ethephon 2	Ethephon.
85678–38	85678	Fomesafen 2 SL	Sodium salt of fomesafen.
85678–39	85678	Clethodim 70% MUP	Clethodim.
86130–9	86130	Flowchem FCB–13	Glutaraldehyde.
86363–12	86363	KT Clethodim 2EC	Clethodim.
86363–23	86363	KT Dicamba 4 DMA	Dicamba.
86363–24	86363	KT Glyphosate 41	Glyphosate-isopropylammonium.
86363–25	86363	KT Dicamba 2,4-D DMA	Dicamba, dimethylamine salt; 2,4-D, dimethylamine salt.
86374–2	86374	ECOPEL All-Family Insect Repellent Spray	Picaridin.
86801–1	86801	SWIMCAS-CHLOR	Sodium hypochlorite.
87093–11	87093	Herbicidal Concentrate	Pelargonic acid, ammonium salt.
87093–12	87093	LN Iron HEDTA	Ferric HEDTA.
87655–2	87655	Fomesafen 2 SL Herbicide	Sodium salt of fomesafen.
87663–1	87663	Emery Agro 7000 Concentrate	Pelargonic acid, ammonium salt.
87845–11	87845	LambdaC Insecticide	Lambda-Cyhalothrin.
87978–8	87978	Surtivo Ultra	Polyhedral occlusion bodies of Helicoverpa zea Nucleopolyhedrovirus ABA-NPV-U; Spodoptera frugiperda Multiple Nucleopolyhedrovirus strain 3AP2; Chrysodeixis includens Nucleopolyhedrovirus, isolate #460; Autographa californica multiple NPV strain R3.
87978–9	87978	Surtivo Plus	Polyhedral occlusion bodies of Helicoverpa zea Nucleopolyhedrovirus ABA-NPV-U; Spodoptera frugiperda Multiple Nucleopolyhedrovirus strain 3AP2; Chrysodeixis includens Nucleopolyhedrovirus, isolate #460; Autographa californica multiple NPV strain R3.
88082–4	88082	Fipronil Technical	Fipronil.
88082–5	88082	Spot and Clear for Cats	Fipronil.
88082–6	88082	Spot and Clear for Dogs	Fipronil.
88810–1	88810	Oblitiroot	Dichlobenil.
88929–1	88929	Myris-100	Alkyl* dimethyl benzyl ammonium chloride *(100%C14).
89094–2	89094	Multi Purpose Cleaner Wipe	Hydrogen peroxide.
89094–3	89094	Bathroom Spray	Hydrogen peroxide.
89094–4	89094	Glass Spray	Hydrogen peroxide.
89160–1	89160	Microbecare XLP	1-Octadecanaminium, N,N-dimethyl-N-(3-(trimethoxysilyl)propyl)-, chloride.
89609–3	89609	Vetguard For Cats	Fipronil.
89850–3	89850	Semios CM Standard	CheckMate Technical Pheromone.
89850–8	89850	Semios Now Plus	(Z,Z)-11,13-Hexadecadienal.
89850–9	89850	Semios Now Standard	(Z,Z)-11,13-Hexadecadienal.
89850–10	89850	Semios OBLR/PLR Standard	(Z)-11-Tetradecenyl acetate.
91421–1	91421	Mosquitno Insect Repellent Family Spray	Picaridin.
91853–1	91853	Potassium Silicate Technical	Potassium silicate.
93650–1	93650	Incopper	Copper as metallic (in the form of chelates of copper citrate and copper gluconate).
93664–1	93664	Q Shield Professional Surface Protector	Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16); 1-Octadecanaminium,N,N-dimethyl-N-[3-(trihydroxysilyl)propyl], chloride.

TABLE 3—REGISTRATIONS CANCELLED FOR NON-PAYMENT OF 2022 MAINTENANCE FEE—Continued

Registration No.	Company No.	Product name	Active ingredient
94085–1	94085	Bug Oil Ornamental	Canola oil; Oil of thyme; Oils, Tagetes; Oils, wintergreen.
94085–2	94085	Bug Oil Food Use	Canola oil; Oil of thyme; Oils, Tagetes; Oils, wintergreen.
94085–3	94085	Bug Oil-O	Canola oil; Oil of thyme; Oils, Tagetes; Oils, wintergreen.
94572–3	94572	Halo Pure Bacteriostatic Water Cartridge	Bromine.
94572–4	94572	Halopure Bacteriostatic Pitcher Cartridge	Bromine.
95407–1	95407	AK600 Solar Pool Ionizer	Copper as elemental.
96148–3	96148	Jebagro Clethodim 26.4% EC	Clethodim.
96148–4	96148	Jebagro Mesotrione 480 SC	Mesotrione.
97092–1	97092	Dr J's Disinfectant Spray	Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16); 1-Decanaminium, N,N-dimethyl-N-octyl-, chloride; 1-Decanaminium, N-decyl-N,N-dimethyl-, chloride; 1-Octanaminium, N,N-dimethyl-N-octyl-, chloride.
97092–2	97092	Dr J's Surface Disinfectant Wipes	Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16); 1-Decanaminium, N,N-dimethyl-N-octyl-, chloride;1-Decanaminium, N-decyl-N,N-dimethyl-, chloride; 1-Octanaminium, N,N-dimethyl-N-octyl-, chloride.
97543–1	97543	Protect-AM	1-Octadecanaminium,N,N-dimethyl-N-[3-(trihydroxysilyl)propyl], chloride.
98003–1	98003	Novabay Hard Nonporous Surface Pro	Hypochlorous Acid.
98003–2	98003	Avenova Surface Pro Plus	Hypochlorous Acid.
98099–1	98099	PX10	Sodium chlorite.
100629–1	100629	Durisan	1-Decanaminium, N-decyl-N,N-dimethyl-, chloride.
*CA080020	68127	Goaltender	Oxyfluorfen.
ID070015	95290	Telone II	Telone.
MO120003	69969	Avipel (Dry) Corn Seed Treatment	Anthraquinone.
MO130003	69969	Avipel (Dry) Corn Seed Treatment	Anthraquinone.
MO140001	69969	Avipel (Dry) Corn Seed Treatment	Anthraquinone.
MO140002	69969	Avipel Liquid Corn Seed Treatment	Anthraquinone.
MT130002	69969	Avipel Liquid Corn Seed Treatment	Anthraquinone.
NC050004	95290	Curfew	Telone.
NC980005	56907	Color Ripe/Witchaway	Ethylene.
NY170004	9359	Surchlor (12.5% Sodium Hypochlorite Solution)	Sodium hypochlorite.
OK200001	96032	Guardian-50	Hypochlorous acid.
OR940038	95290	Telone Ii	Telone.
VT130001	69969	Avipel Liquid Corn Seed Treatment	Anthraquinone.
VT130002	69969	Avipel (Dry) Corn Seed Treatment	Anthraquinone.
WA940038	95290	Telone Ii	Telone.

IV. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided in the notice of receipt that published in the **Federal Register** of August 12, 2022, EPA received no comments on the requests for voluntary cancellations of products listed in Table 1 of Unit III.

V. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit III. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit III. are canceled. The effective date of the cancellations that are the subject of this notice is October 18, 2022. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit III. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VII. will be a violation of FIFRA.

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

FIFRA section 6(f)(1) (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request.

VII. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States, and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit III. until January 15, 2023. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1 of Unit III., except for export in accordance with FIFRA section 17 (7 U.S.C. 136o), or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit III. until existing stocks are exhausted, provided that such sale,

distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 28, 2022.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2022–22582 Filed 10–17–22; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCMENT: October 14, 2022 (87 FR 62413)

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Tuesday, October 18, 2022.

PLACE: The meeting is open to the public. Out of an abundance of caution related to current and potential coronavirus developments, the public's means to observe this Board meeting will be via a Webcast live on the internet and subsequently made available on-demand approximately one week after the event. Visit *https://youtu.be/s7moPsvjKto* to view the meeting. If you need any technical assistance, please visit our Video Help page at: *https://www.fdic.gov/video.html.* Observers requiring auxiliary aids (*e.g.,* sign language interpretation) for this meeting should email *DisabilityProgram@fdic.gov* to make necessary arrangements.

STATUS: Open.

CHANGES IN THE MEETING: The FDIC gave notice of the open meeting scheduled for Tuesday, October 18, 2022. Notice is hereby given that a matter will be added to the ''discussion agenda'' for the meeting.

Matter to be Added: Memorandum and resolution re: Advanced Notice of Proposed Rulemaking entitled ''Resolution-Related Resource Requirements for Large Banking Organizations.''

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

(Authority: 5 U.S.C. 552b)

Dated at Washington, DC, on October 14, 2022.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2022–22704 Filed 10–14–22; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Reporting Requirements Associated with Regulation Y for Extension of Time to Conform to the Volcker Rule (FR Y–1; OMB No. 7100–0333).

DATES: Comments must be submitted on or before December 19, 2022.

ADDRESSES: You may submit comments, identified by FR Y–1, by any of the following methods:

- *Agency Website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–4775, 2001 C St. NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement, and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collection

Collection title: Reporting Requirements Associated with Regulation Y for Extension of Time to Conform to the Volcker Rule.

Collection identifier: FR Y–1.

OMB control number: 7100–0333.

Frequency: Annual, event-generated.

Respondents: Insured depository institutions (other than certain limited-purpose trust institutions and any insured depository institution that has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets), any company that controls such an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing, and nonbank financial companies designated by the Financial Stability Oversight Council that engage in proprietary trading activities or make investments in covered funds.

Estimated number of respondents: 1.

Estimated average hours per response: 12.

Estimated annual burden hours: 12.

General description of report: The Board's Regulation Y—Bank Holding Companies and Change in Bank Control (12 CFR part 225, subpart K) provides that a banking entity or Board-supervised nonbank financial company may, under certain circumstances, request an extension of time to conform its activities to the requirements of section 13 of the Bank Holding Company Act of 1956 (BHC Act),[1] also known as the Volcker Rule.[2]

Proposed revisions: The Board proposes to revise the FR Y–1 to no longer include a provision related to extended transition periods for illiquid funds for banking entities since they were required to completely divest from such funds by July 21, 2022.

Legal authorization and confidentiality: The Volcker Rule specifically authorizes the Board to issue rules to permit entities covered by the Volcker Rule to seek conformance period extensions (12 U.S.C. 1851(c)(6)). The Board also has the authority to require reports from bank holding companies (12 U.S.C. 1844(c)), savings and loan holding companies (12 U.S.C. 1467a(b) and (g)), and state member banks (12 U.S.C. 248(a) and 324). The information collections in the FR Y–1 are required for covered entities that decide to seek an extension of time to conform their activities or investments to the Volcker Rule. The obligation to respond, therefore, is required to obtain a benefit.

To the extent that information submitted in response to the FR Y–1 constitutes nonpublic commercial or financial information, which is both customarily and actually treated as private by the respondent, it may be kept confidential under exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)). Exemption 4 protects ''trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential.''

Board of Governors of the Federal Reserve System, October 13, 2022.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–22632 Filed 10–17–22; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Board Meeting

DATES: October 25, 2022 at 10:00 a.m.

ADDRESSES: Telephonic. Dial-in (listen only) information: Number: 1–202–599–1426, Code: 697 354 489#; or via web: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_M2VkZDY3YmYtNjc5NC00ODgzLTkyMWEtY2U3M2MyNmFlNzdj%40thread.v2/0?context=%7b%22Tid%22%3a%223f6323b7-e3fd-4f35-b43d-1a7afae5910d%22%2c%22Oid%22%3a%227c8d802c-5559-41ed-9868-8bfad5d44af9%22%7d.*

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION:

Board Meeting Agenda

Open Session

1. Approval of the September 27, 2022 Board Meeting Minutes
2. Monthly Reports
   (a) Participant Activity Report
   (b) Legislative Report
3. Quarterly Reports
   (c) Investment Performance
   (d) Audit Status
   (e) Budget Review
4. Mid-Year Financial Review
5. Enterprise Risk Management Update

Closed Session

6. Information covered under 5 U.S.C. 552b (c)(6).

(Authority: 5 U.S.C. 552b (e)(1))

Dated: October 12, 2022.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2022–22543 Filed 10–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0095; Docket No. 2022–0053; Sequence No. 21]

Information Collection; Federal Acquisition Regulation Part 27 Requirements

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision concerning Federal Acquisition Regulation (FAR) part 27

[1] 12 U.S.C. 1851.

[2] The term ''banking entity'' is defined in section 13(h)(1) of the BHC Act (12 U.S.C. 1851(h)(1)). The term means any insured depository institution (other than certain limited-purpose trust institutions and any insured depository institution that has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets), any company that controls such an insured depository institution, any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106), and any affiliate or subsidiary of any of the foregoing.

requirements. DoD, GSA, and NASA invite comments on: whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through February 28, 2023. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by December 19, 2022.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite OMB Control No. 9000–0095, Federal Acquisition Regulation Part 27 Requirements. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0095, Federal Acquisition Regulation Part 27 Requirements.

B. Need and Uses

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration are combining OMB Control Nos. by FAR part. This consolidation is expected to improve industry's ability to easily and efficiently identify burdens associated with a given FAR part. This review of the information collections by FAR part allows improved oversight to ensure there is no redundant or unaccounted for burden placed on industry. Lastly, combining information collections in a given FAR part is also expected to reduce the administrative burden associated with processing multiple information collections.

This justification supports the extension of OMB Control No. 9000–0095 and combines it with the previously approved information collections under OMB Control Nos. 9000–0090 and 0096, with the new title ''Federal Acquisition Regulation Part 27 Requirements''. Upon approval of this consolidated information collection, OMB Control Nos. 9000–0090 and 9000–0096 will be discontinued. The burden requirements previously approved under the discontinued numbers will be covered under OMB Control No. 9000–0095.

This clearance covers the information that offerors and contractors must submit to comply with the following FAR requirements:

FAR 52.227–2, Notice and Assistance Regarding Patent and Copyright Infringement. This clause requires contractors to notify the Government of any allegations of patent or copyright infringement arising during the performance of the contract. The clause requires contractors to furnish, when requested by the contracting officer, all evidence and information in the contractor's possession regarding such a claim or suit. This clause flows down to subcontracts that are expected to exceed the simplified acquisition threshold (SAT—currently $250,000).

FAR 52.227–6, Royalty Information. This provision requires offerors to report all royalties anticipated or paid in excess of $250 for the use of patented inventions by furnishing:

(1) Name and address of licensor.

(2) Date of license agreement.

(3) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable.

(4) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable.

(5) Percentage or dollar rate of royalty per unit.

(6) Unit price of contract item.

(7) Number of units.

(8) Total dollar amount of royalties.

Also, the contracting officer may ask the offeror to provide a copy of the current license agreement identifying claims to specific patents.

FAR 52.227–9, Refund of Royalties. This clause requires contractors to furnish to the contracting officer, before final payment under a contract, a statement of royalties paid or required to be paid in connection with performing the contract. The clause requires contractors to notify the contracting officer if the contractor is relieved, within three years after final payment under the contract, from payment of royalties included in the final contract price. This clause flows down to subcontracts in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

FAR 52.227–11, Patent Rights—Ownership by the Contractor, or 52.227–13, Patent Rights—Ownership by the Government—Commerce Patent Regulations. These FAR clauses require a Government contractor to report all inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work to the contracting officer, submit a disclosure of the invention, and identify any publication, sale, or public use of the invention (52.227–11(c), 52.227–13(e)(1)). The contracting officer may modify 52.227–11(e) or otherwise supplement the clause to require contractors to submit periodic or interim and final reports listing subject inventions (27.303(b)(2)(i) and (ii)). The contracting officer may also require a contractor, under FAR 52.227–11, to: provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified; and furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor. (27.303(b)(2)(iv) and (v). In order to ensure that subject inventions are reported, the contractor is required to establish and maintain effective procedures for identifying and disclosing subject inventions (52.227–11, Alternate IV; 52.227–13(e)(1)). In addition, the contractor must require its employees, by written agreements, to disclose subject inventions (52.227–11(e)(2); 52.227–13(e)(4)). The contractor also has an obligation to utilize the subject invention, and agree to report, upon request, the utilization or efforts to utilize the subject invention (27.302(e); 52.227–11(f)).

FAR 52.227–14, Rights in Data—General. This clause enables the contractor to protect qualifying limited rights data and restricted computer software by withholding the data from the Government and instead delivering

form, fit, and function data. For unauthorized marking of data, the contractor may provide written justification to substantiate the propriety of the markings for the contracting officer to consider whether or not the markings are to be canceled or ignored. For omitted or incorrect markings of data that has not been disclosed without restriction outside the Government, the contractor may request, within 6 months (or a longer time approved by the contracting officer) after delivery of the data, permission to have authorized notices placed on the data at the contractor's expense. Contractors shall obtain from their subcontractors all data and rights necessary to fulfill the contractor's obligations to the Government under the contract. If a subcontractor refuses to accept terms affording the Government those rights, the contractor shall notify the contracting officer of the refusal.

FAR 52.227–15, Representation of Limited Rights Data and Restricted Computer Software. This provision requires an offeror to represent that it has reviewed the requirements for the delivery of technical data or computer software and state, in response to a solicitation, whether data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software. If the Government does not receive unlimited rights, the offeror must provide a list of the data that qualify as limited rights data or restricted computer software. The offeror would identify any proprietary data it would use during contract performance, in order that the contracting officer might ascertain if such proprietary data should be delivered.

FAR 52.227–16, Additional Data Requirements. This clause requires contractors to keep, for possible delivery to the Government, any data, in addition to data already required to be delivered under the contract, first produced or specifically used in performance of the contract for a period of three years from the final acceptance of all items delivered under the contract. The data delivered under this clause may be in the form of computations, preliminary data, records of experiments, etc. For any data to be delivered under this clause, the Government will pay the contractor for converting the data into a specific form, and for reproducing and delivering the data. The purpose of such recordkeeping requirements is to ensure that, if all data requirements are not known prior to contract award, the Government can fully evaluate the research in order to ascertain future activities and to insure that the research was completed and fully reported, as well as to give the public an opportunity to assess the research results and secure any additional information.

FAR 52.227–17, Rights in Data—Special Works. This clause is included in solicitations and contracts primarily for production or compilation of data. It is used in rare and exceptional circumstances to permit the Government to limit the contractor's rights in data by preventing the release, distribution, and publication of any data first produced in the performance of the contract. This clause may also be limited to particular items and not the entire contract. This clause requires contractors to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

FAR 52.227–18, Rights in Data—Existing Works. This clause is used when the Government is acquiring existing audiovisual or similar works, such as books, without modification. This clause requires contractors to obtain a license for the Government to reproduce, prepare derivative works, and perform and display publicly the materials.

FAR 52.227–19, Commercial Computer Software License. This clause requires contractors to affix a notice on any commercial software delivered under the contract that provides notice that the Government's rights regarding the data are set forth in the contract.

FAR 52.227–20, Rights in Data—SBIR Program. This clause authorizes contractors under Small Business Innovation Research (SBIR) contracts to affix a notice to SBIR data delivered under the contract to limit the Government's rights to disclose data first produced under the contract. For omitted or incorrect markings of data that has not been disclosed without restriction outside the Government, the contractor may request, within 6 months (or a longer time approved by the contracting officer) after delivery of the data, permission to have authorized notices placed on the data at the contractor's expense. Contractors shall obtain from their subcontractors all data and rights necessary to fulfill the contractor's obligations to the Government under the contract. If a subcontractor refuses to accept terms affording the Government those rights, the contractor shall notify the contracting officer of the refusal.

FAR 52.227–21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems. This clause requires major systems contractors to certify that the data delivered under the contract is complete, accurate, and compliant with the requirements of the contract.

FAR 52.227–23, Rights to Proposal Data (Technical). This clause allows the Government to identify pages of a proposal that would not be subject to unlimited rights in the technical data.

The information collected is used to protect the Government's rights and interests.

C. Annual Burden

Respondents/Recordkeepers: 1,121.
Total Annual Responses: 14,965.
Total Burden Hours: 54,633. (53,268 reporting hours + 1,365 recordkeeping hours).

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0095, Federal Acquisition Regulation Part 27 Requirements.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2022–22610 Filed 10–17–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0012; Docket No. 2022–0053; Sequence No. 20]

Information Collection; Termination Settlement Proposal Forms (SFs 1435–1440)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision concerning termination settlement proposal forms (SFs 1435–1440). DoD, GSA, and NASA invite comments on: whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the

information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through April 30, 2023. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by December 19, 2022.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through *https://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

Instructions: All items submitted must cite OMB Control No. 9000–0012, Termination Settlement Proposal Forms (SFs 1435–1440). Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0012, Termination Settlement Proposal Forms (SFs 1435–1440).

B. Need and Uses

This clearance covers the information that contractors must submit to comply with the following Federal Acquisition Regulation requirements:

Standard Forms (SFs) 1435 through 1440. These termination settlement proposal forms are used by all Executive agencies, including DoD, for settling terminated prime contracts and subcontracts per FAR subpart 49.6, Contract Termination Forms and Formats. The forms provide a standardized format for listing essential cost and inventory information needed to support the terminated contractor's negotiated position.

The contracting officer uses the collected information to determine or support reimbursement costs upon settlement of a terminated contract.

C. Annual Burden

Respondents: 4,862.
Total Annual Responses: 38,059.
Total Burden Hours: 91,342.
Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0012, Termination Settlement Proposal Forms (SFs 1435–1440).

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2022–22609 Filed 10–17–22; 8:45 am]

BILLING CODE 6820–EP–P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Proposed Collection; Comment Request for Modified Qualified Trust Model Certificates and Model Trust Documents

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice of request for agency and public comments.

SUMMARY: After this second round notice and public comment period, the U.S. Office of Government Ethics (OGE) intends to submit modified versions of the 12 OGE model certificates and model documents for qualified trusts to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995.

Comments: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Jennifer Matis at the U.S. Office of Government Ethics; telephone: 202–482–9216; TTY: 800–877–8339; Email: *jmatis@oge.gov.* Copies of the model documents as currently approved are available on OGE's website, *www.oge.gov.* Electronic copies of these documents may also be obtained, without charge, by contacting Ms. Matis.

SUPPLEMENTARY INFORMATION:

Title: Executive Branch Qualified Trust Documents.

OMB Control Number: 3209–0007.

Type of Information Collection: Revision of a currently approved collection.

Type of Review Request: Regular.

Respondents: Any current or prospective executive branch officials who seek to establish or have established a qualified blind or diversified trust under the Ethics in Government Act of 1978 as a means to avoid conflicts of interest while in office.

Estimated Average Annual Number of Respondents: 2.

Total Estimated Time per Response: 20 minutes to 100 hours (see table below for detailed explanation).

Estimated Average Total Annual Burden: 120 hours.

Abstract: OGE is the supervising ethics office for the executive branch of the Federal Government under the Ethics in Government Act of 1978 (EIGA). Accordingly, OGE administers the qualified trust program for the executive branch. Presidential nominees to executive branch positions subject to Senate confirmation and any other executive branch officials may seek OGE approval for EIGA-qualified blind or diversified trusts as one means to avoid conflicts of interest. The requirements for EIGA-qualified blind and diversified trusts are set forth in section 102(f) of the Ethics in Government Act, 5 U.S.C. app. § 102(f), and OGE's implementing financial disclosure regulations at subpart D of 5 CFR part 2634.

In order to ensure that all applicable requirements are met, OGE is the sponsoring agency for 12 model certificates and model trust documents for qualified blind and diversified trusts. See 5 CFR 2634.402(e)(3), 2634.402(f)(3), 2634.404(e)–(g), 2634.405(d)(2), 2634.407(a); 2634.408(b)(1)–(3), 2634.408(d)(4), 2634.409, and 2634.414. The various model certificates and model trust documents are used by settlors, trustees, and other fiduciaries in establishing and administering these qualified trusts. OGE plans to submit these model certificates and model trust documents (described in detail in the table below) to OMB for renewed approval pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

The 12 model documents, along with their burden estimates, are as follows:

Model qualified trust documents	Estimated burden
(A) Blind Trust Communications (Expedited Procedure for Securing Approval of Proposed Communications).	20 minutes per communication.
(B) Model Qualified Blind Trust Provisions	100 hours per model.
(C) Model Qualified Diversified Trust Provisions	100 hours per model.
(D) Model Qualified Diversified Trust Provisions (For Use in the Case of Multiple Fiduciaries)	100 hours per model.
(E) Model Qualified Blind Trust Provisions (For Use in the Case of an Irrevocable Pre-Existing Trust)	100 hours per model.
(F) Hybrid Version of the Model Qualified Diversified Trust Provisions	100 hours per model.
(G) Model Qualified Blind Trust Provisions (For Use in the Case of Multiple Fiduciaries)	100 hours per model.
(H) Model Qualified Diversified Trust Provisions (For Use in the Case of an Irrevocable Pre-Existing Trust)	100 hours per model.
(I) Model Confidentiality Agreement Provisions (For Use in the Case of a Privately Owned Business)	2 hours per agreement.
(J) Model Confidentiality Agreement Provisions (For Use in the Case of Investment Management Activities).	2 hours per agreement.
(K) Certificate of Independence	20 minutes per certificate.
(L) Certificate of Compliance	20 minutes per certificate.

These estimates are based on the amount of time imposed on professional trust administrators or private representatives. OGE notes that only one set of the various model trust provisions (items (B) through (H)) will be prepared for a single qualified trust, and only prior to the establishment of that qualified trust. Likewise, other model documents listed above are used in connection with establishing the qualified trust (items (I), (J), and (K)). The remaining model documents are used after the trust's creation (items (A) and (L)). Accordingly, OGE notes that the majority of the time burden for any given trust is imposed during the creation of the trust.

At the present time, there are no active qualified trusts in the executive branch. However, OGE anticipates possible limited use of these model documents during the forthcoming three-year period. OGE estimates that there may be an average of one individual per year who initiates a qualified trust using these model documents during calendar years 2023 through 2025. OGE has accordingly estimated the average annual number of respondents to be two, which represents one respondent establishing a qualified trust and one respondent maintaining a previously established qualified trust. Based on the above, OGE estimates an average annual time burden during the next three years of 120 hours. Using an estimated rate of $300 per hour for the services of a professional trust administrator or private representative, the estimated annual cost burden is $36,000.

Under OMB's implementing regulations for the Paperwork Reduction Act, any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons. See 5 CFR 1320.3(c)(4)(i). Therefore, OGE intends to submit, after this second round notice and comment period, all 12 qualified trust model certificates and model documents described above (all of which are included under OMB paperwork control number 3209–0007) for a three-year extension of approval.

OGE is committed to making ethics records publicly available to the extent possible. The communications documents and the confidentiality agreements (items (A), (I) and (J) on the table above), once completed, will not be available to the public because they contain sensitive, confidential information. The other completed certificates and documents (except for any trust provisions that relate to the testamentary disposition of trust assets) are retained and made publicly available based upon a proper request under section 105 of the EIGA until the periods for retention of all other reports (usually the OGE Form 278 Public Financial Disclosure Reports) of the individual establishing the trust have lapsed (generally six years after the filing of the last report). See 5 U.S.C. app. 105; 5 CFR 2634.603(g)(2). The information collected with these model trust certificates and model trust documents is part of the OGE/GOVT–1 Governmentwide Privacy Act system of records.

In seeking an extension of approval, OGE is proposing several nonsubstantive changes to the 12 qualified trust certificates and model documents.

First, OGE proposes updating the dates in Document A (Blind Trust Communications) to make them more contemporary.

Second, OGE proposes replacing ''OGE'' and ''the Office'' with ''the U.S. Office of Government Ethics'' to make references to the agency consistent with that of the actual model trust language.

Third, OGE proposes replacing references to the Ethics in Government Act of 1978 as ''the Ethics Act'' with ''the Act'' in order to maintain consistency.

Fourth, OGE proposes fixing a typo by removing the period (.) following the ''NW'' in OGE's address.

A **Federal Register** Notice with a 60-day comment period soliciting comments on this information collection was published on July 22, 2022 (87 FR 43855). OGE did not receive any comments in response.

Request for Comments: Agency and public comment is invited specifically on the need for and practical utility of this information collection, on the accuracy of OGE's burden estimate, on the enhancement of quality, utility, and clarity of the information collected, and on minimizing the burden to the public. Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of OMB approval. The comments will also become a matter of public record.

Specifically, OGE seeks public comment on the following:

- Do the model qualified blind trusts provide sufficient direction to establish a trust under the Qualified Trust Program? If not, what provisions could be clearer or what language should be changed?
- Do the model qualified diversified trusts provide sufficient direction to establish a trust under the Qualified Trust Program? If not, what provisions could be clearer or what language should be changed?
- Do the Additional Trust Documents provide sufficient information for individuals to comply with the logistical requirements (*e.g.,* procedure for securing approval of proposed communications) of the Qualified Trust Program? If not, what provisions could be clearer or what language should be changed?

Approved: October 12, 2022.

Emory Rounds,

Director, Office of Government Ethics.

[FR Doc. 2022–22544 Filed 10–17–22; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0190]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Warning Plans for Smokeless Tobacco Products

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

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by November 17, 2022.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0671. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Warning Plans for Smokeless Tobacco Products

OMB Control Number 0910–0671—Extension

Tobacco products are governed by chapter IX of the Federal Food, Drug, and Cosmetic Act (sections 900 through 920) (21 U.S.C. 387 through 21 U.S.C. 387t). Section 3 of the Comprehensive Smokeless Tobacco Health Education Act of 1986 (the Smokeless Tobacco Act) (15 U.S.C. 4402) requires, among other things, that all smokeless tobacco product packages and advertisements bear one of four required warning statements. Section (b)(3)(A) of 15 U.S.C. 4402 requires that the warnings be displayed on packaging and advertising for each brand of smokeless tobacco ''in accordance with a plan submitted by the tobacco product manufacturer, importer, distributor, or retailer'' to, and approved by, FDA.

To implement these statutory requirements, warning plans are reviewed by FDA, upon submission by respondents. FDA published a draft guidance entitled ''Submission of Warning Plans for Cigarettes and Smokeless Tobacco Products'' on September 9, 2011, which describes the information and format to be submitted for smokeless plans (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/submission-warning-plans-cigarettes-and-smokeless-tobacco-products*). Submitters may also visit a web page that describes the smokeless tobacco labeling and warning statement requirements (*https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/smokeless-tobacco-labeling-and-warning-statement-requirements*). Additionally, FDA considers a submission to be a supplement if the submitter is seeking approval of a change to an FDA-approved warning plan. Warning plans can be submitted either electronically or in paper format. The Center for Tobacco Products (CTP) Portal, available at *https://ctpportal.fda.gov/ctpportal/login.jsp,* provides a secure online system for electronically submitting documents and receiving messages from CTP.

Based on our experience with the information collection over the past 3 years, we retain our estimate of 60 hours to complete an initial rotational plan. We estimate half this time for preparing and submitting a supplement to an approved plan (30 hours).

In the **Federal Register** of May 9, 2022 (87 FR 27644), FDA published a 60-day notice requesting public comment on the proposed collection of information. Two comments that were not PRA-related were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Submission of initial rotational plans for health warning statements	1	1	1	60	60
Supplement to approved plan	4	1	4	30	120
Total					180

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA estimates a total of 1 respondent will submit a new original warning plan yearly and take 60 hours to complete a rotational warning plan for a total of 60 burden hours. In addition, FDA estimates a total of 4 respondents will submit a supplement to an approved warning plan at 30 hours per response for a total of 120 hours. After receiving the initial influx of original warnings plans, FDA does not expect to receive as many original warning plans annually. We expect that a few supplements will continue to be received as new products are marketed or as warning plans are revised. Therefore, we have decreased our estimate burden by 360 hours.

Dated: October 13, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22615 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–0736]

Gregory Settino: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Gregory Settino from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Settino was convicted of a felony under Federal law for conduct that relates to the regulation of any drug product under the FD&C Act. Mr. Settino was given notice of the proposed permanent debarment and was given an opportunity to request a hearing to show why he should not be debarred. As of August 15, 2022 (30 days after receipt of the notice), Mr. Settino had not responded. Mr. Settino's failure to respond and request a hearing within the prescribed timeframe constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is applicable October 18, 2022.

ADDRESSES: Submit applications for special termination of debarment to the Dockets Management Staff, Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500, or at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Enforcement (ELEM–4144), Office of Strategic Planning and Operational Policy, Office of Regulatory Affairs, Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857, 240–402–8743, or at *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the FD&C Act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. On April 20, 2022, Mr. Settino was convicted, as defined in section 306(l)(1) of the FD&C Act, in the U.S. District Court for the Eastern District of New York, when the court accepted his plea of guilty and entered judgment against him for the felony offense of theft of medical products in violation of 18 U.S.C. 670.

As described in the indictment in his case, filed on September 20, 2020, from approximately 2012 to January 2020, Mr. Settino was the production supervisor of manufacturing for Luitpold Pharmaceuticals, Inc. (Luitpold), which was renamed American Regent, Inc. (American Regent) in January 2019. Luitpold and American Regent manufactured an injectable equine drug called ADEQUAN, which is administered to horses with degenerative joint disease. In his capacity as a production supervisor, Mr. Settino supervised the manufacture of pre-retail medical products including ADEQUAN. From approximately 2012 to January 2020, Mr. Settino stole thousands of bottles of ADEQUAN from Luitpold and American Regent and then sold the stolen ADEQUAN for a total of more than $600,000. As contained in the sentencing memoranda from his case, filed on March 31, 2022, and April 19, 2022, Mr. Settino resold the stolen drugs, many of which were expired, to horse trainers and veterinarians at New York area racetracks.

Based on this conviction, FDA sent Mr. Settino by certified mail on July 11, 2022, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(B) of the FD&C Act, that Mr. Settino was convicted, as set forth in section 306(l)(1) of the FD&C Act, of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act. The proposal also offered Mr. Settino an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Mr. Settino received the proposal on July 15, 2022. He did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(B) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Mr. Settino has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the FD&C Act.

As a result of the foregoing finding, Mr. Settino is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, applicable (see **DATES**) (see section 306(a)(2)(B) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses in any capacity the services of Mr. Settino during his debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Mr. Settino provides services in any capacity to a person with an approved or pending drug product application during his period of debarment, he will be subject to civil money penalties (section 307(a)(7) of the FD&C Act). In addition, FDA will not accept or review any abbreviated new drug application from Mr. Settino during his period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act). Note that, for purposes of sections 306 and 307 of the FD&C Act, a ''drug product'' is defined as a ''drug subject to regulation under section 505, 512, or 802 of this Act (21 U.S.C. 355, 360b, 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262)'' (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Any application by Mr. Settino for special termination of debarment under section 306(d)(4) of the FD&C Act should be identified with Docket No. FDA–2022–N–0736 and sent to the Dockets Management Staff (see **ADDRESSES**). The public availability of information in these submissions is governed by 21 CFR 10.20.

Publicly available submissions will be placed in the docket and will be viewable at *https://www.regulations.gov* or at the Dockets Management Staff (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

Dated: October 13, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22613 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–0008]

Blood Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) announces a forthcoming public advisory committee meeting of the Blood Products Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues related to blood and products derived from blood. At least one portion of the meeting will be closed to the public.

DATES: The meeting will be held virtually on December 8, 2022, from 9:30 a.m. to 1:30 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of the COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.* The online web conference meeting will be available at the following link on the day of the meeting: *https://youtu.be/AQhF3AM_ssg.*

FOR FURTHER INFORMATION CONTACT: Christina Vert or Tonica Burke, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 1244, Silver Spring, MD 20993–0002, 240–402–8054, *CBERBPAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before joining the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. On December 8, 2022, the committee will meet in open session to hear an overview of the research programs of the Laboratory of Emerging Pathogens and the Laboratory of Molecular Virology, Division of Emerging and Transfusion Transmitted Diseases, Office of Blood Research and Review, Center for Biologics Evaluation and Research. After the open session, the meeting will be closed to the public for committee deliberations.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: On December 8, 2022, from 9:30 a.m. to 12:35 p.m. Eastern Time, the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before December 1, 2022. Oral presentations from the public will be scheduled between approximately 11:35 a.m. and 12:35 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before November 17, 2022. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by November 18, 2022.

Closed Committee Deliberations: On December 8, 2022, from 12:35 p.m. to 1:30 p.m. Eastern Time, the meeting will be closed to permit discussion where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)). The recommendations of the advisory committee regarding the progress of the individual investigators' research programs, along with other information, will be discussed during this session. We believe that public discussion of these recommendations on individual scientists would constitute an unwarranted invasion of personal privacy.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Christina Vert at *CBERBPAC@fda.hhs.gov* (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 11, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22612 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–1298]

Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment; Guidance for Industry; Availability

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

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled ''Acute Myeloid Leukemia: Developing Drugs

and Biological Products for Treatment.'' This guidance is intended to assist sponsors in the clinical development of drugs and biological products for the treatment of acute myeloid leukemia (AML). This guidance addresses FDA's current thinking regarding the overall development program and clinical trial designs for the development of drugs and biological products to support an indication of treatment of AML, including indications limited to an individual phase of treatment (for example, maintenance, transplantation preparative regimen, etc.). The guidance addresses the topics of general drug development, efficacy endpoints, and exploratory and confirmatory trial considerations for AML drug development. In addition, the guidance addresses investigational new drug applications, new drug applications, and biologics licensing applications for AML drugs. This guidance finalizes the draft guidance of the same title ''Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment'' issued August 2020.

DATES: The announcement of the guidance is published in the **Federal Register** on October 18, 2022.

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

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2020–D–1298 for ''Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002 or Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Donna Przepiorka, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2116, Silver Spring, MD 20993–0002, 301–796–5358; Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment.'' This guidance is intended to assist sponsors in the clinical development of drugs and biological products for the treatment of AML. This guidance includes FDA's current thinking regarding the overall development program and clinical trial designs to support an indication of treatment of AML, including indications limited to an individual phase of treatment.

New classes of drugs are being developed as alternatives to the standard cytotoxic drugs for the treatment of AML. The following factors contribute substantially to the complexity of clinical development programs for such new drugs: the expansion of treatment intent, broadening of the intended population, and development of a wide range of new drug classes as alternatives to cytotoxic

drugs. This guidance includes FDA's thinking regarding general drug development considerations, efficacy endpoints, exploratory and confirmatory trial considerations, and regulatory submissions for AML drugs to facilitate the development of new drugs for the treatment of AML.

This guidance finalizes the draft guidance entitled ''Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment'' issued August 13, 2020 (85 FR 49383). FDA considered comments received on the draft guidance as the guidance was finalized. Changes from the draft to the final guidance include editorial changes, clarifications of the time frame for marrow sampling and peripheral blood tests to establish complete remission, the inclusion of marker-negative patients in studies of targeted therapies, and recommended operating characteristics for safety-stopping rules.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Acute Myeloid Leukemia: Developing Drugs and Biological Products for Treatment.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001; the collections of information in 21 CFR part 601 have been approved under 0910–0338; and the collections of information in 21 CFR 201.56 and 201.57 have been approved under OMB control number 0910–0572.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances,* or *https://www.regulations.gov.*

Dated: October 11, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22618 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–0286]

Tissue Agnostic Drug Development in Oncology; Draft Guidance for Industry; Availability

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

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Tissue Agnostic Drug Development in Oncology.'' For the purpose of this guidance, the term ''tissue agnostic oncology drug'' refers to a drug that targets a specific molecular alteration(s) (a kind of biomarker) across multiple cancer types as defined, for example by organ, tissue, or tumor type. This draft guidance describes the development of tissue agnostic drugs, scientific considerations in determining when tissue agnostic oncology drug development may be appropriate, and, if appropriate, issues to be addressed during such development. Tissue agnostic drug development may expedite or enable the development of new therapies for patients with rare cancer types.

DATES: Submit either electronic or written comments on the draft guidance by December 19, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2022–D–0286 for ''Tissue Agnostic Drug Development in Oncology.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly

available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Steven Lemery, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2374, Silver Spring, MD 20993–0002, 301–796–2276; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Tissue Agnostic Drug Development in Oncology.'' This draft guidance provides recommendations to sponsors regarding considerations for tissue agnostic drug development in oncology. For the purpose of this guidance, the term ''tissue agnostic oncology drug'' refers to a drug that targets a specific molecular alteration(s) (a kind of biomarker) across multiple cancer types as defined, for example by organ, tissue, or tumor type. A tissue agnostic oncology drug can therefore be used to treat multiple types of cancer (*e.g.,* colorectal, thyroid, and breast cancers) with the targeted molecular alteration (*e.g.,* either the same targeted molecular alteration or targeted molecular alterations affecting a single pathway). The guidance discusses the need in tissue agnostic drug development to generalize treatment effects based on data observed in some cancer types to other cancer types with the same targeted molecular alteration, when no subjects (or a limited number of subjects) with the other cancer types were included in the clinical trial(s). Such an approach may expedite or enable the development of new therapies for patients with rare cancer types when it may not be feasible to test the drug in an adequate number of subjects for every cancer type.

The draft guidance describes factors that sponsors should consider when determining whether a tissue agnostic oncology drug development program may be scientifically and clinically appropriate, such as biology, subject population, clinical pharmacology, and clinical safety and efficacy. In addition, the draft guidance describes issues to be addressed in a tissue agnostic drug development program, such as nonclinical assessment, subject selection, study designs, statistical considerations, endpoints, pediatrics, diagnostic considerations, postapproval data and information, and labeling.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Tissue Agnostic Drug Development in Oncology.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 314 have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338. The collections of information in 21 CFR 201.56 and 201.57 have been approved under OMB control number 0910–0572.

III. Electronic Access

Persons with access to the internet may obtain an electronic version of the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: October 11, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22616 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–1744]

Characterizing, Collecting, and Reporting Immune-Mediated Adverse Reactions in Cancer Immunotherapeutic Clinical Trials; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Characterizing, Collecting, and Reporting Immune-Mediated Adverse Reactions in Cancer Immunotherapeutic Clinical Trials.'' This guidance is intended for sponsors of cancer immunotherapeutic drugs that modulate the endogenous immune system and may break immunologic tolerance to normal organs and tissues; it provides recommendations regarding the data that should be collected and evaluated

to assess whether adverse events are immune-mediated adverse reactions (imARs) and the data on imARs that should be included in a new drug application (NDA) or biologics license application (BLA) for a cancer immunotherapeutic drug.

DATES: Submit either electronic or written comments on the draft guidance by December 19, 2022 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

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

Written/Paper Submissions

Submit written/paper submissions as follows:

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

Instructions: All submissions received must include the Docket No. FDA–2022–D–1744 for ''Characterizing, Collecting, and Reporting Immune-Mediated Adverse Reactions in Cancer Immunotherapeutic Clinical Trials.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Marc Theoret, Center for Drug Evaluation and Research (HFD–150), Food and Drug Administration, 10903 New Hampshire Ave, Silver Spring, MD 20993–0002, 301–796–4099; or Stephen Ripley, Center for Biologics Evaluation and Research, Office of Communication, Outreach, and Development, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Characterizing, Collecting, and Reporting Immune-Mediated Adverse Reactions in Cancer Immunotherapeutic Clinical Trials.'' This guidance is intended for sponsors of cancer immunotherapeutic drugs that modulate the endogenous immune system and may break immunologic tolerance to normal organs and tissues; it provides recommendations regarding the data that should be collected and evaluated to assess whether adverse events are imARs and the data on imARs that should be included in an NDA or BLA for a cancer immunotherapeutic drug.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Characterizing, Collecting, and Reporting Immune-Mediated Adverse Reactions in Cancer Immunotherapeutic Clinical Trials.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 314 including the submission of labeling, have been approved under OMB control number 0910–0001; and the collections

of information in 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: October 11, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22617 Filed 10–17–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Tick-Borne Disease Working Group

AGENCY: Office of Infectious Disease and HIV/AIDS Policy (OIDP), Office of the Assistant Secretary for Health (OASH), Office of the Secretary, Department of Health and Human Services.

ACTION: Notice; addendum to 87 FR 56964 published on September 16, 2022.

SUMMARY: The Office of the Assistant Secretary for Health published a notice of an upcoming meeting of the Tick-Borne Disease Working Group (TBDWG) in the **Federal Register** on September 16, 2022. This addendum provides notice of an additional day added to the October 25, 2022 meeting. The 24th meeting of the TDBWG will now take place from October 24–25, 2022. The September 16th **Federal Register** notice can be accessed at *https://www.federalregister.gov/documents/2022/09/16/2022-20088/meeting-of-the-tick-borne-disease-working-group.*

DATES: The public can view the meeting online via webcast on October 24 and 25, 2022 from approximately 9:00 a.m. to 5:00 p.m. ET (times are tentative and subject to change) each day. The confirmed times and agenda items for the meeting will be posted on the TBDWG web page at *https://www.hhs.gov/ash/advisory-committees/tickbornedisease/meetings/2022-10-25/index.html* when this information becomes available.

SUPPLEMENTARY INFORMATION: As stated in the **Federal Register** notice dated September 16th, the public will have an opportunity to present their views to the TBDWG orally during the meeting's public comment session or by submitting a written public comment. Persons who wish to provide verbal or written public comment should review instructions at *https://www.hhs.gov/ash/advisory-committees/tickbornedisease/meetings/2022-10-25/index.html* and respond by midnight October 17, 2022 ET.

FOR FURTHER INFORMATION CONTACT: James Berger, Designated Federal Officer for the TBDWG; Office of Infectious Disease and HIV/AIDS Policy, Office of the Assistant Secretary for Health, Department of Health and Human Services, Tower Building, 1101 Wootton Parkway, Rockville, MD 20852. Email: *tickbornedisease@hhs.gov*. Phone: 202–795–7608.

Dated: September 30, 2022.

James Berger,

Designated Federal Officer, HHS Tick-Borne Disease Working Group, Office of HIV/AIDS and Infectious Disease Policy.

[FR Doc. 2022–22589 Filed 10–17–22; 8:45 am]

BILLING CODE 4150–28–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: Population Sciences and Epidemiology Integrated Review Group; Cardiovascular and Respiratory Diseases Study Section.

Date: November 8–9, 2022.

Time: 9 a.m. to 8 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: Mohammed F A Elfaramawi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007F, Bethesda, MD 20892, (301) 480–1142, *elfaramawimf@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Cancer and Hematologic Disorders Study Section.

Date: November 9–10, 2022.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Denise Wiesch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3138, MSC 7770, Bethesda, MD 20892, (301) 437–3478, *wieschd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Renal and Urological Sciences.

Date: November 10, 2022.

Time: 8 a.m. to 6 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: Ganesan Ramesh, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182 MSC 7818, Bethesda, MD 20892, (301) 827–5467, *ganesan.ramesh@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–22–002: Center for Rapid Surveillance of Tobacco (CRST) to Assess Changes in Use Behaviors, Product Marketing, and the Marketplace (U01 Clinical Trial Not Allowed).

Date: November 10, 2022.

Time: 1 p.m. to 4 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: Maureen Shuh, Ph.D. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–4097, *maureen.shuh@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: October 12, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22585 Filed 10–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information on Research Opportunities Related to the National Institutes of Health Scientific Workshop on Gender-Affirming Care for Transgender and Gender-Diverse Populations

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: Through this Request for Information (RFI), the Sexual & Gender Minority Research Office (SGMRO) in the Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI), Office of the Director (OD), National Institutes of Health (NIH), invites feedback from stakeholders throughout the scientific research community, clinical practice communities, patient and family advocates, scientific or professional organizations, federal partners, internal NIH stakeholders, and other interested constituents on research opportunities related to the upcoming NIH Scientific Workshop on Gender-Affirming Care for Transgender and Gender-Diverse Populations. Current evidence-based clinical practices are available for health professionals to assist transgender and gender-diverse populations but additional research is needed to advance this area of care. The overarching purpose of this workshop is to identify and prioritize key infrastructure and research needed to further our understanding of gender affirming care for transgender and gender diverse populations across the life course. Various populations (*e.g.,* people with HIV, people with other co-morbidities and complications, racial and ethnic minorities, etc.) and settings (academic medical centers, Federally Qualified Health Centers, community hospitals, HIV care settings, etc.) will be considered.

DATES: The SGMRO's Request for Information is open for public comment for a period of 4 weeks. Comments must be received on or before COB (5:00 p.m. ET) November 18, 2022, to ensure consideration. After the public comment period has closed, the comments received by SGMRO will be considered in a timely manner and shared with invitees to the Scientific Workshop on Gender-Affirming Care for Transgender and Gender-Diverse Populations.

ADDRESSES: Please see the **SUPPLEMENTARY INFORMATION** to view the draft domains and themes of focus for the Scientific Workshop on Gender-Affirming Care for Transgender and Gender-Diverse Populations. It is strongly encouraged to submit comments by email to *SGMRO@nih.gov.* Please include ''RFI: Gender-Affirming Care Scientific Workshop'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Irene Avila, Ph.D., Assistant Director, Sexual & Gender Minority Research Office (SGMRO), *irene.avila@nih.gov,* (301) 594–9701.

SUPPLEMENTARY INFORMATION:

Background: ''Sexual and gender minority'' is an overarching term that includes, but is not limited to, individuals who identify as lesbian, gay, bisexual, asexual, transgender, two-spirit, queer, and/or intersex. Individuals with same-sex or -gender attractions or behaviors and those with a difference in sex development are also included. These populations also encompass those who do not self-identify with one of these terms but whose sexual orientation, gender identity or expression, or reproductive development is characterized by non-binary constructs of sexual orientation, gender, and/or sex. This Notice is in accordance with Section 404N of the 21st Century Cures Act (Pub. L. 114–255), the Director of NIH shall encourage research on SGM populations.

The Sexual and Gender Minority Research Office (SGMRO) (*https://dpcpsi.nih.gov/sgmro*) coordinates sexual and gender minority (SGM)–related research and activities by working directly with the NIH Institutes, Centers, and Offices. The Office was officially established in September 2015 within the NIH Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI) in the Office of the Director.

In September 2020, SGMRO posted the NIH Strategic Plan to Advance Research on the Health and Well-Being of Sexual and Gender Minorities FY 2021–2025 (*https://dpcpsi.nih.gov/sites/default/files/SGMStrategicPlan_2021_2025.pdf*). The current strategic plan provides NIH with a framework to improve the health of SGM populations through increased research and support of scientists conducting SGM-relevant research.

Request for Comments on Research Opportunities Related to the National Institutes of Health Scientific Workshop on Gender-Affirming Care for Transgender and Gender-Diverse Populations: The NIH is hosting a workshop to enhance our understanding of gender-affirming care for transgender and gender-diverse populations and to identify opportunities in gender-affirming care research, including but not limited to non-medical interventions. There are currently evidence-based clinical practices available for health professionals to assist transgender and gender-diverse populations but additional research is needed. The SGMRO invites input from stakeholders throughout the scientific research community, clinical practice communities, patient and family advocates, scientific or professional organizations, federal partners, internal NIH stakeholders, and other interested members of the public on research opportunities related to the four domains highlighted below. This input will serve as a valuable element in the development of the workshop and subsequent report, and the community's time and consideration are highly appreciated. Please provide comments across the following three themes:

- Pediatric and adolescent care
- Adult and older adult care
- Systemic and Institutional Policies

The NIH seeks comments and/or suggestions from all interested parties on key research opportunities in gender-affirming care for transgender and gender-diverse populations.

Responses to this RFI are voluntary. *Do not include any proprietary, classified, confidential, trade secret, or sensitive information in your response.* The responses will be reviewed by NIH staff, and individual feedback will not be provided to any responder. The Government will use the information submitted in response to this RFI at its discretion. The Government reserves the right to use any submitted information on public NIH websites; in reports; in summaries of the state of the science; in any possible resultant solicitation(s), grant(s), or cooperative agreement(s); or in the development of future funding opportunity announcements.

This RFI is for information and planning purposes only and should not be construed as a solicitation for applications or proposals, or as an obligation in any way on the part of the United States Federal Government, the NIH, or individual NIH Institutes, Centers, and Offices to provide support for any ideas identified in response to it. The Federal Government will not pay for the preparation of any information submitted or for the Government's use of such information.

No basis for claims against the U.S. Government shall arise as a result of a response to this RFI or from the Government's use of such information. Additionally, the Government cannot

guarantee the confidentiality of the information provided.

Dated: October 11, 2022.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2022–22553 Filed 10–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 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: Center for Scientific Review Special Emphasis Panel; AREA: Cardiovascular and Respiratory Sciences.

Date: November 10, 2022.

Time: 10:00 a.m. to 5:00 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: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7814, Bethesda, MD 20892, (301) 435–1743, *margaret.chandler@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Health Informatics.

Date: November 16–17, 2022.

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: Michael J. McQuestion, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, Bethesda, MD 20892, 301–480–1276, *mike.mcquestion@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: The Cancer Biotherapeutics Development (CBD).

Date: November 16–17, 2022.

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: Laurie Ann Shuman Moss, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 867–5309, *laurie.shumanmoss@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Musculoskeletal Sciences in Diagnostics, Devices, and Rehabilitation.

Date: November 16–17, 2022.

Time: 10:00 a.m. to 5:00 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: Chee Lim, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, Bethesda, MD 20892, (301) 435–1850, *limc4@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cardiovascular Sciences.

Date: November 16, 2022.

Time: 10:00 a.m. to 5:00 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: Sara Ahlgren, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 4136, Bethesda, MD 20892, 301–435–0904, *sara.ahlgren@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–RM–22–011 and –013 Somatic Mosaicism Across Human Tissues Review Panel: Tool Development and Genome Characterization Centers.

Date: November 16–17, 2022.

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: Tami Jo Kingsbury, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 710Q, Bethesda, MD 20892, (410) 274–1352, *tami.kingsbury@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: HIV/AIDS Biological.

Date: November 16, 2022.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bakary Drammeh, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 805–P, Bethesda, MD 20892, (301) 435–0000, *drammehbs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Bioengineering, Surgery, Anesthesiology, and Trauma.

Date: November 16, 2022.

Time: 10:00 a.m. to 5:00 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: Donald Scott Wright, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7854, Bethesda, MD 20892, (301) 435–8363, *wrightds@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Aging, Injury, Musculoskeletal, and Rheumatologic Disorders Study Section.

Date: November 16–17, 2022.

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: Nketi I. Forbang, MD, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1006K1, Bethesda, MD 20892, (301) 594–0357, *forbangni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–20–238: Intervention Research to Improve Native American Health.

Date: November 16, 2022.

Time: 10:00 a.m. to 5:00 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: Helena Eryam Dagadu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3137, Bethesda, MD 20892, (301) 451–6273, *dagaduhe@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinically Relevant Genes and Variants Expert Curation Panels.

Date: November 16, 2022.

Time: 10:00 a.m. to 3:00 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: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, *methode.bacanamwo@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Metabolism and Reproductive Sciences.

Date: November 16, 2022.
Time: 11:00 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: Victoria Martinez Virador, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Bethesda, Md 20892, 301–594–4703, *victoria.virador@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: October 13, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22625 Filed 10–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; 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 Dental and Craniofacial Research Special Emphasis Panel, Advancing HIV/AIDS Research at the Intersection of Oral and Mental Health.
Date: November 16, 2022.
Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institute of Dental & Craniofacial Research, 6701 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Thomas John O'Farrell, Scientific Review Officer, Scientific Review Branch, National Institute of Dental & Craniofacial Research, National Institutes of Health, 6701 Democracy Blvd., Bethesda, MD 20892, (301) 584–4859, *tom.ofarrell@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: October 13, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22590 Filed 10–17–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX23LR000F60100; OMB Control Number 1028–0059/Renewal]

Agency Information Collection Activities; Comprehensive Test Ban Treaty

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is proposing to renew an Information Collection.

DATES: Interested persons are invited to submit comments on or before December 19, 2022.

ADDRESSES: Send your comments on this Information Collection Request (ICR) by mail to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–0059 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Elizabeth S. Sangine by email at *escottsangine@usgs.gov,* or by telephone at 703–648–7720. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) is the collection necessary to the proper functions of the USGS minerals information mission; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: The collection of this information is required by the Comprehensive Test Ban Treaty (CTBT), and we will, upon request, provide the CTBT Technical Secretariat with geographic locations of sites where chemical explosions greater than 300 tons TNT-equivalent have occurred.

Title of Collection: Comprehensive Test Ban Treaty.
OMB Control Number: 1028–0059.
Form Number: USGS Form 9–4040–A.
Type of Review: Extension of a currently approved collection.
Respondents/Affected Public: Business or Other-For-Profit Institutions: U.S. nonfuel mineral producers.
Total Estimated Number of Annual Respondents: 2,500.
Total Estimated Number of Annual Responses: 2,500.
Estimated Completion Time per Response: 15 minutes.
Total Estimated Number of Annual Burden Hours: 625.
Respondent's Obligation: Voluntary.
Frequency of Collection: Annually.
Total Estimated Annual Non-Hour Burden Cost: There are no ''non-hour cost'' burdens associated with this ICR.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information

unless it displays a currently valid OMB control number.

The authorities for this action are the PRA, the National Materials and Minerals Policy, Research and Development Act of 1980 (30 U.S.C. 1601 *et seq.*), the National Mining and Minerals Policy Act of 1970 (30 U.S.C. 21(a)), the CTBT Part III, and the CTBT USGS-Department of Defense Memorandum of Agreement.

Steven Fortier,

Director, National Minerals Information Center, U.S. Geological Survey.

[FR Doc. 2022–22568 Filed 10–17–22; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

[FWS–R4–ES–2022–N052; FVHC98220410150–XXX–FF04H00000]

Deepwater Horizon Oil Spill Natural Resource Damage Assessment, Alabama Trustee Implementation Group: Final Bon Secour National Wildlife Refuge Recreation Enhancements: Supplemental Restoration Plan

AGENCY: Department of the Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act of 1969 (NEPA), the *Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement* (Final PDARP/PEIS), and the *Deepwater Horizon* (*DWH*) Consent Decree, the Federal and State natural resource trustee agencies for the Alabama Trustee Implementation Group (Alabama TIG) have prepared the *Final Bon Secour National Wildlife Refuge Recreation Enhancements: Supplemental Restoration Plan* (SRP). The Alabama TIG selects their preferred alternative of adding approximately $2 million to the Mobile Street Boardwalk project budget to facilitate full implementation of the project as originally planned. This would continue the process of restoring lost recreational use in the Alabama Restoration Area that resulted from the *DWH* oil spill of 2010.

ADDRESSES: *Obtaining Documents:* You may download the Final SRP from the following websites:

- *http://www.gulfspillrestoration.noaa.gov/restoration-areas/alabama*
- *http://www.doi.gov/deepwaterhorizon*

Alternatively, you may request a CD (compact disc) of the Final SRP (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Nanciann Regalado, via email at *nanciann_regalado@fws.gov* or via telephone at 678–296–6805. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Introduction

On April 20, 2010, the mobile offshore drilling unit, *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252—MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *DWH* oil spill is the largest oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over 1 million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

State and Federal trustees conducted the natural resource damage assessment (NRDA) for the *DWH* oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to the OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. The OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the completion of restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred).

The *DWH* Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service (USFWS), and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

The Trustees reached and finalized a settlement of their natural resource damage claims with BP in an April 4, 2016, Consent Decree approved by the U.S. District Court for the Eastern District of Louisiana. Pursuant to that Consent Decree, restoration projects in the Alabama Restoration Area are now chosen and managed by the Alabama TIG. The Alabama TIG is composed of the following six Trustees: Alabama Department of Conservation and Natural Resources, Geological Survey of Alabama, DOI, NOAA, EPA, and USDA.

Background

The Alabama TIG Restoration Plan III/Environmental Assessment (RP III/EA) selected seven projects for implementation, allocating funds from two restoration types identified in the *DWH* Consent Decree: ''Provide and Enhance Recreational Opportunities'' and ''Birds.'' The Alabama TIG RP III addendum subsequently approved funding for the two projects conditionally approved in the RP III/EA, one of which was the Bon Secour National Wildlife Refuge Recreation Enhancement—Mobile Street Boardwalk (Mobile Street Boardwalk) Project. Since then, the project cost estimate has been revised because of increased costs in materials and construction. The cost increases were incurred, in part, due to economic fluctuations accompanying the COVID–19 pandemic, as well as Hurricane Sally which made landfall in September 2020. Given the substantial increase in project cost, the Alabama TIG prepared a Supplemental Restoration Plan to evaluate increasing project funding under the OPA.

A Notice of Availability of the Draft SRP was published in the **Federal Register** on July 19, 2022 (87 FR 43049). The public was provided with a period to review and comment on the Draft SRP from July 19, 2022, through August 18, 2022. One public comment, which generally supported selection of the AL TIG's preferred alternative, was received.

Overview of the Alabama TIG Final SRP

The Final SRP is being released in accordance with OPA, including criteria set forth in the associated Natural Resource Damage Assessment regulations found in the Code of Federal Regulations (CFR) at 15 CFR part 990, NEPA and its implementing regulations found at 40 CFR parts 1500–1508, and the Final PDARP/PEIS and Consent Decree. The Final SRP provides supplemental OPA NRDA analysis for two Bon Secour National Wildlife Refuge (BSNWR) recreation enhancement projects considered in the RP III/EA: the Mobile Street Boardwalk and Centennial Trail Boardwalk projects. In the Final SRP the AL TIG selects implementation of its preferred alternative: adding $2,037,313 in funding to the Mobile Street Boardwalk project. Fully funding this project will continue the process of restoring natural resources and services injured or lost as a result of the *DWH* oil spill.

Administrative Record

The documents comprising the administrative record for the SRP can be viewed electronically at *https://www.doi.gov/deepwaterhorizon/adminrecord.*

Authority

The authority of this action is the OPA (33 U.S.C. 2701 *et seq.*), its implementing NRDA regulations found at 15 CFR part 990, and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations found at 40 CFR parts 1500–1508.

Mary Josie Blanchard,

Department of the Interior, Director of Gulf of Mexico Restoration.

[FR Doc. 2022–22575 Filed 10–17–22; 8:45 am]

BILLING CODE 4310–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[223.LLHQ220000.L10200000.PK0000; OMB Control No. 1004–0019]

Agency Information Collection Activities; Grazing Management: Range Improvement Agreements and Permits Materials

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Land Management (BLM) proposes to renew an information collection.

DATES: Interested persons are invited to submit comments on or before November 17, 2022.

ADDRESSES: Written comments and recommendations for this information collection request (ICR) should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request additional information about this Information Collection Request (ICR), contact Jessica Phillips by email at *jmphillips@blm.gov,* or by telephone at (406) 490–5654. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we invite the public and other Federal agencies to comment on new, proposed, revised and continuing collections of information. This helps the BLM assess impacts of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BLM information collection requirements and ensure requested data are provided in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on June 27, 2022 (87 FR 38173). No responsive comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again inviting the public and other Federal agencies to comment on the proposed ICR described below. The BLM is especially interested in public comment addressing the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: OMB Control Number 1004–0019 authorizes range improvements to improve livestock grazing management, improve watershed conditions, enhance wildlife habitat on BLM lands or serve similar purposes. There are no program changes requested. The BLM is adjusting the burden downward by 580 annual responses and 580 annual burden hours. The downward adjustment results from removing the burden for individuals and households and for State, Local, and Tribal Governments for activities contained in 43 CFR 4120.5–1 and 4120.5–2 and pertaining to opportunities for cooperation. The BLM mistakenly included public burden for these activities when the activity is performed by the BLM and not members of the public. This OMB Control Number is currently scheduled to expire on March

31, 2023. The BLM request that OMB renew this OMB Control Number for an additional three years.

Title of Collection: Grazing Management: Range Improvements Agreements and Permits (43 CFR Subpart 4120).

OMB Control Number: 1004–0019.

Form Numbers: 4120–6, Cooperative Range Improvement Agreement; and 4120–7, Range Improvement Permit.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Holders of BLM grazing permits or grazing Leases.

Total Estimated Number of Annual Respondents: 530.

Total Estimated Number of Annual Responses: 530.

Estimated Completion Time per Response: 2 hours per response.

Total Estimated Number of Annual Burden Hours: 1,060.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

The authority for this action is the PRA of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin King,

Information Collection Clearance Officer.

[FR Doc. 2022–22548 Filed 10–17–22; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX064A000 221S180110; S2D2S SS08011000 SX064A000 22XS501520; OMB Control Number 1029–0059]

Submission to the Office of Management and Budget for Review and Approval; Grants to States and Tribes

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are proposing to revise an existing information collection.

DATES: Interested persons are invited to submit comments on or before December 19, 2022.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Mark Gehlhar, Office of Surface Mining Reclamation and Enforcement, 1849 C Street NW, Room 4556–MIB, Washington, DC 20240, or by email to *mgehlhar@osmre.gov.* Please reference OMB Control Number 1029–0059 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Mark Gehlhar by email at *mgehlhar@osmre.gov,* or by telephone at 202–208–2716. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) is the collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: State and Tribal reclamation and regulatory authorities are requested to provide specific budget and program information as part of the grant application and reporting processes authorized by the Surface Mining Control and Reclamation Act. States and Tribes use the OSM–51 form to report program narrative information as part of their grant applications and to meet their annual post-award reporting requirement. To ensure that the Bipartisan Infrastructure Law funding is used in accordance with section 40701(f) of the law and to maximize benefits received by the communities impacted by legacy coal mining, OSMRE must collect information from State and Tribal Abandoned Mine Land Programs. OSMRE anticipates using the revised OSM–51 form to collect information that includes, but not limited to: an annual list of projects, a description of how the projects were prioritized and selected, how the State/Tribe obtained and used public input, the estimated benefits of each project, and how the State/Tribe will prioritize projects that employ current and former coal industry employees.

Title of Collection: Grants to States and Tribes.

OMB Control Number: 1029–0059.

Form Number: OSM–47, OSM–49, and OSM–51.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: State and Tribal governments.

Total Estimated Number of Annual Respondents: 26.

Total Estimated Number of Annual Responses: 246.

Estimated Completion Time per Response: Varies 1 hour to 15 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 1,372.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: $0.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Mark J. Gehlhar,

Information Collection Clearance Officer, Division of Regulatory Support.

[FR Doc. 2022–22607 Filed 10–17–22; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–1333]

Institution of Investigation; Certain Automated Put Walls and Automated Storage and Retrieval Systems, Associated Vehicles, Associated Control Software, and Component Parts Thereof (II)

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 9, 2022, under section 337 of the Tariff Act of 1930, as amended, on behalf of OPEX Corporation of Moorestown, New Jersey. The complaint was supplemented on September 29, 2022. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain automated put walls and automated storage and retrieval systems, associated vehicles, associated control software, and component parts thereof by reason of the infringement of certain claims of U.S. Patent No. 11,192,144 (''the '144 patent'') and U.S. Patent No. 11,358,175 (''the '175 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Jessica Mullan, Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2022).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on October 12, 2022, *Ordered That—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–19 of the '144 patent and claims 1–11 and 18–21 of the '175 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''automated put walls and automated storage and retrieval systems; vehicles associated with these automated put walls and automated storage and retrieval systems; control software associated with these automated put walls and automated storage and retrieval systems; and component parts of these automated put walls and automated storage and retrieval systems'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: OPEX Corporation, 305 Commerce Drive, Moorestown, NJ 08057.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

HC Robotics (*a.k.a.* Huicang Information Technology Co., Ltd.), 3rd Floor, Haiwei Building, No. 101 Binkang Road, Binjiang District, Hangzhou City, Zheijang Province, China 310051.

Invata, LLC (*d/b/a* Invata Intralogistics), 1010 Spring Mill Avenue, Suite 300, Conshohocken, PA 19428.

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: October 12, 2022.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2022–22561 Filed 10–17–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1315 (Review)]

Ferrovanadium From South Korea; Scheduling of an Expedited Five-Year Review

AGENCY: 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 ferrovanadium from South Korea would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: July 5, 2022.

FOR FURTHER INFORMATION CONTACT: Keysha Martinez (202–205–2136), 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 this review may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On July 5, 2022, the Commission determined that the domestic interested party group response to its notice of institution (87 FR 19129, April 1, 2022) 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.[1] 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).

Staff report.—A staff report containing information concerning the subject matter of the review has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for this review on October 14, 2022. 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 review and that have provided individually adequate responses to the notice of institution,[2] 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 October 21, 2022 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 review by October 21, 2022. 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 §§ 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,* 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 review 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 § 207.62 of the Commission's rules.

By order of the Commission.
Issued: October 12, 2022.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2022–22560 Filed 10–17–22; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the responses submitted by AMG Vanadium LLC, a U.S. producer, U.S. Vanadium LLC, a U.S. wholesaler, and the Vanadium Producers and Reclaimers Association, a U.S. trade association, to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1100]

Bulk Manufacturer of Controlled Substances Application: National Center for Natural Products Research

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: National Center for Natural Products Research has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before December 19, 2022. Such persons may also file a written request for a hearing on the application on or before December 19, 2022.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on September 12, 2022, National Center for Natural Products Research, Coy Waller Research Center, 806 Hathorn Road, University, Mississippi 38677–1848, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I

The company plans to manufacture the listed controlled substances for product development and reference standards. In reference to drug codes 7360 (Marihuana) and 7370 (Tetrahydrocannabinols), the company plans to isolate these controlled substances from procured 7350 (Marihuana Extract). In reference to drug code 7360, no cultivation activities are authorized for this registration. No other activities for these drug codes are authorized for this registration.

Kristi O'Malley,

Assistant Administrator.

[FR Doc. 2022–22579 Filed 10–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1051P]

Proposed Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2023

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice with request for comments.

SUMMARY: The Drug Enforcement Administration (DEA) proposes to establish the 2023 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA) and the assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

DATES: Interested persons may file written comments on this notice in accordance with 21 CFR 1303.11(c) and 1315.11(d). Electronic comments must be submitted, and written comments must be postmarked, on or before November 17, 2022. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

Based on comments received in response to this notice, the Administrator may hold a public hearing on one or more issues raised. In the event the Administrator decides in her sole discretion to hold such a hearing, the Administrator will publish a notice of any such hearing in the **Federal Register**. After consideration of any comments or objections, or after a hearing, if one is held, the Administrator will publish in the **Federal Register** a final order establishing the 2023 aggregate production quotas for schedule I and II controlled substances, and an assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–1051P'' on all correspondence, including any attachments. DEA encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment.

Please be aware that submitted comments are not instantaneously available for public view on *Regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted, and there is no need to resubmit the same comment. Paper comments that duplicate electronic submissions are not necessary and are discouraged. Should you wish to mail a paper comment *in lieu* of an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: (571) 776–3882.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. They will, unless reasonable cause is given, be made available by the Drug Enforcement Administration (DEA) for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment.

Comments containing personal identifying information or confidential business information identified and located as directed above will generally be made available in redacted form. If a comment contains so much confidential business information or personal

identifying information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *http://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document is available at *http://www.regulations.gov* for easy reference.

Legal Authority

Section 306 of the Controlled Substances Act (21 U.S.C. 826) requires the Attorney General to establish production quotas for each basic class of controlled substances listed in schedules I and II, and for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of DEA pursuant to 28 CFR 0.100.

Analysis for Proposed 2023 Aggregate Production Quotas and Assessment of Annual Needs

The proposed 2023 aggregate production quotas (APQ) and assessment of annual needs represent those quantities of schedule I and II controlled substances, and the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, to be manufactured in the United States (U.S.) in 2023 to provide for the estimated medical, scientific, research, and industrial needs of the United States, lawful export requirements, and the establishment and maintenance of reserve stocks. These quotas include imports of ephedrine, pseudoephedrine, and phenylpropanolamine, but do not include imports of controlled substances for use in industrial processes.

Aggregate Production Quotas

In determining the proposed 2023 aggregate production quotas, the Administrator has taken into account the criteria of 21 U.S.C. 826(a) and 21 CFR 1303.11, including the following seven factors:

(1) Total net disposal of the class by all manufacturers during the current and two preceding years;

(2) Trends in the national rate of net disposal of the class;

(3) Total actual (or estimated) inventories of the class and of all substances manufactured from the class, and trends in inventory accumulation;

(4) Projected demand for such class as indicated by procurement quotas requested pursuant to [21 CFR] 1303.12;

(5) The extent of any diversion of the controlled substance in the class;

(6) Relevant information obtained from the Department of Health and Human Services (HHS), including from the Food and Drug Administration (FDA), the Centers for Disease Control and Prevention (CDC), and the Centers for Medicare and Medicaid Services (CMS), and relevant information obtained from the states; and

(7) Other factors affecting medical, scientific, research, and industrial needs of the United States and lawful export requirements, as the Administrator finds relevant, including changes in the currently accepted medical use in treatment with the class or the substances manufactured from it, the economic and physical availability of raw materials for use in manufacturing and for inventory purposes, yield and stability problems, potential disruptions to production (including possible labor strikes), and recent unforeseen emergencies such as floods and fires.

DEA formally solicited input from FDA and CDC in February of 2022 and from the states in April 2022, as required by 21 U.S.C. 826 and 21 CFR part 1303. DEA did not solicit input from CMS for reasons discussed in previous notices (*see* 85 FR 54414; 85 FR 54407). DEA requested information on trends in the legitimate use of select schedule I and II controlled substances from FDA and rates of overdose deaths for covered controlled substances from CDC. DEA's request for information from the states was made directly to the Prescription Drug Monitoring Program (PDMP) Administrators in each state as well as through the National Association of State Controlled Substances Authorities (NASCSA).

Assessment of Annual Needs

In similar fashion, in determining the proposed 2023 assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, the Administrator has taken into account the criteria of 21 U.S.C. 826(a) and 21 CFR 1315.11, including the five following factors:

(1) Total net disposal of the chemical by all manufacturers and importers during the current and two preceding years;

(2) Trends in the national rate of net disposal of each chemical;

(3) Total actual (or estimated) inventories of the chemical and of all substances manufactured from the chemical, and trends in inventory accumulation;

(4) Projected demand for each chemical as indicated by procurement and import quotas requested pursuant to [21 CFR] 1315.32; and

(5) Other factors affecting medical, scientific, research, and industrial needs in the United States, lawful export requirements, and the establishment and maintenance of reserve stocks, as the Administrator finds relevant, including changes in the currently accepted medical use in treatment with the chemicals or the substances manufactured from them, the economic and physical availability of raw materials for use in manufacturing and for inventory purposes, yield and stability problems, potential disruptions to production (including possible labor strikes), and recent unforeseen emergencies such as floods and fires. 21 CFR 1315.11(b).

In determining the proposed 2023 assessment of annual needs, DEA used the calculation methodology previously described in the 2010 and 2011 assessments of annual needs (74 FR 60294, Nov. 20, 2009, and 75 FR 79407, Dec. 20, 2010, respectively).

Estimates of Medical Need for Schedule II Opioids and Stimulants

In accordance with 21 CFR part 1303, 21 U.S.C. 826, and 42 U.S.C. 242, HHS continues to provide DEA with estimates of the quantities of select schedule I and II controlled substances and three list I chemicals that will be required to meet the legitimate medical needs of the United States for a given calendar year. The responsibility to provide these estimates of legitimate domestic medical needs resides with FDA. FDA provides DEA with predicted estimates of domestic medical usage for selected controlled substances based on information available to them at a specific point in time in order to meet statutory requirements.

FDA predicts that levels of medical need for schedule II opioids in the United States in calendar year 2023 will decline on average 5.3 percent from calendar year 2022 levels. These declines are expected to occur across a variety of schedule II opioids including fentanyl, hydrocodone, hydromorphone, oxycodone, and oxymorphone. DEA considered the potential for diversion of schedule II opioids, as required by 21 CFR 1303.11(b)(5), as well as a potential increase in demand for certain opioids identified as being necessary to treat ventilated patients with COVID–19, pursuant to 21 CFR 1303.11(b)(7), in the proposed 2023 aggregate production quotas.

FDA predicted less than a 0.1 percent decline in domestic medical use of the schedule II stimulants amphetamine, methylphenidate (including

dexmethylphenidate), and lisdexamfetamine, which are widely used to treat patients with attention deficit hyperactivity disorder (ADHD). FDA also raised concerns over drug shortage notifications it received from patients for specific ADHD medications containing methylphenidate and amphetamine. DEA considered FDA's concerns when calculating the aggregate production quota for these substances.

DEA has grown increasingly concerned over the forces that may be impacting the misuse of prescription stimulants among young adults, which coincides with an increase in demand for illicit methamphetamine and cocaine. These medications are all placed in schedule II because of their high abuse liability and associated risk of addiction. Due to the expansion of diagnostic criteria and treatment of ADHD, the domestic demand for these products (in terms of prescriptions written) has increased over the past two decades and so have the number of FDA approved drug products used to treat the condition. For example, Concerta (long-acting methylphenidate) was introduced in 2000, Ritalin LA (methylphenidate) in 2002, Adderall (dextroamphetamine saccharate, amphetamine aspartate, dextroamphetamine sulfate, and amphetamine sulfate) in 2002, and Vyvanse (lisdexamfetamine) in 2007. Patients respond in different ways to different medications; therefore, a variety of products to treat ADHD are available now, but domestic demand is no longer increasing as it was in the past.

Stimulants prescribed to treat ADHD are some of the most diverted drugs among those adolescents that are at risk of substance abuse and dependence.[1] The diversion of ADHD medications for the purposes of recreational use or performance enhancement is common,[2] with approximately 5–10 percent of high school students and 5–35 percent of college students, depending on the study, misusing and diverting stimulants prescribed for ADHD.[3] As a consequence, DEA continues to consult with federal partners at HHS and is closely monitoring trends in licit and illicit stimulant use and corresponding diversion and misuse.

DEA Estimated Projected Trends for Certain Schedule I Controlled Substances

There has been a significant increase in the use of schedule I hallucinogenic controlled substances for research and clinical trial purposes. DEA has received and subsequently approved new registration applications for schedule I researchers and new applications for registration from manufacturers to grow, synthesize, extract, and prepare dosage forms containing specific schedule I hallucinogenic substances for clinical trial purposes. DEA supports regulated research with schedule I controlled substances, as evidenced by increases proposed for 2023 as compared with aggregate production quotas for these substances in 2022. Further, DEA published the final rule, ''Controls to Enhance the Cultivation of Marihuana for Research in the United States'' in December 2020, and the agency continues to review and approve applications for schedule I manufacturers of marihuana that conform to the federal requirements contained in the CSA. *See* 21 CFR part 1318. DEA has proposed increases in 5-Methoxy-N,N-dimethyltryptamine, Lysergic acid diethylamide (LSD), Marijuana, Mescaline, Psilocyn, and All Other Tetrahydrocannabinols to support manufacturing activities related to the increased level of research and clinical trials with these schedule I controlled substances.

Information Received for Consideration of the Remaining Factors

For the factors listed in 21 CFR 1303.11(b)(3) and (4), DEA registered manufacturers of controlled substances in schedules I and II provided information by submitting their individual data to DEA database systems used for reporting inventory, and for distribution, manufacturing, and estimated quota requirements to meet sales forecasts, for each class of controlled substance. *See* 21 CFR 1303.12, 1303.22, and part 1304.

The regulation at 21 CFR 1303.11(b)(5) requires DEA to consider the extent of diversion of controlled substances.[4] Diversion is defined as all distribution, dispensing, or other use of controlled substances for other than legitimate medical purposes. In order to consider the extent of diversion, DEA analyzed reports of diversion of controlled substances from 2021 submitted to its Theft Loss Report database. This database is comprised of DEA registrant reports documenting diversion from the legitimate distribution chain, including employee thefts, break-ins, armed robberies, and material lost in transit. The data was categorized by basic drug class, and the amount of active pharmaceutical ingredient (API) in the dosage form was delineated with an appropriate metric for use in proposing aggregate production quota values (*i.e.,* weight).

In this proposed 2023 aggregate production quota, DEA also considered the effects of the COVID–19 pandemic, pursuant to 21 CFR 1303.11(b)(7), relative to the continued increase in demand for opioids necessary to treat ventilated patients.

Estimates of Diversion of Covered Controlled Substances

DEA is required:

In establishing any quota . . ., or any procurement quota established by [DEA] by regulation, for fentanyl, oxycodone, hydrocodone, oxymorphone, or hydromorphone (in this subsection referred to as a ''covered controlled substance''), [to] estimate the amount of diversion of the covered controlled substance that occurs in the United States.

21 U.S.C. 826(i)(1)(A).

In estimating diversion under that provision, DEA:

(i) shall consider information, in consultation with the Secretary of Health and Human Services, [it] determines reliable on rates of overdose deaths and abuse and overall public health impact related to the covered controlled substance in the United States; and

(ii) may take into consideration whatever other sources of information [it] determines reliable.

21 U.S.C. 826(i)(1)(B).

The statute further mandates that DEA ''make appropriate quota reductions, as determined by [DEA], from the quota [it] would have otherwise established had such diversion not been considered.'' [5]

In estimating the amount of diversion of each covered controlled substance that occurs in the United States, DEA considered information from state PDMP Administrators and from legitimate distribution chain participants.

[1] Epstein-Ngo QM, et al., Diversion of ADHD Stimulants and Victimization Among Adolescents, 41 J Ped Psychol 788–798 (2015).

[2] Wilens TE, et al., Misuse and Diversion of Stimulants Prescribed for ADHD: A Systematic Review of the Literature, 47 J Amer Acad Child Adolesc Psychiatry 21–31 (2008).

[3] Epstein-Ngo QM, et al., Diversion of ADHD Stimulants and Victimization Among Adolescents, 41 J Ped Psychol 788–798 (2015).

[4] The estimates of diversion for five ''covered controlled substances'' as required by 21 U.S.C. 826(i) are discussed later in the document.

[5] 21 U.S.C. 826(i)(1)(C).

Consideration of Information From Certain State PDMPs and From National Sales Data

Pursuant to 21 CFR 1303.11(b)(6), DEA requested state PDMP data for the purpose of establishing its aggregate production quotas. DEA believes state PDMPs to be an essential, reliable source of information for use in effectively estimating diversion of the five covered controlled substances. In April 2022, DEA sent a letter to NASCSA requesting its assistance in obtaining aggregated PDMP data for the five covered controlled substances from each state covering the years 2019–2021. The letter indicated that DEA was specifically interested in an analysis of prescription data from each state's PDMP that would assist DEA in estimating diversion and setting appropriate quotas in compliance with 21 U.S.C. 826(i). In its request, DEA provided specific questions, discussed in detail below, based on common indicia of potential diversion known as ''red flags'' by physicians, pharmacists, manufacturers, distributors, and federal and state regulatory and law enforcement agencies.[6]

DEA requested responses from state PDMP Administrators by June 1, 2022. NASCSA disseminated DEA's request to its PDMP Administrators and provided them with a report tool to ensure that responses to DEA's questions were extracted consistently across all responsive states. Twenty-seven states and three territories provided DEA with summarized PDMP data between April 12 and June 27, 2022, utilizing the standardized report developed by NASCSA.[7] See Table 1a below.

TABLE 1A—STATES/TERRITORIES THAT RESPONDED TO DEA'S DATA REQUEST

State/territory
1. Alabama.
2. Alaska.
3. Arizona.
4. Arkansas.
5. Delaware.
6. District of Columbia.
7. Guam.
8. Hawaii.
9. Indiana.
10. Iowa.
11. Kansas.
12. Kentucky.
13. Louisiana.
14. Maryland.
15. Michigan.
16. Mississippi.
17. Montana.
18. Nevada.
19. New Jersey.
20. New Mexico.
21. North Carolina.
22. North Dakota.
23. Oregon.
24. Puerto Rico.
25. Rhode Island.
26. South Carolina.
27. South Dakota.
28. Texas.
29. Utah.
30. Virginia.

Pharmacies are required by state law to enter controlled substance dispensing data into the state's PDMP database, including the prescriber's name, registered address and DEA number; prescription information (such as drug name); dispensing date; dosage dispensed; pharmacy registered address; and patient name and address. DEA considers PDMP data to be an accurate representation of dispensing activities in states. DEA received data for the following red-flag metrics:

- The total number of patients who saw three or more prescribers in a 90-day period and were dispensed an opioid following each visit. For this metric, DEA requested and was provided the number of prescriptions for the five covered controlled substances dispensed to these patients, as a percentage of the total prescriptions dispensed for that particular covered controlled substance, as well as the corresponding quantity of the covered controlled substance dispensed. This metric (patients being prescribed covered controlled substances from three or more prescribers in a 90-day period) is used to identify potential doctor shopping, a common technique to obtain a high number of controlled substances, which may lead to abuse or diversion of controlled substances. DEA has long considered doctor shopping to be an indicator of potential diversion.[8]
- The number of patients that were dispensed prescriptions for each of the five covered controlled substances that exceeded 240 morphine milligram equivalents (MME) daily. States provided the raw number of such prescriptions dispensed, the number of prescriptions as a percentage of the total covered controlled substance prescriptions dispensed, and the corresponding quantity of the covered controlled substance dispensed. The CDC has advised prescribers to avoid increasing dosages of opioids beyond 90 MME for patients with chronic pain.[9] DEA believes that accounting for quantities in excess of 240 MME daily allows for consideration of oncology patients with legitimate medical needs for covered controlled substance prescriptions in excess of 90 MME daily. Higher dosages place individuals at higher risk of overdose and death. Prescriptions involving dosages exceeding 240 MME daily may indicate diversion, such as illegal distribution of controlled substances or prescribing outside the usual course of professional practice.
- The number of patients that paid cash for covered controlled substance prescriptions, without submitting for insurance reimbursement.[10] States also provided the number of prescriptions paid entirely with cash as a percentage of the total prescriptions for the five covered controlled substances dispensed, as well as the corresponding quantity of the covered controlled substances dispensed. When investigating potential diversion, cash payments are one element considered in identifying prescriptions filled for nonmedical purposes. Unusually high percentages of cash payments made to a prescriber or pharmacy for controlled substances may indicate diversion.[11]

DEA received PDMP data from the states in a standardized format that allowed DEA to aggregate the data. The PDMP data sample represents a population of approximately 125.9

[6] National Association of Boards of Pharmacy (NABP) coalition consensus document ''Stakeholders Challenges and Red Flags and Warning Signs Related to Prescribing and Dispensing Controlled Substances'' (2015). www.nabp.pharmacy/resources/reports. For example, DEA investigators and administrative prosecutors rely on Agency case law in which these red flags of diversion have been upheld as indicia of potential diversion. *See, e.g.,* The Medicine Shoppe, 79 FR 59504, 59507, 59512–13 (2014); Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195, 77 FR 62316 (2012). Certain state regulations also now include red flag circumstances as potential indicators of illegitimate prescriptions, and thus of potential abuse and diversion of controlled substances. *See* The Pharmacy Place Order, 86 FR 21008, at 21012 (2021) (citing 22 Tex. Admin. Code 291.29(c)(4), specifying the geographical distance between the practitioner and the patient or between the pharmacy and the patient). This rule discusses only the use of red flags by DEA as an analytical tool to estimate diversion, not for any other purpose.

[7] NASCSA formatted DEA's request into an analytics model developed by one of its associates, Appriss Inc.

[8] Frank's Corner Pharmacy, 60 FR 17574 (1995); Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195, 77 FR 62316 (2012).

[9] *www.cdc.gov/drugoverdose/pdf/prescribing/Guidelines_factsheet-a.pdf.*

[10] This total does not include insurance co-payments made with cash.

[11] Suntree Pharmacy and Suntree Medical Equipment, LLC, 85 FR 73753 (2018) (finding that the pharmacy filled prescriptions despite the presence of multiple unresolved red flags, including cash payments); Pharmacy Doctors Enterprises d/b/a Zion Clinic Pharmacy, 83 FR 10876 (2018) (revoking pharmacy's registration for filling prescriptions that raised the red flag of customers paying cash for their prescriptions, among other red flags).

million people, which is approximately 38 percent of the U.S. population. DEA believes this sample is sufficient to derive a reasonable nationwide estimate.

While PDMP data is useful in estimating diversion, it is not conclusive. Further investigation would be required before concluding that any of the subject prescriptions were actually diverted. DEA continues to evaluate its methodologies in estimating diversion in an effort to adjust quotas more efficiently. State participation is crucial to accurate data analysis, and DEA anticipates working closely with states, as well as other federal and state entities, in future quota determinations.

To calculate a national diversion estimate for each of the covered controlled substances from the responses received from state PDMP Administrators, DEA relied upon the number of individuals who received a prescription for a covered controlled substance that met any of the three diversion metrics for each of calendar years 2019–2021. Using the population of the states responding to DEA's request, DEA then calculated the percentage of the population issued a prescription with a red flag. Using this estimated percentage for 2019–2021, DEA analyzed trends in the data to predict the estimated percentage of patients who would be expected to meet these diversion metrics for 2023.

DEA also reviewed aggregate sales data for each of the covered controlled substances, which it extracted from IQVIA's National Sales Perspective.[12] IQVIA sales data was selected to help quantify diversion at the national level because it reflects the best national estimate for all prescriptions written and filled, including the total quantity available for diversion or misuse. DEA analyzed trends in IQVIA sales data from January 2019–May 2022, in order to predict the estimated national sales for 2023.

To estimate diversion for each of the covered controlled substances, DEA multiplied the forecasted percentage of patients likely to receive a prescription for a covered controlled substance that meet any of the three diversion-related metrics in 2023 by the forecasted sales data from IQVIA for 2023. The resulting estimate of diversion from data submitted by state PDMP Administrators is summarized below in Table 1b. This data contributed to the final diversion estimate set forth in Table 3.

TABLE 1b—DIVERSION ESTIMATES BASED ON STATE PDMP DATA FOR COVERED CONTROLLED SUBSTANCES

Controlled substance	(g)
Fentanyl	58
Hydrocodone	112,346
Hydromorphone	355
Oxycodone	146,201
Oxymorphone	0

Consideration of Registrant Reported Diversion in the Legitimate Distribution Chain

DEA extracted data from its Theft Loss Report database and categorized it by each basic drug class. DEA calculated the estimated amount of diversion by multiplying the quantity of API in each finished dosage form by the total amount of units reported stolen or lost to estimate the metric weight in grams of the controlled substance being diverted. This estimate of diversion from the legitimate supply chain for each of the covered controlled substances is displayed in Table 2. This data contributed to the final diversion estimates set forth in Table 3.

TABLE 2—DIVERSION ESTIMATES BASED ON SUPPLY CHAIN DIVERSION DATA FOR COVERED CONTROLLED SUBSTANCES

Controlled substance	(g)
Fentanyl	6
Hydrocodone	4,048
Hydromorphone	227
Oxycodone	16,750
Oxymorphone	109

In accordance with 21 U.S.C. 826(i), DEA's estimate of diversion for the five controlled substances was calculated by combining the values in Tables 1b and 2. DEA reduced the aggregate production quotas for each covered controlled substance by the quantities listed in Table 3.

TABLE 3—TOTAL ESTIMATES OF DIVERSION FOR COVERED CONTROLLED SUBSTANCES

Total diversion estimates applied to the 2023 APQ (g)
Fentanyl 64
Hydrocodone 116,394
Hydromorphone 582
Oxycodone 162,951
Oxymorphone 109

The Administrator, therefore, proposes to establish the 2023 aggregate production quotas for certain schedule I and II controlled substances and assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in grams of anhydrous acid or base, as follows:

Basic class	Proposed 2023 quotas (g)
Schedule I	
-[1-(2-Thienyl)cyclohexyl]pyrrolidine	20
1-(1-Phenylcyclohexyl)pyrrolidine	30
1-(2-Phenylethyl)-4-phenyl-4-acetoxypiperidine	10
1-(5-Fluoropentyl)-3-(1-naphthoyl)indole (AM2201)	30
1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole (AM694)	30
1-[1-(2-Thienyl)cyclohexyl]piperidine	15
2′-fluoro 2-fluorofentanyl	30
1-Benzylpiperazine	25
1-Methyl-4-phenyl-4-propionoxypiperidine	10
2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C–E)	30
2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C–D)	30
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C–N)	30
2-(2,5-Dimethoxy-4-n-propylphenyl)ethanamine (2C–P)	30

[12] DEA has purchased this data from IQVIA for decades and routinely uses this information to administer several regulatory functions, including the administration of DEA's quota program.

Basic class	Proposed 2023 quotas (g)
2-(2,5-Dimethoxyphenyl)ethanamine (2C–H)	100
2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B–NBOMe; 2C–B–NBOMe; 25B; Cimbi-36)	30
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C–C)	30
2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C–NBOMe; 2C–C–NBOMe; 25C; Cimbi-82)	25
2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C–I)	30
2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I–NBOMe; 2C–I–NBOMe; 25I; Cimbi-5)	30
2,5-Dimethoxy-4-ethylamphetamine (DOET)	25
2,5-Dimethoxy-4-n-propylthiophenethylamine	25
2,5-Dimethoxyamphetamine	25
2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–2)	30
2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C–T–4)	30
3,4,5-Trimethoxyamphetamine	30
3,4-Methylenedioxyamphetamine (MDA)	200
3,4-Methylenedioxymethamphetamine (MDMA)	8,200
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	40
3,4-Methylenedioxy-N-methylcathinone (methylone)	40
3,4-Methylenedioxypyrovalerone (MDPV)	35
3–FMC; 3-Fluoro-N-methylcathinone	25
3-Methylfentanyl	30
3-Methylthiofentanyl	30
4,4′-Dimethylaminorex	30
4-Bromo-2,5-dimethoxyamphetamine (DOB)	30
4-Bromo-2,5-dimethoxyphenethylamine (2–CB)	25
4-Chloro-alpha-pyrrolidinovalerophenone (4-chloro-alpha-PVP)	25
4–CN-Cumyl-Butinaca	25
4-Fluoroisobutyryl fentanyl	30
4F–MDMB–BINACA	30
4–FMC; Flephedrone	25
4–MEC; 4-Methyl-N-ethylcathinone	25
4-Methoxyamphetamine	150
4-Methyl-2,5-dimethoxyamphetamine (DOM)	25
4-Methylaminorex	25
4-Methyl-N-methylcathinone (mephedrone)	45
4-Methyl-alpha-ethylaminopentiophenone (4–MEAP)	25
4-Methyl-alpha-pyrrolidinohexiophenone (MPHP)	25
4′-Methyl acetyl fentanyl	30
4-Methyl-α-pyrrolidinopropiophenone (4-MePPP)	25
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol	50
5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP–47,497 C8-homolog)	40
5F–AB–PINACA; (1-Amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide	25
5F–ADB; 5F–MDMB–PINACA (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	25
5F–CUMYL–P7AICA; 1-(5-Fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3carboximide	25
5F–CUMYL–PINACA	25
5F–EDMB–PINACA	25
5F–MDMB–PICA	25
5F–AMB (methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3-methylbutanoate)	25
5F–APINACA; 5F–AKB48 (N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide)	25
5-Fluoro-PB–22; 5F–PB–22	25
5-Fluoro-UR144, XLR11 ([1-(5-fluoro-pentyl)-1Hindol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone	25
5-Methoxy-3,4-methylenedioxyamphetamine	25
5-Methoxy-N,N-diisopropyltryptamine	25
5-Methoxy-N,N-dimethyltryptamine	6,000
AB–CHMINACA	30
AB–FUBINACA	50
AB–PINACA	30
ADB–FUBINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide)	30
Acetorphine	25
Acetyl Fentanyl	100
Acetyl-alpha-methylfentanyl	30
Acetyldihydrocodeine	30
Acetylmethadol	25
Acryl Fentanyl	25
ADB–PINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide)	50
AH–7921	30
All other tetrahydrocannabinol	15,000
Allylprodine	25
Alphacetylmethadol	25
alpha-Ethyltryptamine	25
Alphameprodine	25
Alphamethadol	25
alpha-Methylfentanyl	30
alpha-Methylthiofentanyl	30

Basic class	Proposed 2023 quotas (g)
alpha-Methyltryptamine (AMT)	25
alpha-Pyrrolidinobutiophenone (α-PBP)	25
alpha-pyrrolidinoheptaphenone (PV8)	25
alpha-pyrrolidinohexabophenone (alpha-PHP)	25
alpha-Pyrrolidinopentiophenone (α-PVP)	25
Aminorex	25
Anileridine	20
APINCA, AKB48 (N-(1-adamantyl)-1-pentyl-1H-indazole-3-carboxamide)	25
Benzethidine	25
Benzylmorphine	30
Betacetylmethadol	25
beta-Hydroxy-3-methylfentanyl	30
beta-Hydroxyfentanyl	30
beta-Hydroxythiofentanyl	30
beta-Methyl fentanyl	30
beta′-Phenyl fentanyl	30
Betameprodine	25
Betamethadol	4
Betaprodine	25
Brorphine	30
Bufotenine	15
Butonitazene	30
Butylone	25
Butyryl fentanyl	30
Cathinone	40
Clonitazene	25
Codeine methylbromide	30
Codeine-N-oxide	192
Crotonyl Fentanyl	25
Cyclopentyl Fentanyl	30
Cyclopropyl Fentanyl	20
Cyprenorphine	25
d-9-THC	384,460
Desomorphine	25
Dextromoramide	25
Diapromide	20
Diethylthiambutene	20
Diethyltryptamine	25
Difenoxin	9,300
Dihydromorphine	653,548
Dimenoxadol	25
Dimepheptanol	25
Dimethylthiambutene	20
Dimethyltryptamine	3,000
Dioxyaphetyl butyrate	25
Dipipanone	25
Drotebanol	25
Ethylmethylthiambutene	25
Ethylone	25
Etodesnitazene	30
Etonitazene	25
Etorphine	30
Etoxeridine	25
Fenethylline	30
Fentanyl carbamate	30
Fentanyl related substances	600
Flunitazene	30
FUB–144	25
FUB–AKB48	25
Fub-AMB, MMB-Fubinaca, AMB-Fubinaca	25
Furanyl fentanyl	30
Furethidine	25
gamma-Hydroxybutyric acid	29,417,000
Heroin	150
Hydromorphinol	40
Hydroxypethidine	25
Ibogaine	30
Isobutyryl Fentanyl	25
Isotonitazine	25
JWH–018 and AM678 (1-Pentyl-3-(1-naphthoyl)indole)	35
JWH–019 (1-Hexyl-3-(1-naphthoyl)indole)	45
JWH–073 (1-Butyl-3-(1-naphthoyl)indole)	45

Basic class	Proposed 2023 quotas (g)
JWH–081 (1-Pentyl-3-[1-(4-methoxynaphthoyl)]indole)	30
JWH–122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole)	30
JWH–200 (1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole)	35
JWH–203 (1-Pentyl-3-(2-chlorophenylacetyl)indole)	30
JWH–250 (1-Pentyl-3-(2-methoxyphenylacetyl)indole)	30
JWH–398 (1-Pentyl-3-(4-chloro-1-naphthoyl)indole)	30
Ketobemidone	30
Levomoramide	25
Levophenyacylmorphan	25
Lysergic acid diethylamide (LSD)	1,200
MAB–CHMINACA; ADB–CHMINACA (N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide)	30
MDMB–CHMICA; MMB–CHMINACA(methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate)	30
MDMB–FUBINACA (methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate)	30
MMB–CHMICA-(AMB–CHIMCA); Methyl-2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate	25
Metodesnitazene	30
Metonitazene	30
Marijuana	6,675,000
Marijuana extract	1,000,000
Mecloqualone	30
Mescaline	1,200
Methaqualone	60
Methcathinone	25
Methoxetamine	30
Methoxyacetyl fentanyl	30
Methyldesorphine	5
Methyldihydromorphine	25
Morpheridine	25
Morphine methylbromide	5
Morphine methylsulfonate	5
Morphine-N-oxide	150
MT–45	30
Myrophine	25
NM2201: Naphthalen-1-yl 1-(5-fluorpentyl)-1H-indole-3-carboxylate	25
N,N-Dimethylamphetamine	25
Naphyrone	25
N-Ethyl-1-phenylcyclohexylamine	25
N-Ethyl-3-piperidyl benzilate	10
N-Ethylamphetamine	24
N-Ethylhexedrone	25
N-Ethylpentylone, ephylone	30
N-Hydroxy-3,4-methylenedioxyamphetamine	24
Nicocodeine	25
Nicomorphine	25
N-methyl-3-piperidyl benzilate	30
N-Pyrrolidino Etonitazene	30
Noracymethadol	25
Norlevorphanol	2,550
Normethadone	25
Normorphine	40
Norpipanone	25
Ocfentanil	25
ortho-Fluoroacryl fentanyl	30
ortho-Fluorobutyryl fentanyl	30
Ortho-Fluorofentanyl,2-Fluorofentanyl	30
ortho-Fluoroisobutyryl fentanyl	30
ortho-Methyl acetylfentanyl	30
ortho-Methyl methoxyacetyl fentanyl	30
Para-Chlorisobutyrl fentanyl	30
Para-flourobutyryl fentanyl	25
Para-fluorofentanyl	25
para-Fluoro furanyl fentanyl	30
Para-Methoxybutyrl fentanyl	30
Para-methoxymethamphetamine	30
para-Methylfentanyl	30
Parahexyl	5
PB–22; QUPIC	20
Pentedrone	25
Pentylone	25
Phenadoxone	25
Phenampromide	25
Phenomorphan	25

Basic class	Proposed 2023 quotas (g)
Phenoperidine	25
Phenyl fentanyl	30
Pholcodine	5
Piritramide	25
Proheptazine	25
Properidine	25
Propiram	25
Protonitazene	30
Psilocybin	8,000
Psilocyn	8,000
Racemoramide	25
SR–18 and RCS–8 (1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole)	45
SR–19 and RCS–4 (1-Pentyl-3-[(4-methoxy)-benzoyl]indole)	30
Tetrahydrofuranyl fentanyl	15
Thebacon	25
Thiafentanil	25
Thiofentanyl	25
Thiofuranyl fentanyl	30
THJ–2201 ([1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone)	30
Tilidine	25
Trimeperidine	25
UR–144 (1-pentyl-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone	25
U–47700	30
Valeryl fentanyl	25
Schedule II	
1-Phenylcyclohexylamine	15
1-Piperidinocyclohexanecarbonitrile	25
4-Anilino-N-phenethyl-4-piperidine (ANPP)	886,415
Alfentanil	5,000
Alphaprodine	25
Amobarbital	20,100
Bezitramide	25
Carfentanil	20
Cocaine	60,492
Codeine (for conversion)	1,085,024
Codeine (for sale)	21,003,397
D-amphetamine (for sale)	21,200,000
D,L-amphetamine	21,200,000
D-amphetamine (for conversion)	20,000,000
Dexmethylphenidate (for sale)	6,200,000
Dexmethylphenidate (for conversion)	4,200,000
Dextropropoxyphene	35
Dihydrocodeine	132,658
Dihydroetorphine	25
Diphenoxylate (for conversion)	14,100
Diphenoxylate (for sale)	770,800
Ecgonine	60,492
Ethylmorphine	30
Etorphine hydrochloride	32
Fentanyl	691,447
Glutethimide	25
Hydrocodone (for conversion)	1,250
Hydrocodone (for sale)	27,239,822
Hydromorphone	1,994,117
Isomethadone	30
L-amphetamine	30
Levo-alphacetylmethadol (LAAM)	25
Levomethorphan	30
Levorphanol	23,010
Lisdexamfetamine	26,500,000
Meperidine	681,289
Meperidine Intermediate-A	30
Meperidine Intermediate-B	30
Meperidine Intermediate-C	30
Metazocine	15
Methadone (for sale)	25,619,700
Methadone Intermediate	27,673,600
Methamphetamine	150
d-methamphetamine (for conversion)	485,020
d-methamphetamine (for sale)	40,000

Basic class	Proposed 2023 quotas (g)
l-methamphetamine	587,229
Methylphenidate (for sale)	41,800,000
Methylphenidate (for conversion)	15,300,000
Metopon	25
Moramide-intermediate	25
Morphine (for conversion)	2,458,460
Morphine (for sale)	21,747,625
Nabilone	62,000
Norfentanyl	25
Noroxymorphone (for conversion)	22,044,741
Noroxymorphone (for sale)	1,000
Oliceridine	25,100
Opium (powder)	250,000
Opium (tincture)	530,837
Oripavine	33,010,750
Oxycodone (for conversion)	437,827
Oxycodone (for sale)	53,840,608
Oxymorphone (for conversion)	28,204,371
Oxymorphone (for sale)	516,351
Pentobarbital	33,843,337
Phenazocine	25
Phencyclidine	35
Phenmetrazine	25
Phenylacetone	100
Piminodine	25
Racemethorphan	5
Racemorphan	5
Remifentanil	3,000
Secobarbital	172,100
Sufentanil	4,000
Tapentadol	11,941,416
Thebaine	57,137,944
List I Chemicals	
Ephedrine (for conversion)	100
Ephedrine (for sale)	4,136,000
Phenylpropanolamine (for conversion)	14,878,320
Phenylpropanolamine (for sale)	7,990,000
Pseudoephedrine (for conversion)	1,000
Pseudoephedrine (for sale)	174,246,000

The Administrator further proposes that aggregate production quotas for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 remain at zero.

These proposed 2023 quotas reflect the quantities that DEA believes are necessary to meet the estimated medical, scientific, research, and industrial needs of the United States, including any increase in demand for certain controlled substances used to treat patients with COVID–19; lawful export requirements; and the establishment and maintenance of reserve stocks. DEA remains committed to conducting continuous surveillance on the supply of schedule II controlled substances and list I chemicals necessary to treat patients with COVID–19, and, pursuant to her authority, the Administrator will move swiftly and decisively to increase any 2023 aggregate production quota that she determines is necessary to address an unforeseen increase in demand, should that occur.

In accordance with 21 CFR 1303.13 and 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2023 aggregate production quotas and assessment of annual needs as needed. These assessments are subject to reevaluation pursuant to 21 U.S.C. 826 and 21 CFR 1303.13(a)–(b).

Conclusion

After consideration of any comments or objections, or after a hearing, if one is held, the Administrator will issue and publish in the **Federal Register** a final order establishing the 2023 aggregate production quotas for controlled substances in schedule I and II and establishing an assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, as directed by 21 CFR 1303.11(c) and 1315.11(f).

Signing Authority

This document of the Drug Enforcement Administration was signed on October 13, 2022, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2022–22638 Filed 10–14–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1101]

Importer of Controlled Substances Application: Organic Standards Solutions International, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Organic Standards Solutions International, LLC has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before November 17, 2022. Such persons may also file a written request for a hearing on the application on or before November 17, 2022.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on September 20, 2022, Organic Standards Solutions International, LLC, 7290 Investment Drive, Unit B, North Charleston, South Carolina 29418–8305, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to import the listed controlled substances to produce analytical reference standards for sale and distribution to its customers. Drug codes 7350 (Marihuana Extract) and 7360 (Marihuana) will be used for the manufacture of cannabidiol only. In reference to drug codes 7370 (Tetrahydrocannabinols) the company plans to import a synthetic version of this controlled substance. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Kristi O'Malley,

Assistant Administrator.

[FR Doc. 2022–22580 Filed 10–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0002]

Agency Information Collection Activities; Proposed Collection eComments Requested; Revision of a Previously Approved Collection; Notice of Appeal From a Decision of an Immigration Judge

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Executive Office for Immigration Review, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 87 FR 34905 (June 8, 2022), allowing for a 60-day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until November 17, 2022.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0289. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20530 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION:

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and/or

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

1. *Type of Information Collection:* Renewal with change of an approved collection.

2. *The Title of the Form/Collection:* Notice of Appeal from a Decision of an Immigration Judge.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The agency form number is EOIR–26.

Agency Sponsor: Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual noncitizens determined to be removable from the United States and the Department of Homeland Security, Immigration and Customs Enforcement (ICE). Other: None. Abstract: A party (either the noncitizen or ICE) affected by a decision of an Immigration Judge may appeal that decision to the Board, provided that the Board has jurisdiction pursuant to 8 CFR 1003.1(b). An appeal from an Immigration Judge's decision is taken by completing the Form EOIR–26 and submitting it to the Board.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 34,921 respondents will complete the form annually with an average of 30 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 17,460 hours.

If additional information is required contact: Robert Houser, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, Suite 3E.206, Washington, DC 20530.

Dated: October 13, 2022.

Robert Houser,

Department Clearance Officer, Policy and Planning Staff, Office of the Chief Information Officer, U.S. Department of Justice.

[FR Doc. 2022–22592 Filed 10–17–22; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0031]

Agency Information Collection Activities; Proposed eCollection Requested; Extension of a Currently Approved Collection

AGENCY: Office on Violence Against Women, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Office on Violence Against Women (OVW), Department of Justice will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until December 19, 2022.

FOR FURTHER INFORMATION CONTACT: Written comments and/or suggestion regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Cathy Poston, Office on Violence Against Women, at 202–305–5309 or *Catherine.poston@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *Title of the Form/Collection:* Campus Program Grantee Needs and Progress Assesment Tool.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0031.

Sponsor: Office on Violence Against Women, U.S. Department of Justice,

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes current grantees under the Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program. The Campus Program strengthens the response of institutions of higher education to the crimes of sexual assault, domestic violence, dating violence and stalking on campuses enhances collaboration among campuses, local law enforcement, and victim advocacy organizations. Eligible applicants are institutions of higher education. The affected public includes the approximately 100 institutions of higher education currently funded through the Campus program.

Abstract: The Grantee Needs and Progress Assessment Tool will be used to determine the training and technical assistance needs of Campus Program grantees—both new and continuation grantees—throughout the life of the grant award as well measure the development of the capacity of grantees to respond and prevent violence against women on their campuses. In addition, the tool will help campuses and OVW document the impact of their grant-funded work, promote sustainability of important intervention and prevention activities, and provide outcome-based information throughout the life of the grant to help OVW—funded technical assistance providers and grantees make changes to the goals and objectives necessary to achieve the Congressional purpose of the Campus Program.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 100 respondents (Campus Program grantees) approximately 2 hours to complete the assessment tool.

6. *An estimate of the total public burden (in hours) associated with the*

collection: The total annual hour burden for this collection is 200 hours, that is 100 grantees completing a form once a year with an estimated time of two hours for each grantee to complete the assessment form.

If additional information is required contact: Robert Houser, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 3E.206, Washington, DC 20530.

Dated: October 12, 2022.

Robert Houser,

Department Clearance Officer, Policy and Planning Staff, Office of the Chief Information Officer, U.S. Department of Justice.

[FR Doc. 2022–22565 Filed 10–17–22; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Modification of Consent Decree Under the Clean Water Act and Oil Pollution Act

On October 12, 2022, the Department of Justice lodged with the United States District Court for the Western District of Michigan a proposed Seventh Modification of Consent Decree (''Seventh Modification'') in the lawsuit entitled *United States* v. *Enbridge Energy, Limited Partnership, et al.,* Civil Action No. 1:16–cv–914.

On May 23, 2017, the United States District Court for the Western District of Michigan approved and entered a Consent Decree that resolved specified claims asserted by the United States against Enbridge Energy, Limited Partnership and eight affiliated entities (''Enbridge'') under the Clean Water Act and Oil Pollution Act arising from two separate 2010 oil spills resulting from failures of Enbridge oil transmission pipelines near Marshall, Michigan and Romeoville, Illinois. The complaint filed by the United States alleged that Enbridge's pipelines had unlawfully discharged oil into waters of the United States and sought civil penalties, recovery of removal costs, and injunctive relief. The Consent Decree established various requirements applicable to a network of 14 pipelines that comprise Enbridge's Lakehead System—including dig selection criteria governing excavation, repair or mitigation, and imposition of interim pressure restrictions for various features, such as dents, corrosion and cracks, that are detected through In-Line Inspections (''ILI'') of such pipelines. Because certain of these dig selection criteria are based in part on the Established Maximum Operating Pressure (''EMOP'') applicable to the pipeline location where the particular feature is located, the Consent Decree incorporated by reference EMOP values established for each of the pipelines subject to the Consent Decree.

The proposed Seventh Modification would revise provisions of the Consent Decree relating to four main areas. First, the proposed modification would establish requirements and procedures under which Enbridge may seek Partial Termination of specified obligations under the Consent Decree while it remains subject to, and continues to implement, other Consent Decree requirements that are not eligible for Partial Termination. Second, the proposed Seventh Modification would explicitly designate specified pipeline segments on Line 61 and Line 62 as ''Replacement Segments'' that are subject to some additional leak detection system-related requirements under the Consent Decree. The Modification requires Enbridge to maintain existing temperature and pressure sensing instrumentation on the newly-designated Replacement Segments but clarifies that Enbridge is not required to install instrumentation on the newly designated Replacement Segments. Third, the proposed Seventh Modification establishes deadlines applicable to the resumption of In-Line Inspections (ILIs) on Line 62 following a long period when that pipeline was not in service. Finally, in light of information developed following the 2017 hydrostatic pressure tests on a segment of Line 5 that crosses the Straits of Mackinac (generally referred to as the ''Dual Pipelines''), the proposed Seventh Modification would confirm that Enbridge will not be required to perform any axial crack ILI on the Dual Pipelines and associated piping prior to expiration of a time period that corresponds to one-half of the estimated remaining fatigue life of the worst potential axial Crack feature that could have survived the 2017 hydrostatic pressure tests. The Modification does not limit Enbridge's ability to contend that an axial crack ILI is not required on the Dual Pipelines following expiration of the time period referred to above.

The publication of this notice opens a period for public comment on the proposed Seventh Modification of Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Enbridge Energy, Limited Partnership, et al.,* D.J. Ref. No. 90–5–1–1–10099. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, D.C. 20044–7611.

During the public comment period, the proposed Seventh Modification of Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* The Justice Department will provide a paper copy of the proposed Seventh Modification of Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

In requesting a paper copy, please enclose a check or money order for $8.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Patricia A. McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2022–22563 Filed 10–17–22; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2020–0010]

Maritime Advisory Committee on Occupational Safety and Health (MACOSH): Notice of Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of MACOSH meeting.

SUMMARY: The Maritime Advisory Committee on Occupational Safety and Health (MACOSH) will meet on November 16 and 17, 2022.

DATES:

MACOSH Workgroup meetings: The MACOSH Shipyard and Longshoring Workgroups will meet from 9:30 a.m. to 4 p.m., ET, Wednesday, November 16, 2022.

MACOSH full Committee meeting: MACOSH will meet from 9:30 a.m. to 4 p.m., ET, Thursday, November 17, 2022.

ADDRESSES:

Submission of comments and requests to speak: Submit comments by November 10, 2022, identified by the docket number for this **Federal Register** notice (Docket No. OSHA–2022–0010), using the following method:

Electronically: Comments, including attachments, must be submitted electronically at *www.regulations.gov,* the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (Docket No. OSHA–2020–0010). OSHA will place comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download documents in the public docket for this MACOSH meeting, go to *www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *www.regulations.gov.* All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Participation in the MACOSH Workgroup and full committee meetings: Public attendance at the MACOSH Committee and Workgroup meetings will be virtual only. OSHA is not receiving public comments or requests to speak at the MACOSH Workgroup meetings.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general information about MACOSH: Ms. Amy Wangdahl, Director, Office of Maritime and Agriculture, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–2066; email: *wangdahl.amy@dol.gov.*

Telecommunication requirements: For additional information about the telecommunication requirements for the meeting, please contact Ms. Carla Marcellus, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–1865; email: *marcellus.carla@dol.gov.*

For copies of this **Federal Register** *Notice:* Electronic copies of this **Federal Register** notice are available at *www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available at OSHA's web page at *www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Meeting Information

MACOSH Workgroup Meetings

The MACOSH Shipyard and Longshoring Workgroups will meet from 9:30 a.m. to 4 p.m., ET on November 16, 2022.

MACOSH Meeting

MACOSH will meet from 9:30 p.m. to 4 p.m., ET, Thursday, November 17, 2022. The meeting is open to the public.

The tentative agenda for the full Committee will include reports from the Shipyard and Longshoring workgroups, including discussions on the use of ventilation in shipyard employment, employee training, and the rescue of persons in the water. The Committee will also receive updates from the Office of the Assistant Secretary, the Directorate of Standards and Guidance, and the Directorate of Enforcement Programs.

Public attendance at the MACOSH Committee and Workgroup meetings will be virtual only. Meeting information will be posted in the Docket (Docket No. OSHA–2020–0010) and on the MACOSH web page, *https://www.osha.gov/advisorycommittee/macosh,* prior to the meeting.

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 29 U.S.C. 655(b)(1) and 656(d), 5 U.S.C. App. 2, Secretary of Labor's Order No. 8–2020 (85 FR 58393), and 29 CFR part 1912.

Signed at Washington, DC, on October 11, 2022.

James S. Frederick,

Deputy Assistant Secretary for Occupational Safety and Health.

[FR Doc. 2022–22631 Filed 10–17–22; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 22–086]

Biological and Physical Sciences Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Biological and Physical Sciences Advisory Committee. This Committee reports to the Director, Astrophysics Division, Science Mission Directorate, NASA Headquarters. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, November 15, 2022, 11 a.m.–6 p.m., Wednesday, November 16, 2022, 11 a.m.–6 p.m., eastern time.

ADDRESSES: Meeting will be virtual only. See Webex and audio dial-in information below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Mrs. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355, or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: As noted above, this meeting is virtual and will take place telephonically and via Webex. Any interested person must use a touch-tone phone to participate in this meeting. The Webex connectivity information for each day is provided below. For audio, when you join the Webex event, you may use your computer or provide your phone number to receive a call back, otherwise, call the U.S. toll conference number listed for each day.

On Tuesday, November 15, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m01b35a731c1ea71b7838139acd4f3c09,* the meeting number is 2762 360 2352, and meeting password is Bpac1115#

To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035. Access code: 2762 360 2352

On Wednesday, November 16, the event address for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m9b9cd4f034cc4e6ef3b7ee7ef45b4aa2,* the meeting number is 2763 691 6946, and meeting password is Bpac1116#

To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035. Access code: 2763 691 6946

The agenda for the meeting includes the following topics:

—Biological and Physical Sciences Division Overview

—Updates on Space Biology, Physical Sciences, and Fundamental Physics

The agenda will be posted on the Biological and Physical Sciences Advisory Committee web page: *https://science.nasa.gov/researchers/nac/science-advisory-committees/bpac.*

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Carol Hamilton,

Acting Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2022–22539 Filed 10–17–22; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., October 20, 2022.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

1. Board Briefing, Cybersecurity.
2. Board Briefing, Central Liquidity Fund.
3. NCUA Risk Appetite Statement.

CONTACT PERSON FOR MORE INFORMATION: Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703–518–6304.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2022–22674 Filed 10–14–22; 11:15 am]

BILLING CODE 7535–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0067]

Information Collection: NRC Policy Statement, ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,'' Maintenance of Existing Agreement State Programs, Requests for Information Through the Integrated Materials Performance Evaluation Program (IMPEP) Questionnaire, and Agreement State Participation in IMPEP

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''NRC Policy Statement, ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,'' Maintenance of Existing Agreement State Programs, Requests for Information Through the Integrated Materials Performance Evaluation Program (IMPEP) Questionnaire, and Agreement State Participation in IMPEP.''

DATES: Submit comments by December 19, 2022. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0067. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0067 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–2022–0067. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2022–0067 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML22179A336.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. Eastern Time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2022–0067, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact

information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* NRC Policy Statement, ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement,'' Maintenance of Existing Agreement State Programs, Requests for Information Through the Integrated Materials Performance Evaluation Program (IMPEP) Questionnaire, and Agreement State Participation in IMPEP.

2. *OMB approval number:* 3150–0183.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Every four years for completion of the IMPEP questionnaire in preparation for an IMPEP review. One time for new Agreement State applications. Annually for participation by Agreement States in the IMPEP reviews and fulfilling requirements for Agreement States to maintain their programs.

6. *Who will be required or asked to respond:* All Agreement States who have signed Agreements with NRC under Section 274b. of the Atomic Energy Act (Act) and any non-Agreement State seeking to sign an Agreement with the Commission.

7. *The estimated number of annual responses:* 65.

8. *The estimated number of annual respondents:* 41.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 290,822.

10. *Abstract:* The States wishing to become Agreement States are requested to provide certain information to the NRC as specified by the Commission's Policy Statement, ''Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement.'' The Agreement States need to ensure that the radiation control program under the Agreement remains adequate and compatible with the requirements of Section 274 of the Act and must maintain certain information. The NRC conducts periodic evaluations through IMPEP to ensure that these programs are compatible with the NRC's program, meet the applicable parts of the Act, and adequate to protect public health and safety.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: October 13, 2022.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2022–22611 Filed 10–17–22; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[EA–21–045; NRC–2022–0168]

In the Matter of Steel City Gamma, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an Order to Steel City Gamma, LLC, imposing a civil monetary penalty of $25,600. The NRC determined that two willful violations of NRC regulations occurred as identified during an investigation by the NRC's Office of Investigations that was completed on March 1, 2021. The violations involved Steel City Gamma's failure to file for reciprocity prior to performing work in NRC jurisdiction and Steel City Gamma's performance of licensed activities in NRC jurisdiction without a valid NRC or Agreement State license. This order is effective on the date of issuance.

DATES: The Order was issued on October 11, 2022.

ADDRESSES: Please refer to Docket ID NRC–2022–0168 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0168. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Document collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The Order imposing civil monetary penalty of $25,600 is available in ADAMS under Accession No. ML22208A036.

- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. Eastern Time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Leelavathi Sreenivas, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–001; telephone: 301–287–9249, email: *Leelavathi.Sreenivas@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: October 12, 2022.

For the Nuclear Regulatory Commission.

Mark D. Lombard,

Director, Office of Enforcement.

Attachment—Order Imposing Civil Monetary Penalty of $25,600

United States of America

Nuclear Regulatory Commission

In the Matter of: STEEL CITY GAMMA, LLC DAISYTOWN, PENNSYLVANIA

EA–21–045

Order Imposing Civil Monetary Penalty

I

Steel City Gamma, LLC (Steel City Gamma) was an industrial radiography company located in Pennsylvania. From May 14, 2019, until September 2020, Steel City Gamma was authorized under the Commonwealth of Pennsylvania radioactive materials license No. PA–1633 to possess and utilize byproduct material in up to three (3) devices for the purposes of industrial radiography. During the relevant time periods discussed below, Steel City Gamma did not possess a specific license issued by the Nuclear Regulatory Commission (NRC) under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 30. However, as an Agreement state licensee, Steel City Gamma was authorized to conduct radiography in NRC jurisdiction under the general NRC license granted pursuant to 10 CFR 150.20.

II

U.S. NRC Office of Investigations (OI) initiated an investigation on April 21, 2020, to determine whether Steel City Gamma deliberately conducted unauthorized and/or unlicensed radiography activities within NRC jurisdiction. The investigation concluded that two violations of NRC requirements occurred and that those violations were willful. During a closed predecisional enforcement conference held on February 3, 2022, Steel City Gamma acknowledged the violations and stated that it would no longer conduct industrial radiography and intended to withdraw the application for an NRC license for another company, A & B Testing.

A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon Steel City Gamma by letter dated March 2, 2022. The Notice stated the nature of the violations, the provisions of the NRC's requirements that the Steel City Gamma violated, and the amount of the civil penalty proposed for the violations. As of the date of this Order, Steel City Gamma has not responded to the Notice, paid the civil penalty, or requested more time to do so.

III

Because Steel City Gamma did not response to the Notice, there are no additional facts, explanations, or other information to consider. The NRC staff has determined that the violations occurred as stated in the Notice and that the penalty proposed for the violations identified in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, *it is hereby ordered that:*

Steel City Gamma shall pay the civil penalty in the amount of $25,600 within 30 days of the date of this Order through one of the following two methods:

1. Submit the payment with Civil Penalty Invoice No. EA–21–045 to the following address: Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, P.O. Box 979051, St. Louis, MO 63197, or

2. Submit the payment in accordance with NUREG/BR–0254, ''Payment Methods.''

In addition, at the time payment is made, Steel City Gamma shall submit a statement indicating when and by what method payment was made to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

V

Steel City Gamma and any other person adversely affected by this Order may request a hearing on this Order within 30 days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9:00 a.m. and 6:00 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

If a person other than Steel City Gamma requests a hearing, that person shall set forth

with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If a hearing is requested by Steel City Gamma or any other person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 30 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. If payment has not been made by the date the provisions of this Order become final, the matter may be referred to the Attorney General for collection.

For the Nuclear Regulatory Commission.

Mark D. Lombard, Director,

Office of Enforcement,

Dated this 11th day of October 2022.

[FR Doc. 2022–22573 Filed 10–17–22; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service; May 2022

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from May 1, 2022, to May 31, 2022.

FOR FURTHER INFORMATION CONTACT: Julia Alford, Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/*. OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule A Authorities to report during May 2022.

Schedule B

No Schedule B Authorities to report during May 2022.

Schedule C

The following Schedule C appointing authorities were approved during May 2022.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE	Office of Rural Development	State Director—Arkansas	DA220122	05/09/2022
	Farm Service Agency	State Executive Director—Texas	DA220123	05/09/2022
		State Executive Director—Connecticut.	DA220127	05/16/2022
	Risk Management Agency	Chief of Staff	DA220128	05/20/2022
DEPARTMENT OF COMMERCE	Bureau of Industry and Security	Senior Advisor for Export Controls	DC220106	05/06/2022
	Office of Executive Secretariat	Deputy Director	DC220108	05/06/2022
	National Telecommunications and Information Administration.	Director of Public Affairs	DC220110	05/06/2022
	Office of Business Liaison	Deputy Director, Office of Public Engagement.	DC220116	05/20/2022
COMMODITY FUTURES TRADING COMMISSION.	Office of the Chairperson	Senior Advisor	CT220002	05/06/2022
DEPARTMENT OF DEFENSE	Office of the Assistant to the Secretary of Defense (Public Affairs).	Research Assistant	DD220133	05/06/2022
	Washington Headquarters Services	Defense Fellow	DD220134	05/10/2022
	Office of the Assistant Secretary of Defense (Strategy, Plans and Capabilities).	Special Assistant	DD220138	05/16/2022
DEPARTMENT OF EDUCATION	Office of Communications and Outreach.	Traveling Digital Director	DB220051	05/04/2022
DEPARTMENT OF ENERGY	Office of Manufacturing and Energy Supply Chains.	Special Assistant	DE220078	05/05/2022
	Office of the Under Secretary of Energy.	Chief of Staff	DE220079	05/11/2022
	Office of Public Affairs	Writer-Editor Speechwriter	DE220080	05/11/2022
ENVIRONMENTAL PROTECTION AGENCY.	Office of Public Engagement and Environmental Education.	Senior Advisor for Environmental Education.	EP220044	05/04/2022
	Office of the Administrator	Deputy White House Liaison	EP220047	05/04/2022
		White House Liaison	EP220049	05/16/2022
	Office of the Associate Administrator for Congressional and Intergovernmental Relations.	Special Advisor for Intergovernmental Affairs.	EP220046	05/03/2022
		Special Assistant	EP220048	05/06/2022
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of Intergovernmental and External Affairs.	Regional Director, Kansas City, MO Region VII.	DH220083	05/03/2022
	Office of the Deputy Secretary	Senior Advisor	DH220087	05/12/2022
	Office of the Secretary	Scheduler	DH220092	05/23/2022
	Office of the Assistant Secretary for Legislation.	Senior Advisor, Oversight	DH220094	05/31/2022

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF HOMELAND SECURITY.	Office of Legislative Affairs	Director of Legislative Affairs	DM220156	05/19/2022
		Advisor for Strategic Engagement	DM220190	05/31/2022
	Office of Public Affairs	Researcher	DM220160	05/02/2022
	Office of Strategy, Policy, and Plans.	Policy Advisor	DM220179	05/19/2022
	Office of the Secretary	Special Assistant, White House Liaison.	DM220189	05/16/2022
		Special Assistant	DM220150	05/20/2022
	Transportation Security Administration.	Speechwriter	DM220182	05/19/2022
	Office of United States Citizenship and Immigration Services.	Senior Advisor	DM220184	05/31/2022
	Office of United States Customs and Border Protection.	Special Assistant	DM220128	05/05/2022
DEPARTMENT OF JUSTICE	Office of Antitrust Division	Chief of Staff and Senior Counsel	DJ220077	05/16/2022
	Office of Legislative Affairs	Senior Counsel	DJ220083	05/20/2022
DEPARTMENT OF LABOR	Office of Workers Compensation Programs.	Policy Advisor	DL220047	05/09/2022
	Office of the Secretary	Senior Advisor for Private Sector Engagement (2).	DL220048	05/18/2022
			DL220049	05/18/2022
	Office of the Assistant Secretary for Policy.	Deputy Director of the Good Jobs Initiative and Senior Policy Advisor.	DL220050	05/18/2022
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.	Office of the Administrator	Executive Assistant and Advisor	NN220027	05/26/2022
OFFICE OF PERSONNEL MANAGEMENT.	Office of Communications	Press Secretary	PM220037	05/13/2022
SECURITIES AND EXCHANGE COMMISSION.	Office of the Chairman	Program Specialist	SE220010	05/20/2022
SMALL BUSINESS ADMINISTRATION.	Office of Communications and Public Liaison.	Director of Digital Communications	SB220028	05/05/2022
	Office of the Administrator	Special Assistant	SB220030	05/17/2022
SOCIAL SECURITY ADMINISTRATION.	Office of Communications	Senior Advisor	SZ220008	05/05/2022
DEPARTMENT OF STATE	Bureau of Legislative Affairs	Senior Advisor (Nominations)	DS220037	05/06/2022
	Office of the Secretary	Staff Assistant	DS220045	05/20/2022
	Bureau of Population, Refugees and Migration.	Senior Advisor	DS220046	05/20/2022
DEPARTMENT OF TRANSPORTATION.	Office of the Assistant Secretary for Transportation Policy.	Special Assistant for Public Engagement.	DT220083	05/19/2022
	Federal Transit Administration	Senior Advisor	DT220082	05/19/2022
	Office of Public Affairs	Director of Public Affairs	DT220081	05/16/2022
	Office of the Under Secretary of Transportation for Policy.	Supply Chain Advisor	DT220079	05/16/2022
	Office of the Secretary	Director of Scheduling	DT220080	05/16/2022
DEPARTMENT OF VETERANS AFFAIRS.	Office of the Assistant Secretary for Congressional and Legislative Affairs.	Advisor for Congressional and Legislative Affairs.	DV220033	05/19/2022
	Veterans Experience Office	Strategic Advisor to Chief Veterans Experience Officer.	DV220041	05/19/2022
		Advisor to Chief Veterans Experience Officer.	DV220042	05/19/2022

The following Schedule C appointing authorities were revoked during May 2022.

Agency name	Organization name	Position title	Request No.	Vacate date
DEPARTMENT OF COMMERCE	Office of Advance, Scheduling and Protocol.	Deputy Director of Advance	DC210146	05/07/2022
	Office of Executive Secretariat	Special Assistant	DC210167	05/07/2022
	Office of Legislative and Intergovernmental Affairs.	Special Assistant	DC210155	05/04/2022
	Office of Public Affairs	Deputy Press Secretary	DC210164	05/06/2022
DEPARTMENT OF EDUCATION	Office of Career Technical and Adult Education.	Chief of Staff	DB210069	05/21/2022
DEPARTMENT OF ENERGY	Office of the Secretary	Deputy White House Liaison	DE210115	05/07/2022

Agency name	Organization name	Position title	Request No.	Vacate date
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of the Assistant Secretary for Public Affairs.	Press Assistant	DH210095	05/07/2022
	Office of the Secretary	Senior Advisor	DH220008	05/21/2022
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Policy Development and Research.	Special Assistant for Special Projects.	DU210044	05/07/2022
DEPARTMENT OF STATE	Bureau of Global Public Affairs	Spokesperson for USAID	DS210248	05/07/2022
DEPARTMENT OF THE AIR FORCE.	Office of the Secretary	Special Assistant	DF210008	05/22/2022
DEPARTMENT OF TRANSPORTATION.	Federal Transit Administration	Senior Advisor	DT210101	05/22/2022
OFFICE OF THE SECRETARY OF DEFENSE.	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant	DD220102	05/07/2022
	Office of the Secretary of Defense	Special Assistant	DD210178	05/14/2022
SMALL BUSINESS ADMINISTRATION.	Office of Capital Access	Special Advisor	SB210052	05/13/2022
	Office of the Administrator	Director of Scheduling	SB210029	05/21/2022

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

[FR Doc. 2022–22591 Filed 10–17–22; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service; June 2022

AGENCY: Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from June 1, 2022, to June 30, 2022.

FOR FURTHER INFORMATION CONTACT: Julia Alford, Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–936–3085.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/.* OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule A Authorities to report during June 2022.

Schedule B

No Schedule B Authorities to report during June 2022.

Schedule C

The following Schedule C appointing authorities were approved during June 2022.

Agency name	Organization name	Position title	Authorization No.	Effective date
DEPARTMENT OF AGRICULTURE	Office of Rural Development	State Director—California	DA220132	06/03/2022
	Farm Service Agency	State Executive Director—Hawaii	DA220136	06/21/2022
DEPARTMENT OF COMMERCE	Office of International Trade Administration.	Special Advisor	DC220131	06/17/2022
	Office of National Telecommunications and Information Administration.	Director of Congressional Affairs	DC220122	06/03/2022
		Special Advisor	DC220125	06/03/2022
		Deputy Director of Congressional Affairs.	DC220134	06/17/2022
	Office of Advance, Scheduling and Protocol.	Scheduler	DC220130	06/17/2022
	Office of Executive Secretariat	Special Assistant	DC220121	06/03/2022
	Office of White House Liaison	Special Assistant	DC220133	06/17/2022
		Deputy White House Liaison	DC220136	06/17/2022
CONSUMER FINANCIAL PROTECTION BUREAU.	Office of the Director	Senior Advisor to the Director (Communications).	FP220005	06/27/2022
		Senior Advisor (Policy and Strategic Planning).	FP220006	06/27/2022
DEPARTMENT OF DEFENSE	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (2)	DD220149	06/15/2022
			DD220153	06/30/2022
	Office of the Assistant to the Secretary of Defense (Public Affairs).	Chief of Staff	DD220143	06/01/2022
	Office of the Secretary of Defense	Deputy White House Liaison	DD220148	06/15/2022
		Special Assistant (Policy) to the Deputy Secretary of Defense.	DD220150	06/17/2022

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Under Secretary of Defense (Intelligence and Security).	Special Advisor	DD220142	06/01/2022
	Washington Headquarters Services	Senior Director for Strategic Planning.	DD220152	06/23/2022
DEPARTMENT OF THE AIR FORCE.	Office of Assistant Secretary of the Air Force for Manpower and Reserve Affairs.	Special Assistant	DF220014	06/02/2022
DEPARTMENT OF EDUCATION	Office of the Secretary	Executive Director, White House Initiative on Advancing Educational Equity, Excellence, and Economic.	DB220062	06/16/2022
DEPARTMENT OF ENERGY	Office of the Assistant Secretary for Congressional and Intergovernmental Affairs.	Legislative Affairs Advisor (Senate)	DE220083	06/10/2022
	Office of the Assistant Secretary for Energy Efficiency and Renewable Energy.	Senior Advisor	DE220056	06/30/2022
	Office of Management	Special Assistant for Advance	DE220085	06/10/2022
	Office of State and Community Energy Programs.	Chief of Staff	DE220092	06/30/2022
ENVIRONMENTAL PROTECTION AGENCY.	Region II—New York	Special Advisor for Implementation	EP220055	06/07/2022
	Office of the Associate Administrator for Policy.	Special Assistant	EP220056	06/07/2022
GENERAL SERVICES ADMINISTRATION.	Office of the Administrator	Senior Advisor to the Administrator (Climate).	GS220015	06/30/2022
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of Administration for Children and Families.	Special Assistant (2)	DH220101	06/23/2022
			DH220122	06/30/2022
	Office of Intergovernmental and External Affairs.	Regional Director, Boston, Massachusetts, Region I.	DH220119	06/30/2022
	Office of the Assistant Secretary for Legislation.	Special Assistant	DH220121	06/30/2022
	Office of the Secretary	Special Assistant	DH220099	06/01/2022
DEPARTMENT OF HOMELAND SECURITY.	Privacy Office	Senior Advisor	DM220174	06/08/2022
	Office of Legislative Affairs	Director of Legislative Affairs	DM220188	06/14/2022
	Federal Emergency Management Agency.	Director of Intergovernmental Affairs.	DM220205	06/17/2022
	Office of Partnership and Engagement.	Executive Director, Homeland Security Advisory Council.	DM220198	06/23/2022
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Government National Mortgage Association.	Senior Advisor	DU220049	06/17/2022
	Office of Community Planning and Development.	Senior Advisor for Disaster Recovery.	DU220047	06/17/2022
		Policy Advisor	DU220050	06/30/2022
	Office of the Administration	Special Assistant	DU220045	06/17/2022
DEPARTMENT OF JUSTICE	Office of Legal Policy	Counsel	DJ220084	06/02/2022
	Office of Antitrust Division	Counsel	DJ220087	06/02/2022
DEPARTMENT OF LABOR	Office of the Secretary	Deputy Advisor for Private Sector Engagement.	DL220063	06/08/2022
MERIT SYSTEMS PROTECTION BOARD.	Office of the Board, Vice Chairman	Confidential Assistant to the Vice Chairman.	MP220002	06/01/2022
	Office of the Board, Chairman	Confidential Assistant to the Chairman.	MP220003	06/15/2022
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.	Office of Communications	Press Assistant	NN220034	06/03/2022
NATIONAL LABOR RELATIONS BOARD.	Office of the Board Members	Communications Specialist	NL220012	06/08/2022
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE.	Office of Public and Media Affairs	Deputy Assistant United States Trade Representative for Digital.	TN220009	06/17/2022
UNITED STATES INTERNATIONAL DEVELOPMENT FINANCE CORPORATION.	Overseas Private Investment Corporation.	Advisor	PQ220004	06/17/2022
SMALL BUSINESS ADMINISTRATION.	Office of the Administrator	Confidential Assistant	SB220031	06/21/2022
DEPARTMENT OF STATE	Office of the Under Secretary for Political Affairs.	Senior Advisor (Speechwriter)	DS220047	06/03/2022
	Bureau of Global Public Affairs	Principal Deputy Spokesperson	DS220049	06/03/2022
	Bureau of Legislative Affairs	Senior (Congressional) Advisor	DS220050	06/08/2022
DEPARTMENT OF TRANSPORTATION.	Office of the Secretary	Special Projects Manager	DT220090	06/17/2022

Agency name	Organization name	Position title	Authorization No.	Effective date
	Office of the Assistant Secretary for Governmental Affairs.	Advisor for Governmental Affairs ...	DT220091	06/17/2022
		Associate Director for Governmental Affairs.	DT220092	06/17/2022
DEPARTMENT OF THE TREASURY.	Office of the Assistant Secretary (Public Affairs).	Senior Advisor	DY220128	06/24/2022
DEPARTMENT OF VETERANS AFFAIRS.	Office of the Secretary and Deputy	White House Liaison	DV220051	06/03/2022

The following Schedule C appointing authorities were revoked during June 2022.

Agency name	Organization name	Position Title	Request No.	Vacate date
CONSUMER FINANCIAL PROTECTION BUREAU.	Office of the Director	Senior Advisor to the Director (Communications).	FP220001	06/27/2022
DEPARTMENT OF AGRICULTURE	Farm Service Agency	Confidential Assistant	DA220016	06/18/2022
	Office of the Secretary	Director of Scheduling and Advance.	DA220116	06/04/2022
	Office of Rural Development	Special Assistant	DA210124	06/18/2022
DEPARTMENT OF COMMERCE ...	National Telecommunications and Information Administration.	Chief of Staff for National Telecommunications and Information Administration.	DC210156	06/18/2022
	Office of the Assistant Secretary for Economic Development.	Director of Strategic Partnerships ..	DC210203	06/04/2022
	Office of the Under Secretary	Senior Advisor	DC220020	06/04/2022
DEPARTMENT OF ENERGY	Office of the Assistant Secretary for Energy Efficiency and Renewable Energy.	Deputy Chief of Staff	DE210152	06/04/2022
	Office of Public Affairs	Speechwriter	DE210144	06/04/2022
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of Global Affairs	Special Assistant to the Director	DH210076	06/18/2022
	Office of the Secretary	Special Assistant for Scheduling	DH210099	06/04/2022
DEPARTMENT OF HOMELAND SECURITY.	Office of the General Counsel	Oversight Counsel	DM220039	06/17/2022
	Office of the Secretary	Deputy White House Liaison	DM220014	06/03/2022
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Housing	Special Assistant	DU210035	06/04/2022
	Office of Public Affairs	Digital Strategist	DU210104	06/11/2022
DEPARTMENT OF TRANSPORTATION.	Office of the Assistant Secretary for Governmental Affairs.	Special Assistant for Governmental Affairs.	DT210078	06/04/2022
	Office of the Deputy Secretary	Special Assistant	DT210071	06/18/2022
ENVIRONMENTAL PROTECTION AGENCY.	Office of Public Affairs	Public Affairs Specialist	EP210084	06/04/2022
		Deputy Associate Administrator for Public Affairs.	EP210103	06/04/2022
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.	Office of the Chair	Policy Analyst	EE210010	06/04/2022
OFFICE OF THE SECRETARY OF DEFENSE.	Office of the Assistant Secretary of Defense (Legislative Affairs).	Special Assistant (2)	DD210261	06/04/2022
			DD220101	06/16/2022
SECURITIES AND EXCHANGE COMMISSION.	Office of the Chairman	Confidential Assistant (2)	SE150003	06/10/2022
			SE190010	06/03/2022
SMALL BUSINESS ADMINISTRATION.	Office of the Administrator	Special Assistant	SB210048	06/04/2022
UNITED STATES INTERNATIONAL DEVELOPMENT FINANCE CORPORATION.	Overseas Private Investment Corporation.	Special Assistant	PQ220001	06/18/2022

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

[FR Doc. 2022–22597 Filed 10–17–22; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96042; File No. SR–NASDAQ–2022–055]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Nasdaq's Program Providing Eligible Companies With Complimentary Board Recruiting Services

October 12, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2022, 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, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend Nasdaq's program providing Eligible Companies with complimentary board recruiting services.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to extend its program, described in IM–5900–9, providing Eligible Companies [3] with complimentary board recruiting services. The rule currently requires Eligible Companies to request services by December 1, 2022; as revised that deadline would be extended to December 1, 2023. Nasdaq also proposes to make clarifying changes to reflect the approval of Rule 5605(f).

Under IM–5900–9,[4] Nasdaq provides Eligible Companies with one year of complimentary access for two users to a board recruiting service, which provides access to a network of board-ready diverse candidates for companies to identify and evaluate. Nasdaq believes that offering this board recruiting solution assists and encourages listed companies to increase diverse representation on their boards, which can result in improved corporate governance, thus strengthening the integrity of the market and building investor confidence.

Currently, Eligible Companies may request the board recruiting complimentary service on or before December 1, 2022. After evaluating the service and progress made in enhancing diversity, Nasdaq proposes to extend the program until December 1, 2023. Under Nasdaq Rule 5605(f)(7), the earliest that a Nasdaq listed company will need to explain why it does not have at least one Diverse [5] director, is August 6, 2023; and the earliest it will have to explain why it does not have at least two Diverse directors is August 6, 2025.[6] As such, Nasdaq believes it continues to be appropriate to offer the complimentary board recruiting service to Eligible Companies.

In addition, Nasdaq proposes to update the reference in Nasdaq Rule IM–5900–9 to Nasdaq's proposed rule contained in SR–Nasdaq–2020–081, as it pertains to the Diverse Board Representation, to instead reference the approved Nasdaq Rule 5605(f). This change is non-substantive, and clarifies the rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] 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. It is also consistent with this provision because it is not designed to permit unfair discrimination between issuers. Nasdaq also believes that the proposed rule change is consistent with the provisions of Sections 6(b)(4) [9] and 6(b)(8),[10] in that the proposal is designed, among other things, to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities and that the rules of the Exchange do not impose any burden on competition not

[3] Under Nasdaq Rule IM–5900–9, an Eligible Company is:

(a) any listed Company, except as described below, that represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community;

(b) a listed Company that (i) is a Foreign Private Issuer (as defined in Rule 5005(a)(19), or (ii) is considered a foreign issuer under Rule 3b–4(b) under the Act and has its principal executive offices located outside of the United States, if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female; and (ii) at least one director who self-identifies as one or more of the following: female, an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices, or lesbian, gay, bisexual, transgender or as a member of the queer community; or

(c) a listed Company that is a Smaller Reporting Company (as defined in Rule 12b–2 under the Act), if it represents to Nasdaq that it does not have (i) at least one director who self-identifies as female, and (ii) at least one director who self-identifies as one or more of the following: female, Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities, or who self-identifies as lesbian, gay, bisexual, transgender or as a member of the queer community.

[4] Securities Exchange Act Release No. 92590 (August 6, 2021), 86 FR 44424 (August 12, 2021) (SR–NASDAQ–2020–082).

[5] Nasdaq Rule 5605(f)(1) provides the definition of ''Diverse''. ''Diverse'' means an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority, or LGBTQ+. ''Female'' means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

[6] Nasdaq Rule 5065(f)(7)(A).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(4).

[10] 15 U.S.C. 78f(8).

necessary or appropriate in furtherance of the purposes of the Exchange Act.

Nasdaq believes that research surrounding the value of diversity on a company's board and investor interest in more diverse boards [11] supports the fact that the proposal to offer access to a board recruiting solution promotes just and equitable principles of trade and protects investors and the public interest. Nasdaq believes that by making this service available for a longer duration, more companies will seek to enhance the diversity of their boards to achieve these benefits. However, no company is required to use this service. Nasdaq believes it is reasonable, and not unfairly discriminatory, to offer the board recruiting solution only to Eligible Companies because these companies have the greatest need to identify diverse board candidates. They will need to identify diverse board candidates if they wish to satisfy that requirement instead of explaining why they do not satisfy it. Further, Nasdaq believes that companies that already have two Diverse directors will already be familiar with the benefits of board diversity and have demonstrated that they do not need Nasdaq's assistance in identifying diverse candidates.

Under Nasdaq Rule 5605(f), companies will have until August 6, 2023 to have, or explain why they do not have, at least one Diverse director and until August 6, 2025 to have, or explain why they do not have, at least two Diverse directors. Some Eligible Companies have already requested the service, other Eligible Companies may first use an alternate approach to identify a Diverse director. Therefore, to provide Eligible Companies with adequate time to determine whether to utilize the complimentary service before they first need to comply with Nasdaq Rule 5605(f), Nasdaq believes it is reasonable to extend the expiration date until December 1, 2023 to begin using the service.

Nasdaq faces competition in the market for listing services,[12] and competes, in part, by offering valuable services to companies. Nasdaq believes that it is reasonable to continue to offer this complimentary service as a tool to attract and retain listings as part of this competition. In particular, Nasdaq believes some companies will view the proposed board recruiting solution as a valuable tool to help achieve diversity, to the potential benefit of the company and its investors. Nasdaq also believes that offering this complimentary service will help it compete to attract and retain listings in light of the additional requirements contained in Rule 5065(f).

For these reasons, Nasdaq believes it is not an inequitable allocation of fees, unfairly discriminatory, nor an unnecessary or inappropriate burden on competition to continue to extend the offer of board recruiting solution only to Eligible Companies until December 1, 2023. Nasdaq represents that individual listed companies are not given specially negotiated packages of products or services to list, or remain listed, which the Commission has previously stated would raise unfair discrimination issues under the Exchange Act.[13]

In addition, the proposal to reflect the approval of SR–Nasdaq–2020–081, and to directly reference the now-approved Nasdaq Rule 5605(f), is non-substantive, and simply clarifies the rules. The Exchange believes that this is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act.[15]

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 noted above, Nasdaq faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The proposed rule change reflects competition, but does not impose any burden on the competition with other exchanges. Rather, Nasdaq believes that some companies will find the proposed board recruiting solution an attractive offering and therefore make listing or remaining listed on Nasdaq more attractive, which will enhance competition for listings.

Other exchanges can also offer similar services to companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In addition, the proposal to reflect the approval of Nasdaq Rule 5605(f), is non-substantive, and simply aligns the rules in a clear and consistent manner. Nasdaq does not believe this change will impose any burden on competition.

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)(iii) of the Act [16] and subparagraph (f)(6) of Rule 19b–4 thereunder.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2022–055 on the subject line.

[11] Securities Exchange Act Release No. 92590 (August 6, 2021), 86 FR 44424 (August 12, 2021) (SR–NASDAQ–2020–082).

[12] The Justice Department has noted the intense competitive environment for exchange listings. See ''NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit'' (May 16, 2011), available at *http://www.justice.gov/atr/public/press_releases/2011/271214.htm.*

[13] See Exchange Act Release No. 79366, 81 FR 85663 at 85665 (citing Securities Exchange Act Release No. 65127 (August 12, 2011), 76 FR 51449, 51452 (August 18, 2011) (approving NYSE–2011–20)).

[14] Ibid 9.

[15] Ibid 10.

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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.

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–2022–055. 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 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–2022–055 and should be submitted on or before November 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22555 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96038; File No. SR–CboeBZX–2022–045]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend the Opening Auction Process Provided Under Rule 11.23(b)(2)(B)

October 12, 2022.

On August 15, 2022, Cboe BZX Exchange, Inc. (''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Opening Auction process provided under Rule 11.23(b)(2)(B). The proposed rule change was published for comment in the **Federal Register** on August 31, 2022.[3] The Commission has received no comments on the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days (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 shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is October 15, 2022. The Commission is extending this 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, pursuant to Section 19(b)(2) of the Act,[5] the Commission designates November 29, 2022, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2022–045).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22554 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 95601 (Aug. 25, 2022), 87 FR 53514.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96044; File No. SR–PEARL–2022–42]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the MIAX Pearl Options Fee Schedule

October 12, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 29, 2022, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Add/Remove Tiered Rebates/Fees set forth in Section (1)(a) of the Fee Schedule to: (1) modify the volume threshold for the alternative volume criteria for certain Maker (defined below) rebates for Non-Priority Customer, Firm, Broker-Dealer (''BD''), and Non-MIAX Pearl Market Maker origins (collectively, ''Professional Members''); (2) lower the alternative Maker rebate for Professional Members in Penny Classes (defined below); and (3) modify the volume threshold for the alternative volume criteria for the lower Taker (defined below) fee for Professional Members' Firm origin when trading against origins other than Priority Customer [3] in Penny Classes.

Background

The Exchange currently assesses transaction rebates and fees to all market participants which are based upon the total monthly volume executed by the Member [4] on MIAX Pearl in the relevant, respective origin type (not including Excluded Contracts) [5] (as the numerator) expressed as a percentage of (divided by) TCV [6] (as the denominator). In addition, the per contract transaction rebates and fees are applied retroactively to all eligible volume for that origin type once the respective threshold tier (''Tier'') has been reached by the Member. The Exchange aggregates the volume of Members and their Affiliates.[7] Members that place resting liquidity, *i.e.,* orders resting on the book of the MIAX Pearl System,[8] are paid the specified ''maker'' rebate (each a ''Maker''), and Members that execute against resting liquidity are assessed the specified ''taker'' fee (each a ''Taker''). For opening transactions and ABBO [9] uncrossing transactions, per contract transaction rebates and fees are waived for all market participants. Finally, Members are assessed lower transaction fees and receive lower rebates for order executions in standard option classes in the Penny Interval Program [10] (''Penny Classes'') than for order executions in standard option classes that are not in the Penny Interval Program (''Non-Penny Classes''), where Members are assessed higher transaction fees and receive higher rebates.

Proposal To Modify the Volume Threshold for the Alternative Volume Criteria for Certain Maker Rebates for Professional Members and Lower the Alternative Rebate for Professional Members in Penny Classes

The Exchange proposes to amend footnote ''^'' below the tables in the Add/Remove Tiered Rebates/Fees section set forth in Section (1)(a) of the Fee Schedule to decrease the affiliated Priority Customer threshold in order for Members to qualify for alternative Maker rebates for options transactions in all classes for Professional Members, provided that the Member meets certain volume criteria. Currently, Professional Members may qualify for Maker rebates equal to the greater of: (A) ($0.40) for Penny Classes and ($0.65) for Non-Penny Classes, or (B) the amount set forth in the applicable Tier reached by the Member in the relevant origin, if the Member and their Affiliates execute at least 2.25% volume in the relevant month, in Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to the TCV in all MIAX Pearl listed option classes.

The Exchange proposes to decrease the affiliated Priority Customer threshold percentage amount in footnote ''^'' in order for Members to qualify for the alternative Maker rebates for their Professional Members. The threshold will change from at least 2.25% to at least 1.25% volume in the relevant month, in Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to the TCV in all MIAX Pearl listed option classes. For purposes of qualifying for such rates, the Exchange will continue

[3] ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The number of orders shall be counted in accordance with Interpretation and Policy .01 of Exchange Rule 100. *See* the Definitions section of the Fee Schedule and Exchange Rule 100.

[4] ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[6] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period time in which the Exchange experiences an ''Exchange System Disruption'' (solely in the option classes of the affected Matching Engine (as defined below)). The term Exchange System Disruption, which is defined in the Definitions section of the Fee Schedule, means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hours or more, during trading hours. The term Matching Engine, which is also defined in the Definitions section of the Fee Schedule, is a part of the MIAX Pearl electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. The Exchange believes that it is reasonable and appropriate to select two consecutive hours as the amount of time necessary to constitute an Exchange System Disruption, as two hours equates to approximately 1.4% of available trading time per month. The Exchange notes that the term ''Exchange System Disruption'' and its meaning have no applicability outside of the Fee Schedule, as it is used solely for purposes of calculating volume for the threshold tiers in the Fee Schedule. *See* the Definitions Section of the Fee Schedule.

[7] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An ''Appointed Market Maker'' is a MIAX Pearl Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an ''Appointed EEM'' is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Pearl Market Maker) that has been appointed by a MIAX Pearl Market Maker, pursuant to the following process. A MIAX Pearl Market Maker appoints an EEM and an EEM appoints a MIAX Pearl Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to *membership@miaxoptions.com* no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange's acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. *See* the Definitions Section of the Fee Schedule.

[8] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[9] ''ABBO'' means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Exchange Rule 1400(g)) and calculated by the Exchange based on market information received by the Exchange from OPRA. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[10] *See* Securities Exchange Act Release No. 88992 (June 2, 2020), 85 FR 35142 (June 8, 2020) (SR–PEARL–2020–06).

to aggregate the Priority Customer volume transacted by Members and their Affiliates. As the amount and type of volume that is executed on the Exchange has shifted since it first established the alternative Maker rebates for options transactions in all classes for Professional Members, provided that the Member meets certain volume criteria, the Exchange has determined to level-set this threshold amount so that it is more reflective of the current operating conditions and the current type and amount of volume executed on the Exchange.[11] This change is also for business and competitive reasons in order to attract additional Priority Customer volume from Professional Members by decreasing the alternative volume threshold in order for Professional Members to achieve the alternative Maker rebates denoted by footnote ''^'', which should benefit all Exchange participants by providing more trading opportunities and tighter spreads.

The Exchange also proposes to amend footnote ''^'' to decrease the alternative Maker rebate for Professional Members in Penny Classes. As described above, footnote ''^'' provides that Members may achieve an alternative Maker rebate of ($0.40) in Penny Classes if a certain volume threshold is achieved in the Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to the TCV in all MIAX Pearl listed option classes. The Exchange now proposes to decrease this Maker rebate from ($0.40) to ($0.37). Accordingly, with both of the proposed changes to footnote ''^,'' Members may qualify for Maker rebates equal to the greater of: (A) ($0.37) for Penny Classes and ($0.65) for Non-Penny Classes, or (B) the amount set forth in the applicable Tier reached by the Member in the relevant origin, if the Member and their Affiliates execute at least 1.25% volume in the relevant month, in Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to the TCV in all MIAX Pearl listed option classes.

The purpose of adjusting the specified Maker rebate is for business and competitive reasons. In order to attract order flow, the Exchange initially set its Maker rebates so that they were higher than other options exchanges that operate comparable maker/taker pricing models.[12] The Exchange believes that it is appropriate to adjust this specified Maker rebate so that it is more in line with other exchanges, but will remain highly competitive such that it should enable the Exchange to continue to attract order flow and maintain market share.[13]

Proposal To Modify the Volume Threshold for the Alternative Volume Criteria for the Lower Taker Fee for Professional Members' Firm Origin When Trading Against Origins Other Than Priority Customer in Penny Classes

The Exchange proposes to amend footnote ''◊'' below the tables in the Add/Remove Tiered Rebates/Fees section set forth in Section (1)(a) of the Fee Schedule to decrease the affiliated Priority Customer threshold in which Members may qualify for alternative lower Taker fee for options transactions in Penny Classes for Professional Members' Firm origin, provided that the Member meets certain volume criteria. Currently, Professional Members may qualify for the alternative lower Taker fee for their Firm origin of $0.48 in Penny Classes when trading against origins other than Priority Customer if the Member and their Affiliates execute at least 2.25% of TCV in the relevant month in the Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to TCV in all MIAX Pearl listed option classes.

The Exchange proposes to decrease the affiliated Priority Customer threshold percentage amount in footnote ''◊'' in order for Members' Firm origin to qualify for the alternative lower Taker fee. The threshold will change from at least 2.25% to at least 1.25% of TCV in the relevant month, in Priority Customer origin type, in all options classes, not including Excluded Contracts, as compared to the TCV in all MIAX Pearl listed option classes. As the amount and type of volume that is executed on the Exchange has shifted since it first established the alternative Taker fee,[14] the Exchange has determined to level-set this threshold amount so that it is more reflective of the current operating conditions and the current type and amount of volume executed on the Exchange. The purpose of this change is also for business and competitive reasons in order to attract additional Priority Customer volume by decreasing the alternative volume threshold in order for Professional Members to achieve the lower Taker fee for their Firm origin orders, which should benefit all Exchange participants by providing more trading opportunities and tighter spreads.

Implementation

The proposed changes are effective beginning October 1, 2022.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[15] in general, and furthers the objectives of Section 6(b)(4) of the Act,[16] in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,[17] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its

[11] *See* Securities Exchange Act Release Nos. 91605 (April 16, 2021), 86 FR 21405 (April 22, 2021) (SR–PEARL–2021–16); 83419 (June 12, 2018), 83 FR 28285 (June 18, 2018) (SR–PEARL–2018–13); 85608 (April 11, 2019), 84 FR 16073 (April 17, 2019) (SR–PEARL–2019–13).

[12] *See* Securities Exchange Act Release Nos. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10) (establishing the Exchange's fee schedule with Market Maker and Professional Member Maker Penny Class rebates ranging from ($0.25) in Tier 1 to ($0.48) in Tier 4, the highest Tier at that time).

[13] *See, generally,* The Nasdaq Stock Market, Options 7 Pricing Schedule, Section 2 (Professional Member rebates ranging from $0.20 in Tier 1 to $0.48 in Tier 6); Cboe BZX Options Fee Schedule, Standard Rates (Professional rebates for Penny Class securities ranging from $0.25 to $0.48 for adding liquidity; and Firm, Broker-Dealer, Joint Back Office rebates for Penny Class securities ranging from $0.25 to $0.46 for adding liquidity).

[14] *See* Securities Exchange Act Release Nos. 85608 (April 11, 2019), 84 FR 16073 (April 17, 2019) (SR–PEARL–2019–13) (establishing lower alternative Taker fee for Firm origin with volume threshold of 2.00% of TCV); 85807 (May 8, 2019), 84 FR 21368 (May 14, 2019) (SR–PEARL–2019–15) (removing one of the conditions that must be met in order for Members to qualify for the alternative lower Taker fee for Penny Classes for their Firm origin).

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(1) and (b)(5).

broader forms that are most important to investors and listed companies.'' [18]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of September 26, 2022, no single exchange has more than approximately 10–11% equity options market share for the month of September 2022.[19] Therefore, no exchange possesses significant pricing power. More specifically, as of September 26, 2022, the Exchange has a market share of approximately 4.04% of executed volume of multiply-listed equity options for the month of September 2022.[20]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products and services, terminate an existing membership or determine to not become a new member, and/or shift order flow, in response to transaction fee changes. For example, on February 28, 2019, the Exchange filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).[21] The Exchange experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that its March 1, 2019, fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes its proposal to decrease the Priority Customer threshold for alternative Maker rebates for options transactions in all classes for Professional Members, provided that the Member meets certain volume criteria is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants are subject to the same tiered rebates and fees. The Exchange believes that providing alternative Maker rebates for options transactions in all classes for Professional Members (if the Member meets certain volume criteria relating to Priority Customer volume), and adjusting the threshold requirement so that it is reflective of current operating conditions and the current type and amount of volume executed on the Exchange, will encourage Members to execute additional Priority Customer and Professional Member volume on the Exchange. The Exchange believes that additional Priority Customer and Professional Member volume executed on the Exchange will attract further liquidity to the Exchange, which in turn will benefit all market participants.

The Exchange believes its proposal to decrease the alternative Maker rebate for Professional Members in Penny Classes is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants are subject to the same tiered rebates and fees. In order to attract order flow, the Exchange initially set its Maker rebates so that they were higher than other options exchanges that operate comparable maker/taker pricing models.[22] The Exchange believes that it is reasonable and equitable to adjust this specified Maker rebate so that it is more in line with other exchanges, but will remain highly competitive such that it should enable the Exchange to continue to attract order flow and maintain market share.[23]

The Exchange believes its proposal to decrease the Priority Customer threshold for the alternative lower Taker fee for Professional Members' Firm origin, provided that the Member meets certain volume criteria is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants are subject to the same tiered rebates and fees. The Exchange believes that providing the lower alternative Taker fee for Professional Members Firm origin (if the Member meets certain volume criteria relating to Priority Customer volume), and adjusting the threshold requirement so that it is reflective of current operating conditions and the current type and amount of volume executed on the Exchange, will encourage Members to execute additional Priority Customer and Professional Member volume on the Exchange. The Exchange believes that additional Priority Customer and Professional Member volume executed on the Exchange will attract further liquidity to the Exchange, which in turn will benefit all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change to lower the volume threshold for the alternative volume criteria for certain Maker rebates for Professional Members should continue to encourage the provision of liquidity that enhances the quality of the Exchange's market and increase the number of trading opportunities on the Exchange for all participants who will be able to compete for such opportunities. Similarly, the Exchange believes that the proposed change to lower the volume threshold for the alternative volume criteria for the lower Taker fee for Professional Members' Firm origin should continue to encourage the provision of liquidity that enhances the quality of the Exchange's market and increase the number of trading opportunities on the Exchange for all participants who will be able to compete for such opportunities. These proposed changes should enable the Exchange to continue to attract and compete for Professional Member and Priority Customer order flow with other exchanges. However, this competition does not create an undue burden on competition but rather offers all market participants the opportunity to receive the benefit of competitive pricing.

The Exchange believes the proposed Maker rebate adjustment is intended to keep the Exchange's rebates highly competitive with those of other exchanges, and to encourage liquidity and should enable the Exchange to continue to attract and compete for order flow with other exchanges. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the

[18] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[19] *See* ''The market at a glance,'' (last visited September 26, 2022), *available at https://www.miaxoptions.com/.*

[20] *See id.*

[21] *See* Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR–PEARL–2019–07).

[22] *See* Securities Exchange Act Release Nos. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10) (establishing the Exchange's fee schedule with Market Maker and Professional Member Maker Penny Class rebates ranging from ($0.25) in Tier 1 to ($0.48) in Tier 4, the highest Tier at that time).

[23] *See, generally,* The Nasdaq Stock Market, Options 7 Pricing Schedule, Section 2 (Professional Member rebates ranging from $0.20 in Tier 1 to $0.48 in Tier 6); Cboe BZX Options Fee Schedule, Standard Rates (Professional rebates for Penny Class securities ranging from $0.25 to $0.48 for adding liquidity; and Firm, Broker-Dealer, Joint Back Office rebates for Penny Class securities ranging from $0.25 to $0.46 for adding liquidity).

Exchange must continually adjust its rebates and fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule changes reflect this competitive environment because the proposal modifies the Exchange's fees in a manner that encourages market participants to continue to provide liquidity and to send order flow to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[24] and Rule 19b–4(f)(2)[25] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2022–42.

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–PEARL–2022–42. 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 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–PEARL–2022–42, and should be submitted on or before November 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22556 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

[24] 15 U.S.C. 78s(b)(3)(A)(ii).

[25] 17 CFR 240.19b–4(f)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96046; File No. SR–MRX–2022–20]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX's Pricing Schedule at Options 7, Section 6

October 12, 2022.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 11, 2022, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, section 6.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/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

MRX proposes to amend its Pricing Schedule at Options 7, section 6, Ports and Other Services, to assess port fees, which were not assessed until this year. Prior to this year, MRX did not assess its Members any port fees. MRX launched its options market in 2016[3] And Members did not pay any port fees until 2022.

The proposed changes are designed to update fees for MRX's services to reflect their current value—rather than their value when it was established six years ago—based on MRX's ability to deliver

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed pricing changes on May 2, 2022 (SR–MRX–2022–04) instituting fees for membership, ports and market data. On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership, ports and market data. SR–MRX–2022–06 replaced the port fees set forth in SR–MRX–2022–04. SR–MRX–2022–06 was withdrawn on July 1, 2022 and replaced with SR–MRX–2022–09. On August 25, 2022. SR–MRX–2022–09 which was withdrawn and replaced with SR–MRX–2022–12. The instant filing replaces SR–MRX–2022–12 which was withdrawn on October 11, 2022.

value to its customers through technology, liquidity and functionality. Newly-opened exchanges often charge no fees for certain services, such as ports, in order to attract order flow to an exchange, and later amend their fees to reflect the true value of those services.[4] Allowing newly-opened exchanges time to build and sustain market share before charging non-transactional fees encourages market entry and promotes competition. The proposed port fees within Options 7, section 6, Ports and Other Services, are described below.

This proposal reflects MRX's assessment that it has gained sufficient market share to compete effectively against the other 15 options exchanges without waiving fees for ports. These types of fees are assessed by options exchanges that compete with MRX in the sale of exchange services—indeed, as of the date of the initial filing of these port fees, MRX was the only options exchange (out of the 16 current options exchanges) not assessing port fees. New exchanges commonly waive connectivity fees to attract market participants, facilitating their entry into the market and, once there is sufficient depth and breadth of liquidity, ''graduate'' to compete against established exchanges and charge fees that reflect the value of their services.[5] If MRX is incorrect in this assessment, that error will be reflected in MRX's ability to compete with other options exchanges.[6]

The Exchange proposes to amend fees for the following ports within Options 7, section 6: (1) FIX,[7] (2) SQF; [8] (3) SQF Purge; [9] (4) OTTO; [10] (5) CTI; [11] (6) FIX DROP; [12] and Disaster Recovery Ports.[13] Currently, no fees are being assessed for these ports.

The Exchange proposes to assess no fee for the first FIX Port obtained by an Electronic Access Member [14] or the first SQF Port obtained by a Market Maker.[15] The Exchange proposes to assess a FIX Port Fee of $650 per port, per month, per account number [16] for each subsequent port beyond the first port. The Exchange proposes to assess an SQF Port Fee of $1,250 per port, per month for each subsequent port beyond the first port.[17] The Exchange proposes to assess an SQF Purge Port Fee of $1,250 per port, per month. The Exchange proposes to assess an OTTO Port Fee of $650 per port, per month, per account number. The Exchange proposes to assess a CTI Port Fee and a FIX Drop Port Fee of $650 per port, per month.

The Exchange proposes to assess no fee for the first FIX Disaster Recovery Port obtained by an Electronic Access Member [18] or the first SQF Disaster

[4] *See, e.g.,* Securities Exchange Act Release No 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt the Initial Fee Schedule and Other Fees for MEMX LLC).

[5] For example, MIAX Emerald commenced operations as a national securities exchange registered on March 1, 2019. *See* Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10–233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange). MIAX Emerald filed to adopt its transaction fees and certain of its non-transaction fees in its filing SR–EMERALD–2019–15. *See* Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR–EMERALD–2019–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule). MIAX Emerald waived its one-time application fee and monthly Trading Permit Fees assessable to EEMs and Market Makers among other fees within SR–EMERALD–2019–15.

[6] Nasdaq announced that, beginning in 2022, it plans to migrate its North American markets to Amazon Web Services in a phased approach, starting with MRX. The MRX migration will take place in November 2022. The proposed fee changes are entirely unrelated to this effort.

[7] ''Financial Information eXchange'' or ''FIX'' is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders to the Exchange. Features include the following: (1) execution messages; (2) order messages; (3) risk protection triggers and cancel notifications; and (4) post trade allocation messages. *See* Supplementary Material .03(a) to Options 3, section 7.

[8] ''Specialized Quote Feed'' or ''SQF'' is an interface that allows Market Makers to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (*e.g.,* underlying and complex instruments); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Market Maker. Market Makers may only enter interest into SQF in their assigned options series. *See* Supplementary Material .03(c) to Options 3, section 7.

[9] SQF Purge is a specific port for the SQF interface that only receives and notifies of purge requests from the Market Maker. Dedicated SQF Purge Ports enable Market Makers to seamlessly manage their ability to remove their quotes in a swift manner.

[10] ''Ouch to Trade Options'' or ''OTTO'' is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (*e.g.,* underlying and complex instruments); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. *See* Supplementary Material .03(b) to Options 3, section 7.

[11] Clearing Trade Interface (''CTI'') is a real-time cleared trade update message that is sent to a Member after an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement (''CMTA'') or The Options Clearing Corporation (''OCC'') number; (ii) badge or mnemonic; (iii) account number; (iv) information which identifies the transaction type (*e.g.,* auction type) for billing purposes; and (v) market participant capacity. *See* Options 3, section 23(b)(1).

[12] FIX DROP is a real-time order and execution update message that is sent to a Member after an order been received/modified or an execution has occurred and contains trade details specific to that Member. The information includes, among other things, the following: (i) executions; (ii) cancellations; (iii) modifications to an existing order; and (iv) busts or post-trade corrections. *See* Options 3, section 23(b)(3).

[13] Disaster Recovery ports provide connectivity to the Exchange's disaster recovery data center, to be utilized in the event the Exchange should failover during a trading day.

[14] The first FIX Port would be provided to each Electronic Access Member. The term ''Electronic Access Member'' or ''EAM'' means a Member that is approved to exercise trading privileges associated with EAM Rights. *See* General 1, section 1(a)(6). Also, the first SQF Port would be provided to each Market Maker. The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* Options 1, section 1(a)(21). The term ''Competitive Market Maker'' means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, section 1(a)(12). The term ''Primary Market Maker'' means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, section 1(a)(35).

[15] The first SQF Port would be provided to each Market Maker. The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* Options 1, section 1(a)(21). The term ''Competitive Market Maker'' means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, section 1(a)(12). The term ''Primary Market Maker'' means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, section 1(a)(35).

[16] An ''account number'' shall mean a number assigned to a Member. Members may have more than one account number. *See* Options 1, section 1(a)(1). Account numbers are free on MRX.

[17] SQF's Port Fees are assessed a higher dollar fee as compared to FIX and OTTO ports ($1,250 vs. $650) because the Exchange has to maintain options assignments within SQF and manage quoting traffic. Market Makers may utilize SQF Ports in their assigned options series. Market Maker badges are assigned to specific SQF ports to manage the option series in which a Market Maker may quote. Additionally, because of quoting obligations provided for within Options 2, section 5, Market Makers are required to provide liquidity in their assigned options series which generates quote traffic. The Exchange notes because of the higher fee, SQF ports are billed per port, per month while FIX and OTTO ports are billed per port, per month, per account number. Members may have more than one account number.

[18] The first FIX Port would be provided to each Electronic Access Member. The term ''Electronic Access Member'' or ''EAM'' means a Member that is approved to exercise trading privileges associated with EAM Rights. *See* General 1, section 1(a)(6). Also, the first SQF Port would be provided to each Market Maker. The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market

Recovery Port obtained by a Market Maker.[19] The Exchange proposes to assess each additional FIX Disaster Recovery Port and each additional SQF Disaster Recovery Port a fee of $50 per port, per month, per account number. Additionally, the Exchange proposes to assess a Disaster Recovery Fee for SQF Purge and OTTO Ports of $50 per port, per month, per account number. Finally, the Exchange proposes to assess a Disaster Recovery Fee for CTI Ports and FIX DROP Ports of $50 per port, per month.

The OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports [20] are available to all Electronic Access Members, and will be subject to a monthly cap of $7,500.

The SQF Port and the SQF Purge Port are available to all Market Makers, and will be subject to a monthly cap of $17,500.[21]

The Exchange is not amending the TradeInfo MRX Interface [22] or the Nasdaq MRX Depth of Market, Nasdaq MRX Order Feed, Nasdaq MRX Top Quote Feed, Nasdaq MRX Trades Feed, or Nasdaq MRX Spread Feed Ports; all of these aforementioned ports will continue to be assessed no fees. Additionally, as is the case today, the Disaster Recovery Ports for TradeInfo and the Nasdaq MRX Depth of Market, Nasdaq MRX Order Feed, Nasdaq MRX Top Quote Feed, Nasdaq MRX Trades Feed and Nasdaq MRX Spread Feed Ports will not be assessed a fee.

Order and Quote Entry Protocols

Only one order protocol is required for an MRX Member to submit orders into MRX. The Exchange will provide each Electronic Access Member the first FIX Port at no cost to submit orders into MRX. Only one account number is necessary to transact an options business on MRX and account numbers are available to Members at no cost. Only one quote protocol is required for an MRX Market Maker to submit quotes into MRX. The Exchange will provide each Market Maker the first SQF Port at no cost to submit quotes into MRX. A quoting protocol, such as SQF, is only required to the extent an MRX Member has been appointed as a Market Maker in an options series pursuant to Options 2, section 1.

Only MRX Members may utilize ports on MRX. Any market participant that sends orders to a Member would not need to utilize a port. The Member can send all orders, proprietary and agency, through one port to MRX. Members may elect to obtain multiple account numbers to organize their business, however only one account number and one port for orders and one port for quotes is necessary for a Member to trade on MRX.

MRX also offers an OTTO protocol. Unlike FIX, which offers routing capability, OTTO does not permit routing. Depending on a Member's business model, Members may elect to purchase an OTTO Port in addition to the first FIX Port offered at no cost. Members may prefer one protocol as compared to another protocol, for example, the ability to route may cause a Member to utilize FIX and a Member that desires to execute an order locally may utilize OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Members depending on their trading behavior. MRX Members utilizing the first FIX Port offered at no cost do not need to purchase an OTTO Port. However, Members may elect to utilize both order entry protocols, depending on how they organize their business. Because the Exchange is providing the first FIX Port at no cost, the use of an OTTO Port is optional. OTTO provides MRX Members with an additional choice as to the type of protocol that they may use to submit orders to the Exchange. Today, Nasdaq Phlx LLC (''Phlx'') and Nasdaq BX, Inc. (''BX'') offer only a FIX Port to submit orders on those options markets.[23]

Further, while only one protocol is necessary to submit orders into MRX, Members may choose to purchase a greater number of order entry ports, depending on that Member's business model.[24] To the extent that Electronic Access Members chose to utilize more than one FIX Port, the Electronic Access Member would be assessed $650 per port, per month, per account number for each subsequent optional port beyond the first port. To the extent that Market Makers chose to utilize more than one SQF Port, the Market Maker would be assessed $1,250 per port, per month for each subsequent optional port beyond the first port. Additionally, to the extent a Member expended more than $7,500 for FIX Ports or more than $17,500 for SQF Ports, the Exchange would not charge an MRX Member for additional FIX or SQF Ports, respectively, beyond the cap.

Other Protocols

The Exchange's proposal to offer an SQF Purge Port for $1,250 per port, per month is optional. The SQF Purge Port is designed to assist Market Makers in the management of, and risk control over, their quotes. Market Makers may utilize a purge port to reduce uncertainty and to manage risk by purging all quotes in their assigned options series. Of note, Market Makers may only enter interest into SQF in their assigned options series. Additionally, the SQF Purge Port may be utilized by a Market Maker in the event that the Member has a system issue and determines to purge its quotes from the order book. The SQF Purge Port is optional as Market Makers have various ways of purging their quotes from the order book. First of all, a Market Maker may cancel quotes through SQF in their assigned option series.[25] Second, a Member may cancel any bids or offers in any series of options by requesting MRX Market Operations staff to effect such cancellation as per the instructions of the Member.[26] Third, in the event of a loss of communication with the Exchange, MRX offers the ability to cancel all of a Member's open quotes via a cancel-on-disconnect control.[27] Fourth, MRX offers Market Makers the ability, with respect to quotes, to establish pre-determined levels of risk exposure which would be utilized to automatically remove quotes in all

Makers'' collectively. *See* Options 1, section 1(a)(21). The term ''Competitive Market Maker'' means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, section 1(a)(12). The term ''Primary Market Maker'' means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, section 1(a)(35).

[19] The first SQF Port would be provided to each Market Maker. The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* Options 1, section 1(a)(21). The term ''Competitive Market Maker'' means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, section 1(a)(12). The term ''Primary Market Maker'' means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, section 1(a)(35).

[20] This includes FIX, SQF, SQF Purge, OTTO, CTI and FIX Drop Disaster Recovery Ports.

[21] Only Market Makers may quote on MRX. The Exchange is proposing non-substantive technical amendments to add commas within the ''Production'' column of the proposed rule text to separate terms.

[22] TradeInfo is a user interface that permits a Member to: (i) search all orders submitted in a particular security or all orders of a particular type, regardless of their status (open, canceled, executed, etc.); (ii) view orders and executions; and (iii) download orders and executions for recordkeeping purposes. TradeInfo users may also cancel open orders at the order, port or firm mnemonic level through TradeInfo. *See* Options 3, section 23(b)(2).

[23] *See* Phlx and BX Options 3, section 7 for a list of protocols.

[24] For example, a Member may desire to utilize multiple FIX or OTTO Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Member.

[25] SQF Purge Ports, similar to SQF Ports, allow Market Makers to mass cancel quotes.

[26] See Options 3, section 19, Mass Cancellation of Trading Interest.

[27] *See* MRX Options 3, section 18, Detection of Loss. This risk protection is free.

series of an options class.[28] Accordingly, the Exchange believes that the SQF Purge Port provides an efficient option to other available services which allow a Market Maker to cancel quotes.

CTI Ports and FIX DROP Ports are optional as Members have multiple ways of receiving information concerning open orders and executed transactions. First, FIX and OTTO protocols provide Members with real-time order execution messages similar to the Clearing Trade Interface and FIX DROP. Second, TradeInfo provides Members with the ability to query open orders and order executions real-time, at no cost, similar to the Clearing Trade Interface and FIX DROP. Third, Members receive free daily reports listing open orders and trade executions from the Exchange. While not real-time, the Open Orders Report and Trade Detail Report provide Members with information similar to the Clearing Trade Interface and FIX DROP.

Disaster Recovery

With respect to Disaster Recovery Ports, the Exchange proposes to assess no fee for the first FIX Disaster Recovery Port obtained by an Electronic Access Member or the first SQF Disaster Recovery Port obtained by a Market Maker. The Exchange proposes to assess no fees for these ports to provide Members with continuous access to MRX in the event of a failover at no cost. Electronic Access Members only require one FIX Disaster Recovery Port to submit orders in the event of a failover. Market Makers only require one SQF Disaster Recovery Port to submit quotes in the event of a failover. Electronic Access Members may elect to purchase additional optional FIX Disaster Recovery Ports for $50 per port, per month, per account number. Market Makers may elect to purchase additional optional SQF Disaster Recovery Ports for $50 per port, per month, per account number. The additional FIX and SQF Disaster Recovery Ports are not necessary to connect to the Exchange in the event of a failover because the Exchange has provided Members with a FIX Disaster Recovery Port and an SQF Disaster Recovery Port at no cost.

Further, the Exchange's proposal to offer Disaster Recovery Ports for SQF Purge Ports and OTTO Ports for $50 per port, per month, per account number and Disaster Recovery Ports for CTI Ports and FIX DROP Ports for $50 per port, per month is optional. As noted herein, today, there are other alternatives for these ports. The purchase of an SQF Purge Port, OTTO Port, CTI Port, and FIX DROP Port in production are optional and, therefore, so is the purchase of Disaster Recovery Ports for these ports. The proposed Disaster Recovery Port fees are intended to encourage Members to be efficient when purchasing Disaster Recovery Ports. Similar to all other ports, Disaster Recovery Ports need to be maintained by the Exchange.[29]

Finally, in the event that an MRX Member elects to subscribe to multiple ports, the Exchange offers a monthly cap beyond which a Member would be assessed no additional port fees in a given month. As noted above, the SQF Port and the SQF Purge Port are subject to a monthly cap of $17,500 and the OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports are subject to a monthly cap of $7,500.

As noted herein, these different protocols are not all necessary to conduct business on MRX; a Member may choose among protocols based on their business workflow. The proposed port fees are similar to fees assessed today by GEMX.[30] The Exchange's proposal to offer the first FIX and SQF Port at no cost as well as the first FIX and SQF Disaster Recovery Ports at no cost would allow MRX Members to submit orders and quotes into MRX at no cost.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[31] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[32] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to the Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [33]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [34]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [35] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [36] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [37] In its 2019 guidance

[28] *See* MRX Options 3, section 15(a)(3)(B). Thresholds may be set by Members based on percentage, volume, delta or vega. This risk protection is free.

[29] The Exchange maintains ports in a number of ways to ensure that ports are properly connected to the Exchange at all times. This includes offering testing, ensuring all ports are up-to-date with the latest code releases, as well as ensuring that all ports meet the Exchange's information security specifications.

[30] *See* GEMX Options 7, section 6.C. (Ports and Other Services).

[31] *See* 15 U.S.C. 78f(b).

[32] *See* 15 U.S.C. 78f(b)(4) and (5).

[33] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[34] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[35] *See NetCoalition,* 615 F.3d at 534–35; *see also* H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[36] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[37] *Id.*

on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [38]

History of MRX Operations

Over the years, MRX has amended its transactional pricing to remain competitive and attract order flow to the Exchange.[39]

In June 2019, MRX commenced offering complex orders.[40] With the addition of complex order functionality, MRX offered Members certain order types, an opening process, auction capabilities and other trading functionality that was nearly identical to functionality available on ISE.[41] By way of comparison, ISE assessed fees for ports [42] in 2019 while offering the same suite of functionality as MRX, with a limited exception.[43]

Ports Are Subject to Significant Substitution-Based Competitive Forces

An exchange can show that a product is ''subject to significant substitution-based competitive forces'' by introducing evidence that customers can substitute the product for products offered by other exchanges.

Chart 1 below shows the January 2022 market share for multiply-listed options by exchange. Of the 16 operating options exchanges, none currently has more than a 13.1% market share, and MRX has the smallest market share at 1.8%. Customers widely distribute their transactions across exchanges according to their business needs and the ability of each exchange to meet those needs through technology, liquidity and functionality. Average market share for the 16 options exchanges is 6.26 percent, with the median at 5.8, and a range between 1.8 and 13.1 percent.

[38] *See* U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Rule filings Relating to Fees'' (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

[39] *See e.g.* Securities Exchange Act Release Nos. 77292 (March 4, 2016), 81 FR 12770 (March 10, 2016) (SR–ISEMercury–2016–02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the Schedule of Fees); 77409 (March 21, 2016), 81 FR 16240 (March 25, 2016) (SR–ISEMercury–2016–05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 81 FR 16238 (March 21, 2016), 81 FR 16238 (March 25, 2016) (SR–ISEMercury-2016–06) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 77841 (May 16, 2016), 81 FR 31986 (SR–ISEMercury–2016–11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 82537 (January 19, 2018), 83 FR 3784 (January 26, 2018) (SR–MRX–2018–01) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees To Introduce a New Pricing Model); 82990 (April 4, 2018), 83 FR 15434 (April 10, 2018) (SR–MRX–2018–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Chapter IV of the Exchange's Schedule of Fees); 28677 (June 14, 2018), 83 FR 28677 (June 20, 2018) (SR–MRX–2018–19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase Certain Route-Out Fees Set Forth in section II.A of the Schedule of Fees); 84113 (September 13, 2018), 83 FR 47386 (September 19, 2018) (SR–MRX–2018–27) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate the Exchange's Schedule of Fees); 85143 (February 14, 2019), 84 FR 5508 (February 21, 2019) (SR–MRX–2019–02) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Pricing Schedule at Options 7, section 3); 85313 (March 14, 2019), 84 FR 10357 (March 20, 2019) (SR–MRX–2019–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to PIM Fees and Rebates); 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019–14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Complex Order Pricing); 88022 (January 23, 2020), 85 FR 5263 (January 29, 2020) (SR–MRX–2020–02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Pricing Schedule); 89046 (June 11, 2020), 85 FR 36633 (June 17, 2020) (SR–MRX–2020–11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7); 89320 (July 15, 2020), 85 FR 44135 (July 21, 2020) (SR–MRX–2020–14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7, section 5, Other Options Fees and Rebates, in Connection With the Pricing for Orders Entered Into the Exchanges Price Improvement Mechanism); 90503 (November 24, 2020), 85 FR 77317 (December 1, 2020) (SR–MRX–2020–18) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7 for Orders Entered Into the Exchange's Price Improvement Mechanism); 90434 (November 16, 2020), 85 FR 74473 (November 20, 2020) (SR–MRX–2020–19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To the Exchange's Pricing Schedule at Options 7 To Amend Taker Fees for Regular Orders); 90455 (November 18, 2020), 85 FR 75064 (November 24, 2020) (SR–MRX–2020–21) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule); and 91687 (April 27, 2021), 86 FR 23478 (May 3, 2021) (SR–MRX–2021–04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Options 7). Note that ISE Mercury is an earlier name for MRX.

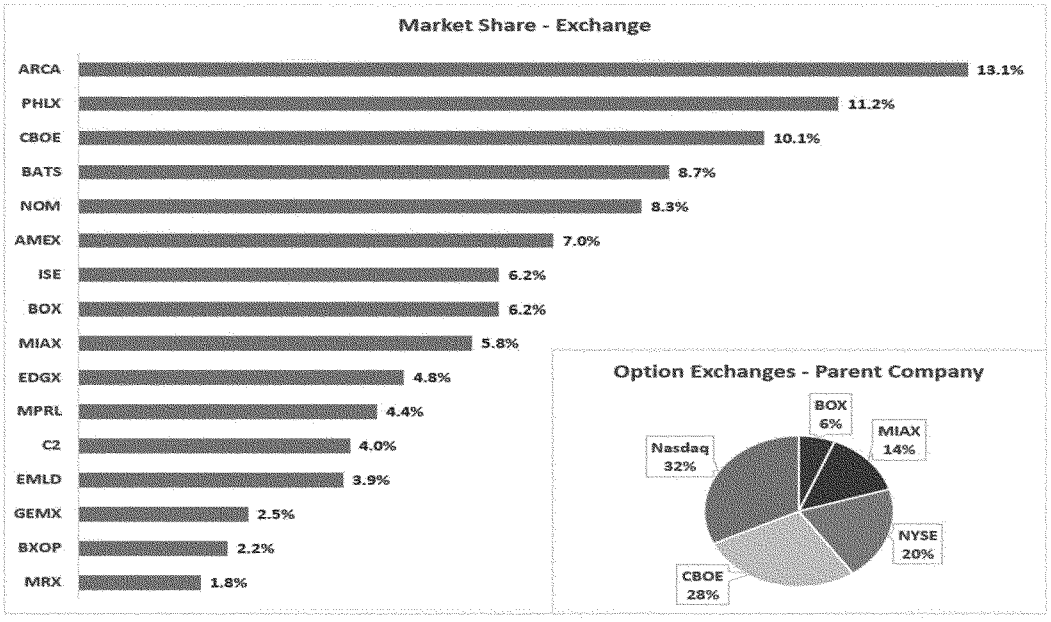
[40] *See* Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019–14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Complex Order Pricing).

[41] One distinction is that ISE offered its Members access to Nasdaq Precise in 2019 and since that time. MRX has never offered Precise. ''Nasdaq Precise'' or ''Precise'' is a front-end interface that allows EAMs and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (*e.g.,* parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (*e.g.,* NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (*e.g.,* kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (*e.g.,* order history and done away trade reports). *See* ISE Supplementary Material .03(d) of Options 3, section 7. Precise is also available on GEMX.

[42] Since 2019, ISE has assessed the following port fees: a FIX Port Fee of $300 per port, per month, per mnemonic, an SQF Port Fee and SQF Purge Port Fee of $1,100 per port, per month, an OTTO Port Fee of $400 per port, per month, per mnemonic with a monthly cap of $4,000, a CTI Port Fee and FIX DROP Port Fee of $500 per port, per month, per mnemonic. *See* Securities Exchange Act Release No. 82568 (January 23, 2018), 83 FR 4086 (January 29, 2018) (SR–ISE–2018–07) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Assess Fees for OTTO Port, CTI Port, FIX Port, FIX Drop Port and Disaster Recovery Port Connectivity). Of note, ISE assessed port fees prior to 2019 as well.

[43] *See* note 41, *supra.*

Chart 1: Market Share by Exchange for January 2022



Market share is the percentage of volume on a particular exchange relative to the total volume across all exchanges, and indicates the amount of order flow directed to that exchange. High levels of market share enhance the value of trading and ports.

As described in detail below, only one order protocol is required to submit orders to MRX. Quoting protocols are only required to the extent an MRX Member has been appointed as a Market Maker in an options series pursuant to Options 2, section 1, and only one quoting protocol is necessary to quote on MRX. Members may choose a greater number of order or quote entry ports, beyond the first FIX Port and the first SQF Port which are proposed to be offered at no cost, depending on that Member's particular business model.[44] However, Members do not need more than one order entry port (and account number) and one quote port to submit interest to MRX.

The experience of MRX's affiliates shows that the number of ports that members choose to purchase varies widely. For example, a review of the Phlx exchange in April 2022 shows that, among its member organizations that purchase ports, approximately 26 percent purchased 1 SQF or FIX port, another 26 percent purchased between 2 and 5 ports, 21 percent purchased between 6 and 10 ports, and 28 percent purchased more than 11 ports. This means that any MRX Member may enter all of their interest (orders or quotes) with only one order and one quote port and remain competitive.[45]

By way of comparison, the number of ports that MRX Members purchased in April 2022 also varied widely.

[44] For example, a Member may desire to utilize multiple FIX ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that Member.

[45] As noted above, one port would be required to submit orders and one port would be required to submit quotes.

Chart 2: Number of SQF and FIX Ports Subscribed to by MRX Members in April 2022

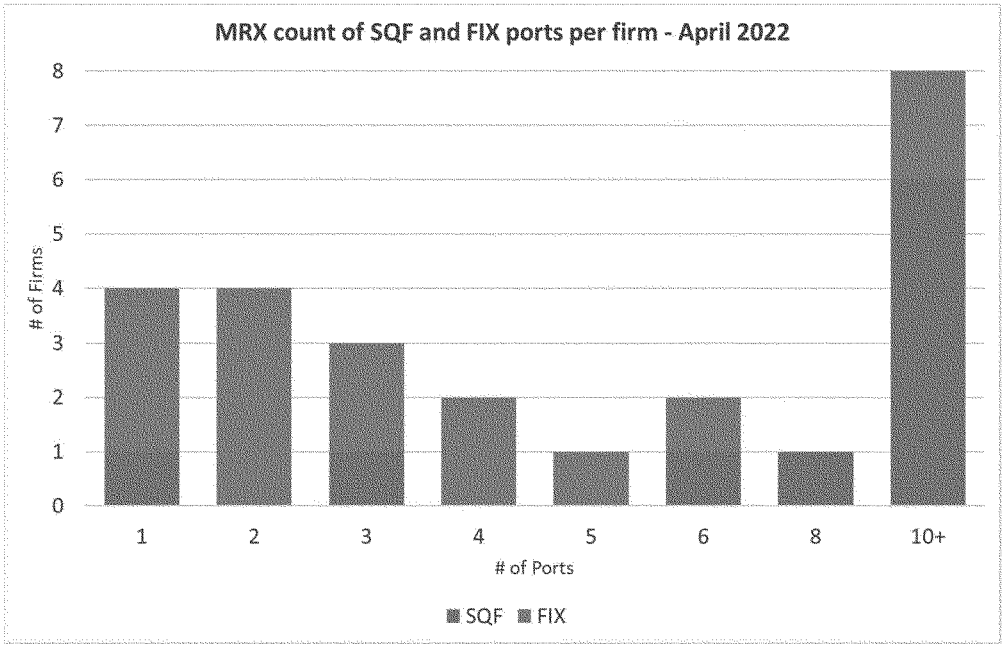


Chart 2 indicates the number of FIX and SQF Ports, respectively, that MRX Members were subscribed to in April 2022. Chart 2 shows that 1 MRX Member only subscribed to 1 SQF Port and 3 MRX Members subscribed to 1 FIX Port.

Further, approximately 23 percent of MRX Members purchased 1 SQF, FIX or OTTO Port,[46] another 43 percent purchased between 2 and 5 ports, 13 percent purchased between 6 and 10 ports, and 20 percent purchased more than 11 ports. MRX Members, similar to Phlx member organizations, have the option of reducing their port purchases without purchasing a substitute product.

All of these statistics must be viewed in the context of a field with relatively low barriers to entry. MRX, like many new entrants to the field, offered ports for free to establish itself and gain market share. As new entrants enter the field, MRX can also expect competition from these new entrants. Those new entrants, like MRX, are likely to set port, or other fees to zero, increasing marketplace competition.

The Exchange notes that one MRX Member cancelled 1 SQF Port and 1 OTTO Port to avoid being assessed an SQF Port fee as of May 2, 2022.[47] As of July 1, 2022, the Exchange did not assess MRX Members for their first SQF Port. MRX port fees are subject to significant substitution-based competitive forces due to its consistently low percentage of market share, the relatively small number of purchasers for each product, and the purchasers that either cancelled or are reviewing their subscriptions. Implementation of the proposed fees is therefore consistent with the Act.

Fees for Ports

The proposed port fees described below are in line with those of other markets. Setting a fee above competitors is likely to drive away customers, so the most efficient price-setting strategy is to set prices at the same level as other firms.

As noted above, market participants may choose to become a member of one or more options exchanges based on the market participant's business model. The Exchange believes that there are many factors that may cause a market participant to decide to become a member of a particular exchange dependent upon their business model. A very small number of market participants choose to become a member of all sixteen options exchanges. It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one options market.[48] Most firms that actively trade on options markets are not currently Members of MRX and do not purchase port services at MRX. Ports are only available to MRX Members or service bureaus, and only an MRX Member may utilize a port.[49]

Using options markets that Nasdaq operates as points of comparison, less

[46] Phlx only offers FIX and SQF ports while MRX offers FIX, OTTO and SQF ports for order and quote entry.

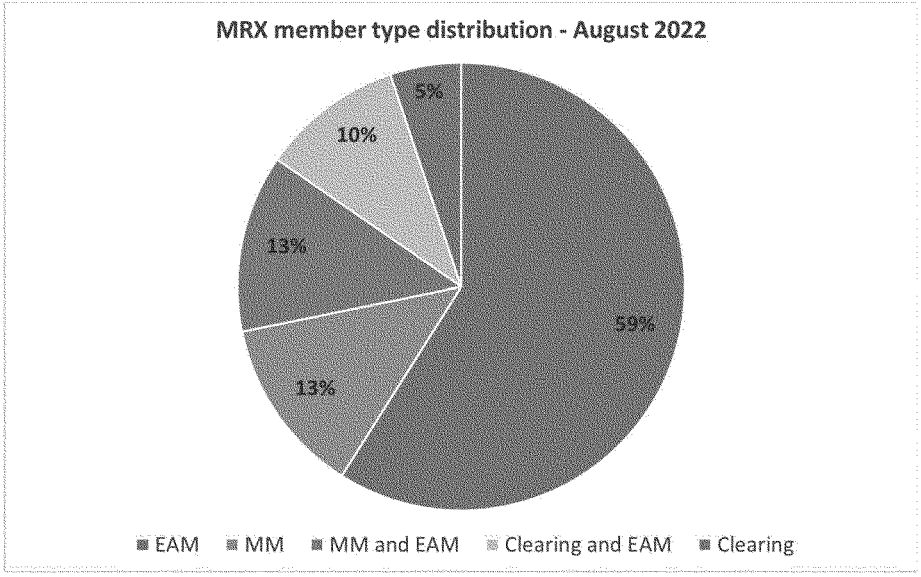
[47] MRX originally filed to assess a fee for all FIX Ports.

[48] BOX Exchange LLC (''BOX'') amended its fees on January 3, 2022 to adopt an electronic market maker trading permit fee. *See* Securities and Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). In the BOX–2022–17 rule change, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. The Exchange again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on the Exchange.'' Further, in 2022, MEMX LLC (''MEMX'') established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). The Monthly Membership Fee is assessed to each active Member at the close of business on the first day of each month. MEMX reasoned in MEMX–2022–19 that that there is value in becoming a member of the exchange. MEMX stated that it believed that its proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange.'' Moreover, ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.'' The Exchange notes that neither BOX–2022–17 or MEMX–2022–19 were suspended.

[49] Service bureaus may obtain ports on behalf of Members. The Exchange would only assign a badge and/or mnemonic to a Member to be utilized to submit quotes and/or orders to the Exchange.

than a third of the firms that are members of at least one of the options markets that Nasdaq operates are also Members of MRX (approximately 29%). MRX, like other options markets, has a mix of market participants as Members. Chart 3 below displays the percentage of Electronic Access Members, Market Makers and Clearing Firms on MRX.[50]

Chart 3: Composition of MRX Membership as of August 2022



The percentages in Chart 3 represent percentages of the total number of MRX Members. Some Members have dual representations (*e.g.,* a Market Maker and Electronic Access Member) as reflected in Chart 2.

The Exchange notes that no firm is a Member of MRX only. Few, if any, firms have purchased port services at MRX, notwithstanding the fact that ports are currently free, because MRX currently has less liquidity than other options markets. As explained above, MRX has the smallest market share of the 16 options exchanges, representing only approximately 1.8% of the market, and, for certain market participants, the current levels of liquidity may be insufficient to justify the costs associated with becoming a Member and connecting to the Exchange, notwithstanding the fact that ports are currently free.

The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services. The decision to become a member of an exchange is made at the beginning of the relationship, and is no less subject to competition than trading fees or ports.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at MRX.[51] If MRX is not at the NBBO, MRX will route an order to any away market that is at the NBBO to prevent a trade-through and also ensure that the order was executed at a superior price.[52]

With respect to the submission of orders, Members may also choose not to purchase any port at all from the Exchange, and instead rely on the port of a third party to submit an order.[53] For example, a third-party broker-dealer Member of MRX may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[54] or request sponsored access [55] through a member of an exchange in order to submit a trade directly to an options exchange.[56] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees

[50] Of note, Nasdaq Execution Services, LLC (''NES''), a Nasdaq affiliate, is a Member of MRX. NES is a broker-dealer and the Routing Facility of the Exchange. NES routes orders in options listed and open for trading on the System to away markets either directly or through one or more third-party unaffiliated routing broker-dealers pursuant to Exchange Rules on behalf of the Exchange. NES is subject to regulation as a facility of the Exchange, including the requirement to file proposed rule changes under section 19 of the Securities Exchange Act of 1934, as amended

[51] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at *https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[52] MRX Members may elect to not route their orders by marking an order as ''do-not-route.'' In this case, the order would not be routed. *See* Options 3, section 7(m).

[53] Market Makers on MRX are required to obtain one SQF port to submit quotes into MRX.

[54] Service bureaus provide access to market participants to submit and execute orders on an exchange. On MRX, a Service Bureau may be a Member. Some MRX Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders. As noted herein only MRX Members may submit orders or quotes through ports.

[55] Sponsored Access is an arrangement whereby a member permits its customers to enter orders into an exchange's system that bypass the member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[56] This may include utilizing a Floor Broker and submitting the trade to one of the five options trading floors.

to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange. Market participants may elect any of the above models and weigh the varying costs when determining how to submit trades to an exchange. Depending on the number of orders to be submitted, technology, ability to control submission of orders, and projected revenues, a market participant may determine one model is more cost efficient as compared to the alternatives.

Only if a market participant elects to become a Member of MRX will the market participant need to utilize a port to submit orders and/or quotes into MRX. Once an applicant is approved for membership on MRX and becomes a Member, the Exchange assigns the Member a badge [57] and/or mnemonic [58] to submit quotes and/or orders to the Exchange through the applicable port. An MRX Member may have one or more accounts numbers and may assign badges or mnemonics to those account numbers.[59] Membership approval grants a Member a right to exercise trading privileges on MRX, which includes the submission of orders and/or quotes into the Exchange through a secure port by utilizing the badge and/or mnemonic assigned to a specific Member by the Exchange. The Exchange utilizes ports as a secure method for Members to submit orders and/or quotes into the Exchange's match engine and for the Exchange to send messages related to those orders and/or quotes to its Members.

MRX is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, MRX takes measures to ensure access is monitored and maintained with various controls. Ports are a method utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member of MRX, and is approved for membership by MRX, the Member is granted trading rights to enter orders and/or quotes into MRX through secure ports.

As noted herein, there is no legal or regulatory requirement that a market participant become a Member of MRX, or, if it is a Member, to purchase port services beyond the one quoting protocol or one order entry protocol necessary to quote or submit orders on MRX. The Exchange proposes to offer the first FIX and SQF Port at no cost in addition to the first FIX Disaster Recovery Port and the first SQF Disaster Recovery Port at no cost.[60] As noted above, Members may freely choose to rely on one or many ports, depending on their business model.

The Exchange's proposal to amend port fees is reasonable, equitable and not unfairly discriminatory as MRX is providing MRX Electronic Access Members the first FIX Port to submit orders and MRX Market Makers the first SQF Port to submit quotes to MRX, at no cost, in addition to providing the first FIX Disaster Recovery Port and the first SQF Disaster Recovery Port at no cost; all other ports offered by MRX are optional and not necessary to trade options on the Exchange.

The proposed fees reflect the ongoing services provided to maintain and support the ports. In order to submit orders into MRX, only one order protocol is required, and MRX is providing Electronic Access Members the first FIX Port at no cost. Quoting protocols are only required to the extent an MRX Member has been appointed as a Market Maker in an options series pursuant to Options 2, section 1. Similarly, only one quoting protocol is necessary to quote on MRX and MRX is providing Market Makers the first SQF Port at no cost. As noted above, only Members may utilize ports. A Member can send all orders, proprietary and agency, through one port to MRX and all quotes through one port. Therefore, for the foregoing reasons, it is reasonable to assess no fee for the first FIX Port obtained by an Electronic Access Member or the first SQF Port obtained by a Market Maker. Further it is equitable and not unfairly discriminatory to assess no fee for the first FIX Port to Electronic Access Members as all Electronic Access Members would be entitled to the first FIX Port at no cost. Also, it is equitable and not unfairly discriminatory to assess no fee for the first SQF Port to Market Makers as all Market Makers would be entitled to the first SQF Port at no cost. With this proposal, MRX Members may organize their business in such a way as to submit orders and/or quotes continuously to MRX at no cost.

The Exchange's proposal to assess Members $650 per port, per month, per account number for FIX Ports beyond the first port and $1,250 per port, per month for SQF Ports beyond the first port is reasonable because these ports are optional and Members only require one FIX Port to submit orders to MRX and one SQF Port to submit quotes to MRX. Members electing to subscribe to more than one FIX or SQF Port are choosing the additional ports to accommodate their business model. Additionally, to the extent a Member expended more than $7,500 for FIX Ports or more than $17,500 for SQF Ports, the Exchange would not charge an MRX Member for additional FIX or SQF Ports beyond the cap. The fees for the proposed additional FIX and SQF Ports are equitable and not unfairly discriminatory because any Member may elect to subscribe to additional ports. Electronic Access Members would be subject to the same fees for FIX Ports and Market Makers would be subject to the same fees for SQF Ports. Unlike other market participants, Market Makers are required to provide continuous two-sided quotes on a daily basis,[61] and are subject to various obligations associated with providing liquidity.[62] Also, as noted herein, account numbers are available on MRX at no cost.

The Exchange's proposal to assess $650 per port, per month, per account number for an OTTO Port is reasonable because OTTO is optional. The Exchange is offering the first FIX Port at no cost to submit orders to MRX. In addition to the FIX Port, all Members may elect to purchase OTTO to submit orders to MRX. Unlike FIX, which offers routing capability, OTTO does not permit routing. Depending on a Member's business model, Members may elect to purchase an OTTO Port in addition to the FIX Port, which is being provided at no cost. Members may prefer one protocol as compared to another protocol. For example, the ability to route may cause a Member to utilize FIX and a Member that desires to execute an order locally may utilize OTTO. Also, the OTTO Port offers lower latency as compared to the FIX Port, which may be attractive to Members depending on their trading behavior. MRX Members utilizing the FIX Port, which is offered at no cost, do not need to utilize OTTO. Members may elect to utilize both order entry protocols, depending on how they organize their

[57] A ''badge'' shall mean an account number, which may contain letters and/or numbers, assigned to Market Makers. A Market Maker account may be associated with multiple badges. *See* MRX Options 1, section 1(a)(5).

[58] A ''mnemonic'' shall mean an acronym comprised of letters and/or numbers assigned to Electronic Access Members. An Electronic Access Member account may be associated with multiple mnemonics. *See* MRX Options 1, section 1(a)(23).

[59] The Exchange provides account numbers, badges and mnemonics at no cost.

[60] Only Members and service bureaus may request ports on MRX, and only Members may utilize ports on MRX through their assigned badge or mnemonic. *See* Options 1, section 1(a)(5) and (23).

[61] *See* MRX Options 2, section 5.

[62] *See* MRX Options 2, section 4.

business. OTTO provides MRX Members with an additional choice as to the type of protocol that they may use to submit orders to the Exchange. Today, Phlx and BX offer only a FIX Port to submit orders on those options markets.[63] The proposed OTTO fee is equitable and not unfairly discriminatory because any Member may elect to purchase an optional OTTO Port and would be subject to the same fee.

The Exchange's proposal to offer an SQF Purge Port for $1,250 per port, per month is reasonable because this port is optional. The SQF Purge Port is designed to assist Market Makers in the management of, and risk control over, their quotes. Market Makers may utilize a purge port to reduce uncertainty and to manage risk by purging all quotes in their assigned options series. Of note, Market Makers may only enter interest into SQF in their assigned options series. Additionally, the SQF Purge Port may be utilized by a Market Maker in the event that the Member has a system issue and determines to purge from the order book. The SQF Purge Port is optional as Market Makers have various ways of purging their quotes from the order book. First of all, a Market Maker may cancel quotes through SQF in their assigned options series in the same manner as they may cancel quotes with an SQF Purge Port.[64] Second, a Member may cancel any bids or offers in any series of options by requesting MRX Market Operations staff to effect such cancellation as per the instructions of the Member.[65] Third, in the event of a loss of communication with the Exchange, MRX offers the ability to cancel all of a Member's open quotes via a cancel-on-disconnect control.[66] Fourth, MRX offers Market Makers the ability, with respect to simple orders, to establish pre-determined levels of risk exposure which would be utilized to automatically remove quotes in all series of an options class.[67] Accordingly, the Exchange believes that the SQF Purge Port provides an efficient alternative to other available services which allow a Market Maker to cancel quotes. The proposed SQF Purge Port is equitable and not unfairly discriminatory because any Member may elect to purchase an optional SQF Purge Port and would be subject to the same fee.

The Exchange's proposal to assess $650 per port, per month for CTI Ports and FIX DROP Ports is reasonable because these ports are optional because Members have various ways of receiving information concerning open orders and executed transactions. First, FIX and OTTO provide Members with real-time order executions similar to the Clearing Trade Interface and FIX DROP. Second, TradeInfo provides Members with the ability to query open orders and order executions real-time, at no cost, similar to the Clearing Trade Interface and FIX DROP. Third, Members receive free daily reports listing open orders and trade executions from the Exchange. While not real-time, the Open Orders Report and Trade Detail Report provide Members with information similar to the Clearing Trade Interface and FIX DROP. The proposed CTI and FIX DROP Ports are equitable and not unfairly discriminatory because any Member may elect to purchase an optional CTI Port or FIX DROP Port and would be subject to the same fee.

The Exchange's proposal to assess no fee for the first FIX Disaster Recovery Port or the first SQF Disaster Recovery Port is reasonable because it will provide Members with continuous access to MRX in the event of a failover, at no cost. Further it is equitable and not unfairly discriminatory to assess no fee for the first FIX Disaster Recovery Port to Electronic Access Members as all Electronic Access Members would be entitled to the first FIX Disaster Recovery Port at no cost. Also, it is equitable and not unfairly discriminatory to assess no fee for the first SQF Disaster Recovery Port to Market Makers as all Market Makers would be entitled to the first SQF Disaster Recovery Port at no cost.

The Exchange's proposal to assess Members $50 per port, per month, per account number for optional FIX Disaster Recovery Ports beyond the first port offered at no cost and $50 per port, per month, per account number for optional SQF Disaster Recovery Ports beyond the first port offered at no cost is reasonable because these ports are optional and Members only require one FIX Disaster Recovery Port to submit orders to MRX in the event of a failover and one SQF Disaster Recovery Port to submit quotes to MRX in the event of a failover. Additionally, to the extent a Member expended more than $7,500 for Disaster Recovery Ports, the Exchange would not charge an MRX Member for additional Disaster Recovery Ports beyond the cap. The fees for the proposed additional FIX and SQF Disaster Recovery Ports are equitable and not unfairly discriminatory because any Member may elect additional ports and would be subject to the same fees.

The Exchange's proposal to offer Disaster Recovery Ports for SQF Purge Ports, and OTTO Ports at $50 per port, per month, per account number and CTI Ports, and FIX DROP Ports for $50 per port, per month is reasonable because these ports are optional. As noted herein, there are other alternatives for all of these ports today, the purchase of an SQF Purge Port, OTTO Port, CTI Port, and FIX DROP Port in production is optional and, therefore, so is the purchase of Disaster Recovery Ports for these ports. The proposed Disaster Recovery Port fees are intended to encourage Members to be efficient when purchasing Disaster Recovery Ports. The proposed Disaster Recovery Ports are equitable and not unfairly discriminatory because any Member may elect to purchase an optional Disaster Recovery Port and would be subject to the same fee, depending on the port.

Finally, in the event that an MRX Member elects to subscribe to multiple ports, the Exchange offers a monthly cap beyond which a Member would be assessed no additional fees for month. As noted above, the SQF Port and the SQF Purge Port are subject to a monthly cap of $17,500 and the OTTO Port, CTI Port, FIX Port, FIX Drop Port and all Disaster Recovery Ports are subject to a monthly cap of $7,500. These caps are reasonable because they allow Members to limit their fees beyond a certain level if they elect to purchase multiple ports in a given month. The caps are also equitable and not unfairly discriminatory because any Member will be subject to the cap, provided they exceeded the appropriate dollar amount in a given month.

The proposed port fees are similar to the fees assessed by GEMX.[68]

After 6 years, MRX proposes to commence assessing port fees, just as all other options exchanges while offerings its Members the ability to submit orders and quotes to the Exchange at no cost. The introduction of these fees will not impede a Member's access to MRX, but rather will allow MRX to continue to compete and grow its marketplace so that it may continue to offer a robust trading architecture, a quality opening process, an array of simple and complex order types and auctions, and competitive transaction pricing. If MRX is incorrect in its assessment of the

[63] *See* Phlx and BX Options 3, section 7 for a list of protocols.

[64] SQF Purge Ports, similar to SQF Ports, allow Market Makers to mass cancel quotes.

[65] See Options 3, section 19, Mass Cancellation of Trading Interest.

[66] *See* MRX Options 3, section 18, Detection of Loss. This risk protection is free.

[67] *See* MRX Options 3, section 15(a)(3)(B). Thresholds may be set by Members based on percentage, volume, delta or vega. This risk protection is free.

[68] *See* GEMX Options 7, section 6.C. (Ports and Other Services).

value of its services, that assessment will be reflected in MRX's ability to compete with other options exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any intermarket burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes its proposal to offer the first FIX and SQF Ports for free, as well as the first Disaster Recovery version of these ports, positions MRX as a competitive market among other options exchanges, all of which assess fees for the first order and/or quote protocols. MRX's offering would permit Electronic Access Members and Market Makers the ability to submit orders and quote to MRX at no cost. The remainder of the port offerings are optional. The Exchange believes that the optional port offerings permit MRX to remain competitive with other options markets in its offerings.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

By way of example, today, with the exception of Precise, ISE has identical functionality to MRX. Market participants may elect to become members of ISE instead of MRX if those market participants believe that the order flow on ISE provides more value than the order flow on MRX. ISE has more market share (6.2%) as compared to MRX (1.8%). A market participant may evaluate the fees assessed by ISE, its market share, and proprietary products, among other things, and determine to become a member of ISE instead of MRX if it determines the proposed fees to be unreasonable. Additionally, the proposed port fees are similar to port fees assessed by GEMX [69] for similar connectivity.

Further, in connection with a technology migration, Cboe Exchange, Inc. (''Cboe'') amended access and connectivity fees, including port fees.[70] Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports, tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges, and reasonably so, as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[71] Cboe also justified its proposal by stating that, '' . . . the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over-the-Counter (OTC) markets.'' [72] Cboe stated in its proposal that,

> The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[73]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[74] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[75] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [76] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[77]

Cboe concluded that the Exchange is subject to significant substitution-based competitive forces in pricing its connectivity and access fees.[78] Cboe stressed that the proof of competitive constraints does not depend on showing that members walked away, or threatened to walk away, from a product due to a pricing change. Rather, the very absence of such negative feedback (in and of itself, and particularly when coupled with positive feedback) is indicative that the proposed fees are, in fact, reasonable and consistent with the Exchange being subject to competitive forces in setting fees.[79]

[69] *See* GEMX Options 7, section 6.C. (Ports and Other Services).

[70] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105).

[71] *Id.* at 71676.

[72] *Id.* at 71676.

[73] *Id.* at 71677.

[74] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 71679.

[79] *Id.* at 71680.

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[80] Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production environment, including live production trading on the Exchange.[81]

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.[82] Cboe noted that other exchanges assess similar fees and cited to Nasdaq Stock Market LLC and MIAX Options Exchange.[83] Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.[84] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[85] Cboe BZX Exchange, Inc.,[86] and Cboe EDGA Exchange, Inc.[87]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in Susquehanna Int'l Grp., LLC v. SEC, 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as SR–MRX–2022–12[sic]. In summary, MRX requests the Commission apply the same standard of review to SR–MRX–2022–12[sic] which was applied to the various Cboe and Cboe affiliated markets' filings with respect to port fees. If the Commission were to apply a different standard of review to MRX–2022–12[sic] than it applied to other exchange fee filings it would create a burden on competition such that it would impair MRX's ability to compete among other options markets.

The Exchange does not believe that the proposed rule change will impose any intramarket burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Only one order protocol is required to submit orders to MRX, and the Exchange proposes to offer the first FIX Port and the first FIX Disaster Recovery Port to Electronic Access Members at no cost. This would provide Members with the ability to continuously submit orders to MRX, even in the event of a failover. Likewise, only one quoting protocol is required to submit quotes to MRX, and the Exchange proposes to offer the first SQF Port and the first SQF Disaster Recovery Port to Market Makers at no cost. This would provide Market Makers with the ability to continuously submit quotes to MRX, even in the event of a failover. Only one account number is necessary per Member and account numbers are free.

As noted above, the remainder of the proposed port fees are for optional ports (additional FIX and SQF Ports, additional FIX and SQF Disaster Recovery Ports, SQF Purge Port, OTTO Port, CTI Port, FIX DROP Port and Disaster Recovery Ports for SQF Purge Ports, OTTO Ports, CTI Ports, and FIX DROP Ports). These different protocols are not all necessary to conduct business on MRX. Members choose among the protocols based on their business workflow. The proposed fees do not impose an undue burden on competition because the Exchange would uniformly assess the port fees to all Members and would uniformly apply monthly caps. Market participants may also connect to third parties instead of directly to the Exchange.

With respect to the higher fees assessed for SQF Ports and SQF Purge Ports, the Exchange notes that only Market Makers may utilize these ports. Market Makers are required to provide continuous two-sided quotes on a daily basis,[88] and are subject to various obligations associated with providing liquidity.[89] As a result of these quoting obligations, the SQF Port and SQF Purge Port are designed to handle higher throughput to permit Market Makers to bundle orders to meet their obligations. The technology to permit Market Makers to submit a greater number of quotes, in addition to the various risk protections[90] afforded to these market participants when quoting, accounts for the higher SQF Port and SQF Purge Port fees. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. Also, an increase in the activity of Market Makers in turn facilitates tighter spreads.

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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act.[91] 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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MRX–2022–20 on the subject line.

[80] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, Drop Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.,* ''Certification Logical Ports'').

[81] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[82] *Id.* at 18426.

[83] *Id.* at 18426.

[84] *Id.* at 18426.

[85] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[86] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[87] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeBZX–2022–021).

[88] *See* MRX Options 2, section 5.

[89] *See* MRX Options 2, section 4.

[90] *See* MRX Options 3, section 15(a)(3). Market Makers are offered risk protections to permit them to manage their risk more effectively.

[91] 15 U.S.C. 78s(b)(3)(A)(ii).

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–MRX–2022–20. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of 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–MRX–2022–20 and should be submitted on or before November 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[92]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22557 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

[92] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34727; File No. 812–15379]

Lincoln Variable Insurance Products Trust and Lincoln Investment Advisors Corporation

October 13, 2022.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application under Section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from Section 15(c) of the Act.

Summary of Application: The requested exemption would permit a Trust's board of trustees (the ''Board'') to approve new sub-advisory agreements and material amendments to existing sub-advisory agreements without complying with the in-person meeting requirement of Section 15(c) of the Act.

Applicants: Lincoln Variable Insurance Products Trust (the ''Trust''), and Lincoln Investment Advisors Corporation (''LIAC'' or the ''Adviser'').

Filing Dates: The application was filed on August 8, 2022, and amended on September 30, 2022.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *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 Commission by 5:30 p.m. on November 7, 2022, 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 emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Ronald Holinsky, Esq., Lincoln Investment Advisors Corporation, 150 N. Radnor-Chester Road, Radnor, PA 19087; Robert Robertson, Esq., Dechert LLP US Bank Tower, 633 West 5th Street, Suite 4900, Los Angeles, CA, 90071–2032.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' first amended application, dated September 30, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22629 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96047; File No. SR–MRX–2022–19)

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX's Pricing Schedule at Options 7, Section 5 Related to Membership Fees

October 12, 2022.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 5, 2022, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, section 5 related to Membership Fees.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/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

MRX proposes to amend its Pricing Schedule at Options 7, section 5, Other Options Fees and Rebates, to assess membership fees, which were not assessed until this year. Prior to this year, MRX did not assess its Members any membership fees. MRX launched its options market in 2016 and Members did not pay any membership fees until 2022.[3]

The proposed changes are designed to update fees for MRX's services to reflect their current value—rather than their value when it was a new exchange six years ago—based on MRX's ability to deliver value to its customers through technology, liquidity and functionality. Newly-opened exchanges often charge no fees for certain services such as membership, in order to attract order flow to an exchange, and later amend their fees to reflect the true value of those services.[4] Allowing newly-opened exchanges time to build and sustain market share before charging non-transactional fees encourages market entry and promotes competition. The proposed changes to membership fees within Options 7, section 5; Other Options Fees and Rebates, are described below.

This proposal reflects MRX's assessment that it has gained sufficient market share to compete effectively against the other 15 options exchanges without waiving fees for membership. These types of fees are assessed by options exchanges that compete with MRX in the sale of exchange services—indeed, as of the date of the initial filing of these membership fees, MRX was the only options exchange (out of the 16 current options exchanges) not assessing membership fees today. New exchanges commonly waive membership fees to attract market participants, facilitating their entry into the market and, once there is sufficient depth and breadth of liquidity, ''graduate'' to compete against established exchanges and charge fees that reflect the value of their services.[5] If MRX is incorrect in this assessment, that error will be reflected in MRX's ability to compete with other options exchanges.[6]

Access Fees

As noted above, MRX Members were not assessed fees for membership until this year. Under the proposed fee change, MRX Members will pay a monthly Access Fee, which entitles MRX Members to trade on the Exchange based on their membership type. Specifically, MRX proposes to assess Electronic Access Members[7] an Access Fee of $200 per month, per membership. The Exchange proposes to assess Market Makers[8] Access Fees depending on whether they are a Primary Market Maker (''PMM'') or a Competitive Market Maker (''CMM''). A PMM would be assessed an Access Fee of $200 per month, per membership. A CMM would be assessed an Access Fee of $100 per month, per membership.[9] The proposed fees are identical to access fees on Nasdaq GEMX, LLC (''GEMX'').[10] Of note, a Member would pay each applicable fee (an Electronic Access Fee or a Market Maker Access Fee). For example, a Competitive Market Maker who does not enter orders would only pay the $100 per month, per membership Access Fee.

CMM Trading Rights Fee

In order to receive market making appointments to quote in any options class, CMMs will also be assessed a CMM Trading Right Fee identical to GEMX.[11] CMM trading rights entitle a CMM to enter quotes in options symbols that comprise a certain percentage of industry volume. On a quarterly basis, the Exchange assigns points to each options class equal to its percentage of overall industry volume (not including exclusively traded index options), rounded down to the nearest one hundredth of a percentage with a maximum of 15 points (''CMM Trading Right''). A new listing is assigned a point value of zero for the remainder of the quarter in which it was listed. CMMs may seek appointments to options classes that total 20 points for the first CMM Trading Right it holds, and 10 points for the second and each subsequent CMM Trading Right it holds.[12] In order to encourage CMMs to

[3] The Exchange initially filed the proposed pricing changes on May 2, 2022 (SR–MRX–2022–04) instituting fees for membership, ports and market data. On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership, ports and market data. SR–MRX–2022–07 replaced the membership fees set forth in SR–MRX–2022–04. Thereafter, SR–MRX–2022–13 replaced the membership fees set forth in SR–MRX–2022–07. The instant filing replaces SR–MRX–2022–13 which was withdrawn on October 5, 2022.

[4] *See also* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (introduction of membership fees by MEMX).

[5] For example, MIAX Emerald commenced operations as a national securities exchange registered on March 1, 2019. *See* Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10–233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange). MIAX Emerald filed to adopt its transaction fees and certain of its non-transaction fees in its filing SR–EMERALD–2019–15. *See* Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR–EMERALD–2019–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule). MIAX Emerald waived its one-time application fee and monthly Trading Permit Fees assessable to EEMs and Market Makers among other fees within SR–EMERALD–2019–15.

[6] Nasdaq announced that, beginning in 2022, it plans to migrate its North American markets to Amazon Web Services in a phased approach, starting with MRX. The MRX migration will take place in November 2022. The proposed fee changes are entirely unrelated to this effort.

[7] The term ''Electronic Access Member'' or ''EAM'' means a Member that is approved to exercise trading privileges associated with EAM Rights. *See* General 1, Section 1(a)(6).

[8] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* Options 1, Section 1(a)(21). The term ''Competitive Market Maker'' means a Member that is approved to exercise trading privileges associated with CMM Rights. *See* Options 1, Section 1(a)(12). The term ''Primary Market Maker'' means a Member that is approved to exercise trading privileges associated with PMM Rights. *See* Options 1, Section 1(a)(35).

[9] In the case where a single Member has multiple MRX memberships, the monthly access fee is charged for each membership. For example, if a single member firm is both an EAM and a CMM, or owns multiple CMM memberships, the firm is subject to the access fee for each of those memberships.

[10] *See* GEMX Options 7, Section 6.A. (Access Fees).

[11] *See* GEMX Options 7, Section 6.B. (CMM Trading Rights Fees).

[12] A CMM may request changes to its appointments at any time upon advance

quote on the Exchange, MRX launched CMM Trading Rights without any fees, allowing CMMs to freely quote in all options classes.

The Exchange is now proposing to adopt a monthly CMM Trading Right Fee. Under the proposed fee structure, CMMs will be assessed a CMM Trading Right Fee of $850 per month for the first trading right, which will entitle the CMM to quote in 20 percent of industry volume. Each additional CMM Trading Right will cost $500 per month, and will entitle the CMM to quote an additional 10 percent of volume. Similar to GEMX's trading rights fee,[13] a new CMM would pay $850 for the first CMM Trading Right and all CMMs would thereafter pay $500 for each additional CMM Trading Right. For example, if a CMM desired to quote in all options series listed on MRX, the CMM would need to obtain 9 CMM Trading Rights at a cost of $4,850. The Exchange is proposing this pricing model to encourage CMMs to obtain a greater number of CMM Trading Rights in order that they may add more liquidity on MRX. With this model, each subsequent CMM Trading Right of $500 per month costs less than the initial CMM Trading Right of $850 per month. As noted, the maximum expense would be $4,850 for a CMM to obtain the ability to quote in all option series listed on MRX. All CMMs have the opportunity to purchase additional CMM Trading Rights beyond the initial CMM Trading Right in order to quote in some or all options series on MRX. With this proposal, PMMs would not be assessed a Trading Rights Fee.

PMMs have additional obligations on MRX as compared to CMMs. PMMs are required to open options series in which they are assigned each day on MRX. Specifically, PMMs must submit a Valid Width Quote each day to open their assigned options series.[14] PMMs are integral to providing liquidity during MRX's Opening Process.[15] Intra-day, PMMs must provide two-sided quotations in a certain percentage of their assigned options series.[16] In contrast, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs (60% for CMMs compared to 90% for PMMs).[17] While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. The Exchange desires to encourage Market Makers to compete for appointments as PMMs in an options series. The Exchange believes that PMMs serve an important role on MRX in opening an option series and ensuring liquidity in that option series throughout the trading day. This liquidity benefits the market through, for example, more robust quoting. Additionally, all market participants may interact with the liquidity.

Finally, the Exchange is proposing only to charge the $200 access fee to EAMs, and no trading rights fee, as the technical, regulatory, and administrative services associated with an EAM's use of the Exchange are not as comprehensive as those associated with Market Makers' use.[18] As noted above, a Member would pay each applicable fee (an Electronic Access Fee or a Market Maker Access Fee). A Competitive Market Maker or Primary Market Maker who does not enter orders would only pay the $100 or $200 per month, respectively, per membership Access Fee.

MRX believes that its membership fees, which have been in effect since May 2, 2022, are in line with or less than those of other options exchanges. The Exchange believes it is notable that during this time, there have been no comment letters submitted to the Commission arguing that the Exchange's new fees are unreasonable. The membership fees are constrained by competition. For example, since the inception of the membership fees on May 2, 2022, one firm cancelled nine CMM trading rights as well as their membership on MRX.[19] Also, another firm decreased their CMM trading rights from nine to four CMM trading rights.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[20] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[21] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to the Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [22]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system

notification to the Exchange in a form and manner prescribed by the Exchange. *See* MRX Options 2, Section 3(c)(3).

[13] *See* GEMX Options 7, Section 6.B.

[14] *See* Options 3, Section 8(c)(1) and 8(c)(3).

[15] The Exchange notes that most options markets do not require their primary or lead market maker to open their assigned options series.

[16] *See* Options 2, Section 5(e)(2) which states, ''Primary Market Makers, associated with the same Member, are collectively required to provide two-sided quotations in 90% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading. Primary Market Makers shall be required to make two-sided markets pursuant to this Rule in any Quarterly Options Series, any Adjusted Options Series, and any option series with an expiration of nine months or greater for options on equities and ETFs or with an expiration of twelve months or greater for index options.''

[17] *See* Options 2, Section 5(e)(1) which states, that ''On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . .''.

[18] The Exchange notes that all MRX Members may submit orders; however, only Market Makers may submit quotes. The Exchange surveils Market Maker quoting to ensure these participants have met their obligations. The regulatory oversight for Market Makers is in addition to the regulatory oversight which is administered for all EAMs.

[19] The Exchange notes that this Member was not active on MRX prior to the cancellation.

[20] *See* 15 U.S.C. 78f(b).

[21] *See* 15 U.S.C. 78f(b)(4) and (5).

[22] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [23]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [24] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [25] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [26] In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [27]

History of MRX Operations

Over the years, MRX has amended its transactional pricing to remain competitive and attract order flow to the Exchange.[28]

In June 2019, MRX commenced offering complex orders.[29] With the addition of complex order functionality, MRX offered Members certain order types, an opening process, auction capabilities, and other trading functionality that was nearly identical to functionality available on ISE.[30] By way of comparison, ISE, unlike MRX, assessed membership fees in 2019 [31] while offering the same suite of functionality as MRX, with a limited exception.[32]

Membership Is Subject to Significant Substitution-Based Competitive Forces

An exchange can show that a product is ''subject to significant substitution-based competitive forces'' by introducing evidence that customers can substitute the product for products offered by other exchanges.

Chart 1 below shows the January 2022 market share for multiply-listed options by exchange. Of the 16 operating options exchanges, none currently has more than a 13.1% market share, and MRX has the smallest market share at 1.8%. Customers widely distribute their transactions across exchanges according to their business needs and the ability of each exchange to meet those needs through technology, liquidity and functionality. Average market share for the 16 options exchanges is 6.26 percent, with the median at 5.8, and a range between 1.8 and 13.1 percent.

[23] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[24] *See NetCoalition,* 615 F.3d at 534–35; *see also* H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[25] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[26] *Id.*

[27] *See* U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Rule filings Relating to Fees'' (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

[28] *See e.g.* Securities Exchange Act Release Nos. 77292 (March 4, 2016), 81 FR 12770 (March 10, 2016) (SR–ISEMercury–2016–02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the Schedule of Fees); 77409 (March 21, 2016), 81 FR 16240 (March 25, 2016) (SR–ISEMercury–2016–05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 81 FR 16238 (March 21, 2016), 81 FR 16238 (March 25, 2016) (SR–ISEMercury–2016–06) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 77841 (May 16, 2016), 81 FR 31986 (SR–ISEMercury–2016–11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 82537 (January 19, 2018), 83 FR 3784 (January 26, 2018) (SR–MRX–2018–01) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees To Introduce a New Pricing Model); 82990 (April 4, 2018), 83 FR 15434 (April 10, 2018) (SR–MRX–2018–10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Chapter IV of the Exchange's Schedule of Fees); 28677 (June 14, 2018), 83 FR 28677 (June 20, 2018) (SR–MRX–2018–19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase Certain Route-Out Fees Set Forth in Section II.A of the Schedule of Fees); 84113 (September 13, 2018), 83 FR 47386 (September 19, 2018) (SR–MRX–2018–27) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate the Exchange's Schedule of Fees); 85143 (February 14, 2019), 84 FR 5508 (February 21, 2019) (SR–MRX–2019–02) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Pricing Schedule at Options 7, Section 3); 85313 (March 14, 2019), 84 FR 10357 (March 20, 2019) (SR–MRX–2019–05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to PIM Fees and Rebates); 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019–14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Complex Order Pricing); 88022 (January 23, 2020), 85 FR 5263 (January 29, 2020) (SR–MRX–2020–02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Pricing Schedule); 89046 (June 11, 2020), 85 FR 36633 (June 17, 2020) (SR–MRX–2020–11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7); 89320 (July 15, 2020), 85 FR 44135 (July 21, 2020) (SR–MRX–2020–14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates, in Connection With the Pricing for Orders Entered Into the Exchanges Price Improvement Mechanism); 90503 (November 24, 2020), 85 FR 77317 (December 1, 2020) (SR–MRX–2020–18) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7 for Orders Entered Into the Exchange's Price Improvement Mechanism); 90434 (November 16, 2020), 85 FR 74473 (November 20, 2020) (SR–MRX–2020–19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To the Exchange's Pricing Schedule at Options 7 To Amend Taker Fees for Regular Orders); 90455 (November 18, 2020), 85 FR 75064 (November 24, 2020) (SR–MRX–2020–21) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule); and 91687 (April 27, 2021), 86 FR 23478 (May 3, 2021) (SR–MRX–2021–04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Options 7). Note that ISE Mercury is an earlier name for MRX.

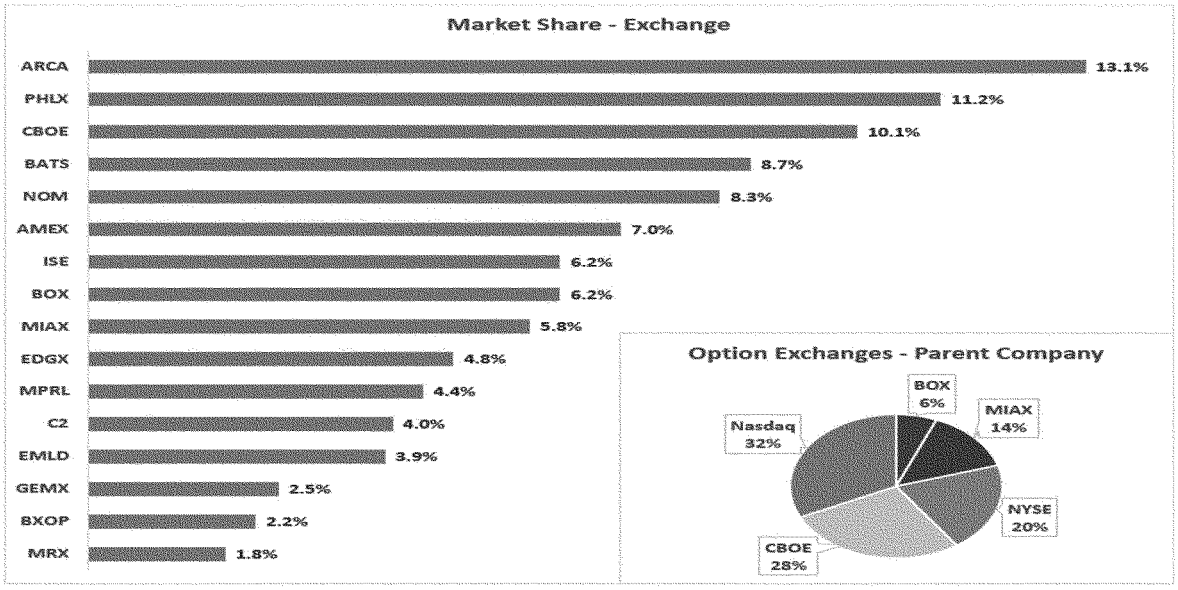
[29] *See* Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019–14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Complex Order Pricing).

[30] One distinction is that ISE offered its Members access to Nasdaq Precise in 2019 and since that time. MRX has never offered Precise. ''Nasdaq Precise'' or ''Precise'' is a front-end interface that allows EAMs and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (*e.g.,* parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (*e.g.,* NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (*e.g.,* kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (*e.g.,* order history and done away trade reports). *See* ISE Supplementary Material .03(d) of Options 3, Section 7. Precise is also available on GEMX.

[31] In 2019, ISE assessed the following Access Fees: $500 per month, per membership to an Electronic Access Member, $5,000 per month, per membership to a Primary Market Maker and $2,500 per month, per membership to a Competitive Market Maker. ISE does not assess Trading Rights Fees to Competitive Market Makers. See Securities Exchange Act Release No. 82446 (January 5, 2018), 83 FR 1446 (January 11, 2018) (SR–ISE–2017–112) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Certain Non-Transaction Fees in the Exchange's Schedule of Fees). Of note, ISE assessed Access Fees prior to 2019 as well.

[32] Unlike ISE, MRX does not offer Precise. *See* note 30, *supra.*

Chart 1: Market Share by Exchange for January 2022



Market share is the percentage of volume on a particular exchange relative to the total volume across all exchanges, and indicates the amount of order flow directed to that exchange. High levels of market share enhance the value of trading and membership. MRX has the smallest number of Members relative to its GEMX, ISE, NOM and Phlx affiliates, with approximately 40 members. This demonstrates that customers can and will choose where to become members, need not become members of all exchanges, and do not need to become Members of MRX and instead may utilize a third party.[33]

The Exchange established these lower (when compared to other options exchanges in the industry) membership fees in order to encourage market participants to become MRX Members and register as MRX Market Makers. As noted above, MRX has grown its market share since inception and seeks to continue to grow its membership base. The Exchange believes that there are many factors that may cause a market participant to decide to become a member of a particular exchange in addition to its pricing.

As noted herein, MRX filed its membership fees on May 2, 2022 and has not received a comment with respect to the proposed membership fee changes. MRX Members may elect to cancel their membership on MRX. Since the inception of the membership fees on May 2, 2022, one firm cancelled nine CMM trading rights as well as their membership on MRX. Also, another firm decreased their CMM trading rights from nine to four CMM trading rights. Also, no MRX Member is required by rule, regulation, or competitive forces to be a Member on the Exchange.

Fees for Membership

The proposed membership fees described below are in line with or less than those of other markets. Setting a fee above competitors is likely to drive away customers, so the most efficient price-setting strategy is to set prices at the same level as other firms. The Exchange's proposal to adopt membership fees is reasonable, equitable and not unfairly discriminatory. As a self-regulatory organization, MRX's membership department reviews applicants to ensure that each application complies with the rules specified within MRX General 3 [34] as well as other requirements for membership.[35] Applicants must meet the Exchange's qualification criteria prior to approval. The membership review includes, but is not limited to, the registration and qualification of associated persons, financial health, the validity of the required clearing relationship, and the history of disciplinary matters. Approved Members would be required to comply with MRX's By-Laws and Rules and would be subject to regulation by MRX. The proposed membership fees are identical to membership fees on GEMX,[36] and are in line with or lower than similar fees assessed on other options markets.[37]

Access Fees

MRX's flat rate Access Fee to Electronic Access Members of $200 per month, per membership is reasonable because the Exchange notes that the technical, regulatory, and administrative services associated with an EAM's use of the Exchange are not as comprehensive as those associated with Market Makers.[38] Any Member entering orders on MRX would pay the same $200 per month Access Fee. MRX's flat rate Access Fee to Electronic Access Members of $200 per month, per membership is equitable and not unfairly discriminatory as all Members transacting orders on MRX would be subject to this same fee. The Electronic

[33] Of course, that third party must itself become a Member of MRX, so at least some market participants must become Members of MRX for any trading to take place at all. Nevertheless, because some firms would be able to exercise the option of not becoming Members, excessive membership fees would cause the Exchange to lose members.

[34] MRX General 3, Membership and Access, incorporates by reference Nasdaq General 3.

[35] The Exchange's Membership Department must ensure, among other things, that an applicant is not statutorily disqualified.

[36] *See* GEMX Options 7, Section 6A (Access Fees).

[37] *See* Cboe's Fees Schedule. Cboe assesses permit fees as follows: Market-Maker Electronic Access Permit of $5,000 per month; Electronic Access Permits of $3,000 per month; and Clearing TPH Permit of $2,000 per month. *See also* Miami International Securities Exchange, LLC's (''MIAX'') Fee Schedule. MIAX assesses an Electronic Exchange Member Fee of $1,500 per month.

[38] The Exchange notes that all MRX Members may submit orders; however, only Market Makers may submit quotes. The Exchange surveils Market Maker quoting to ensure these participants have met their obligations. The regulatory oversight for Market Makers is in addition to the regulatory oversight which is administered for all EAMs.

Access Member Feeis identical to GEMX.[39]

With respect to Market Makers submitting quotes on MRX, the Exchange's proposal to assess Primary Market Makers a slightly higher flat rate Access Fee of $200 per month, per membership as compared to Competitive Market Makers who would be assessed a flat rate Access Fee of $100 per month, per membership is reasonable because Primary Market Makers have higher regulatory obligations and require more technical, regulatory, and administrative services as compared to Competitive Market Makers. For PMMs on MRX, the fees required to access the Exchange are substantially lower than those of competing exchanges. For example, a PMM could quote on the Exchange for only $200 (*i.e.,* the access fee), compared with the minimum $6,000 per month trading permit fee charged by NYSE Arca.

The Exchange does not believe that it is unfairly discriminatory to assess different fees for EAMS, PMMs, and CMMs. While PMMs would pay lower membership fees as compared to CMMs, PMMs have additional obligations on MRX as compared to CMMs. PMMs are required to open options series in which they are assigned each day on MRX. Specifically, PMMs must submit a Valid Width Quote each day to open their assigned options series.[40] PMMs are integral to providing liquidity during MRX's Opening Process.[41] Intra-day, PMMs must provide two-sided quotations in a certain percentage of their assigned options series.[42] In contrast, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs.[43] While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. The Exchange desires to encourage Members to compete for appointments as PMMs in an options series. The Exchange believes that PMMs serve an important role on MRX in opening an option series and ensuring liquidity in that option series throughout the trading day. This liquidity benefits the market through, for example, more robust quoting.

Further, with respect to the higher fees for Market Makers generally, MRX notes that Market Makers: (1) consume the most bandwidth and resources of the network; (2) transact a majority of the volume on the Exchange; and (3) require the high touch network support services provided by the Exchange and its staff. Other non-Market Maker market participants take up significantly less Exchange resources as discussed further below. Further, the Exchange notes that Market Makers account for greater than 99% of message traffic over the network, while other non-Market Maker market participants account for less than 1% of message traffic over the network. Most Members do not have a business need for the high performance network solutions generally required by Market Makers. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 3 million quote messages per second. On an average day, MRX handles over 6.10 billion total messages. Of those 6.10 billion daily messages, Market Makers generate 6.08 billion of those messages, while other non-Market Maker market participants generate approximately 20 million messages. Additionally, in order to achieve consistent, premium network performance, MRX must build out and maintain a network that has the capacity to handle the message rate requirements beyond those 6.08 billion daily messages. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall expense for storage and network transport capabilities. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers are assessed different Access Fees as compared to EAMs.

MRX notes that while Market Makers continue to account for a vast majority of resources placed on MRX and its System (as discussed herein), Market Makers continue to be valuable market participants on the exchanges as the options market is a quote driven industry. MRX recognizes the value that Market Makers bring to the Exchange. For certain transactions, MRX also assesses a lower fee for Market Makers compared to other non-Priority Customer market participants to attract liquidity to the Exchange.[44] Finally, the Exchange notes that PMMs are entitled to certain enhanced allocations as a result of providing liquidity on MRX.[45] The proposed membership fees are meant to strike a balance between resources consumed by Market Makers on MRX and continuing to incentivize Market Makers to access and make a market on MRX.

Additionally, the Exchange believes that the proposed change will better align MRX's membership fees with rates charged by competing options exchanges. Further, the Exchange believes that the proposal is reasonably designed to continue to compete with other options exchanges by incentivizing market participants to register as Market Makers on MRX in a manner than enables MRX to improve its overall competitiveness and strengthen market quality for all market participants.

CMM Trading Right Fee

The Exchange believes that it is reasonable to assess CMMs a CMM Trading Right Fee because these Market Makers are not required to enter quotations in the options classes to which it is appointed unless the CMM initiates quoting in an options class.[46] With respect to the CMM Trading Rights Fee, the proposed fees compare favorably with those of other options exchanges. For example, a market maker on MIAX is assessed a $3,000 one-time fee and then a tiered monthly fee from $7,000 for up to 10 classes to $22,000 for over 100 classes.[47] By comparison,

[39] *See* GEMX Options 7, Section 6.B. (CMM Trading Rights Fees).

[40] *See* Options 3, Section 8(c)(1) and 8(c)(3).

[41] The Exchange notes that most options markets do not require their primary or lead market maker to open their assigned options series.

[42] *See* Options 2, Section 5(e)(2) which states, ''Primary Market Makers, associated with the same Member, are collectively required to provide two-sided quotations in 90% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading. Primary Market Makers shall be required to make two-sided markets pursuant to this Rule in any Quarterly Options Series, any Adjusted Options Series, and any option series with an expiration of nine months or greater for options on equities and ETFs or with an expiration of twelve months or greater for index options.''

[43] *See* Options 2, Section 5(e)(1) which states, that ''On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . .''.

[44] *See* MRX's Pricing Schedule at Options 7.

[45] *See* Options 3, Section 10.

[46] *See* Options 2, Section 5(e)(2).

[47] *See* Miami International Securities Exchange, LLC Fee Schedule at 20 and 21: *https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_03012022.pdf.*

under the proposed fee structure, a CMM can be granted access on the Exchange for as little as $950 per month (*i.e.,* a $100 access fee and an $850 trading right), and could quote in all options classes on the Exchange by paying the access fee and obtaining nine CMM trading rights for a total of $4,950 per month. The Exchange notes that its tiered model for CMM trading rights is consistent with the pricing practices of other exchanges, such as NYSE Arca, which charges $6,000 per month for the first market maker trading permit, down to $1,000 per month for the fifth and additional trading permits, with various tiers in-between. Like other options exchanges, the Exchange is proposing a tiered pricing model because it may encourage CMM firms to purchase additional trading rights and quote more options series because subsequent CMM Trading Rights are priced lower than the initial CMM Trading Right.

The Exchange believes that it is equitable and not unfairly discriminatory to assess only CMMs a CMM Trading Right Fee. While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. Unlike PMMs who must open each option series to which they are assigned,[48] CMMs have no opening obligations. Intra-day, unlike PMMs, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs.[49]

Similar to recent proposal by BOX Exchange LLC (''BOX''),[50] the Exchange notes that there is no regulatory requirement that market makers connect and access any one options exchange. Moreover, a Market Maker membership is not a requirement to participate on the Exchange and participation on an exchange is completely voluntary. BOX noted in its rule change that it reviewed membership details at three options exchanges and found that there are 62 market making firms across these three exchanges.[51] Further, BOX found that 42 of the 62 market making firms access only one of the three exchanges.[52] Additionally, BOX identified numerous market makers that are members of other options exchanges, but not BOX.[53] Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the market maker membership analysis by BOX of three options exchanges discussed above. Indeed, Market Makers choose if and how to access a particular exchange and because it is a choice, MRX must set reasonable pricing, otherwise prospective market makers would not connect and existing Market Makers would disconnect from the Exchange.

As noted above, one MRX Member cancelled their membership on MRX as well as nine CMM Trading Rights.[54] Also, another MRX Member decreased their CMM Trading Rights from nine to four CMM Trading Rights. The Exchange believes the Commission has a sufficient basis to determine that MRX was subject to significant competitive forces in setting the terms of its proposed fees. Moreover, the Commission has found that, if an exchange meets the burden of demonstrating it was subject to significant competitive forces in setting its fees, the Commission ''will find that its fee rule is consistent with the Act unless 'there is a substantial countervailing basis to find that the terms' of the rule violate the Act or the rules thereunder.'' [55] The Exchange is not aware of, nor has the Commission articulated, a substantial countervailing basis for finding the proposal violates the Act or the rules thereunder.

Membership fees were charged by all options exchanges except MRX until May 2, 2022. In 2022, similar to MRX, MEMX LLC (''MEMX'') commenced assessing a monthly membership fee.[56] MEMX reasoned in that rule change that there is value in becoming a member of the exchange.[57] MEMX stated that it believed that its proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange.'' [58] Moreover, ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.'' [59] In this respect, MEMX is correct; a monthly membership fee is reasonable, equitably allocated and not unfairly discriminatory. Market participants may choose to become a member of one or more options exchanges based on the market participant's business model. A very small number of market participants choose to become a member of all sixteen options exchanges. It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one options market.

MRX makes the same arguments herein as were proposed by MEMX in similarly adopting membership fees. The Exchange notes that MRX's ability to assess membership fees similar to MEMX and all other options markets permits it to compete with other options markets on an equal playing field. MRX is the only options market that does not have membership fees. Most firms that actively trade on options markets are not currently Members of MRX. Using options markets that Nasdaq operates as points of comparison, less than a third of the firms that are members of at least one of the options markets that Nasdaq operates are also Members of MRX (approximately 29%). The Exchange notes that no firm is a Member of MRX only. Few, if any, firms have become Members at MRX, notwithstanding the fact that MRX membership is currently free, because MRX currently has less liquidity than other options markets. As explained above, MRX has the smallest market share of the 16 options exchanges, representing only approximately 1.8% of the market, and, for certain market participants, the current levels of liquidity may be insufficient to justify the costs

[48] *See* Options 3, Section 8(c)(1) and 8(c)(3).

[49] *See* Options 2, Section 5(e)(1) which states, that ''On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . . ''.

[50] *See* Securities and Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). BOX amended its fees on January 3, 2022 to adopt an electronic market maker trading permit fee.

[51] *Id.*

[52] *Id.*

[53] *Id.* For example, BOX identified 47 market makers that are members of Cboe Exchange Inc. (an exchange that only lists options), but not the Exchange (which also lists only options).

[54] The Exchange notes that this Member was not active on MRX prior to the cancellation.

[55] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order'') (approving proposed rule change to establish fees for a depth-of-book market data product).

[56] *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). The Monthly Membership Fee is assessed to each active Member at the close of business on the first day of each month.

[57] *Id.*

[58] *Id.*

[59] *Id.*

associated with becoming a Member and connecting to the Exchange, notwithstanding the fact that membership is free.

The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. Becoming a member of an exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services. The decision to become a member of an exchange is made at the beginning of the relationship, and is no less subject to competition than trading fees.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at MRX.[60] If MRX is not at the NBBO, MRX will route an order to any away market that is at the NBBO to prevent a trade-through and also ensure that the order was executed at a superior price.[61]

In lieu of joining an exchange, a third-party may be utilized to execute an order on an exchange. For example, a third-party broker-dealer Member of MRX may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[62] or request sponsored access[63] through a member of an exchange in order to submit a trade directly to an options exchange.[64] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange. Market participants may elect any of the above models and weigh the varying costs when determining how to submit trades to an exchange. Depending on the number of orders to be submitted, technology, ability to control submission of orders, and projected revenues, a market participant may determine one model is more cost efficient as compared to the alternatives.

After 6 years, MRX proposes to commence assessing membership fees, just as all other options exchanges.[65] The introduction of these fees will not impede a Member's access to MRX, but rather will allow MRX to continue to compete and grow its marketplace so that it may continue to offer a robust trading architecture, a quality opening process, an array of simple and complex order types and auctions, and competitive transaction pricing. If MRX is incorrect in its assessment of the value of its services, that assessment will be reflected in MRX's ability to compete with other options exchanges.

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.

The Exchange believes its proposal remains competitive with other options markets, and will offer market participants with another choice of venue to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange notes that other options markets have adopted membership fees. MEMX recently reasoned that it should be permitted to adopt membership fees because MEMX's proposed membership fees would be lower than the cost of membership on other exchanges, and therefore,

> . . . may stimulate intramarket competition by attracting additional firms to become Members on the Exchange or at least should not deter interested participants from joining the Exchange. In addition, membership fees are subject to competition from other exchanges. Accordingly, if the changes proposed herein are unattractive to market participants, it is likely the Exchange will see a decline in membership as a result. The proposed fee change will not impact intermarket competition because it will apply to all Members equally. The Exchange operates in a highly competitive market in which market participants can determine whether or not to join the Exchange based on the value received compared to the cost of joining and maintaining membership on the Exchange.''[66]

The Exchange also notes that Cboe Exchange, Inc. (''Cboe'') amended access fees[67] in a fee change that was filed subsequent to the D.C. Circuit decision in Susquehanna Int'l Grp., LLC v. SEC, 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as the instant filing. The Commission permitted Cboe to amend their trading permit fees[68] based on competitive arguments. Cboe stated in its proposal that,

> The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the

[60] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at *https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[61] MRX Members may elect to not route their orders by marking an order as ''do-not-route.'' In this case, the order would not be routed. *See* Options 3, Section 7(m).

[62] Service bureaus provide access to market participants to submit and execute orders on an exchange. On MRX, a Service Bureau may be a Member. Some MRX Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders. As noted herein only MRX Members may submit orders or quotes through ports.

[63] Sponsored Access is an arrangement whereby a member permits its customers to enter orders into an exchange's system that bypass the member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[64] This may include utilizing a Floor Broker and submitting the trade to one of the five options trading floors.

[65] Today, MRX is the only options exchange that does not assess membership fees.

[66] *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19).

[67] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105).

[68] Pre-migration, the Exchange issued the following three types of Trading Permits: (1) Market-Maker Trading Permits, which were assessed a monthly fee of $5,000 per permit; (2) Floor Broker Trading Permits, which were assessed a monthly fee of $9,000 per permit; and (3) Electronic Access Permits (''EAPs''), which were assessed a monthly fee of $1,600 per permit. The Exchange also offered separate Market-Maker and Electronic Access Permits for the Global Trading Hours (''GTH'') session, which were assessed a monthly fee of $1,000 per permit and $500 per permit respectively. In connection with the migration, the Exchange adopted separate on-floor and off-floor Trading Permits for Market-Makers and Floor Brokers, adopted a new Clearing TPH Permit, and proposes to modify the corresponding fees and discounts. Among other fees, Cboe amended its Electronic Access Permit to a monthly fee of $3,000, and amended its Clearing TPH Permit, for TPHs acting solely as a Clearing TPH, to a monthly fee of $2,000. Also, Cboe adopted progressive monthly fees for MM Appointment Units.

equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[69]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[70] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. In that filing, the Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[71] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [72] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[73]

Cboe concluded in its fee filing that the Exchange is subject to significant substitution-based competitive forces in pricing its connectivity and access fees.[74] Cboe stressed that the proof of competitive constraints does not depend on showing that members walked away, or threatened to walk away, from a product due to a pricing change. Rather, the very absence of such negative feedback (in and of itself, and particularly when coupled with positive feedback) is indicative that the proposed fees are, in fact, reasonable and consistent with the Exchange being subject to competitive forces in setting fees.[75]

MRX requests the Commission apply the same standard of review to its proposed fee change that was applied to the Cboe fee filing which permitted Cboe to amend its membership fees. If the Commission were to apply a different standard of review to MRX's membership fee filing than it applied to other exchange fee filings it would create a burden on competition such that it would impair MRX's ability to compete among other options markets. MRX's ability to assess membership fees, similar to MEMX, Cboe and all other options markets, would permit it to compete with other options markets on an equal playing field. As noted herein, MRX is the only options market that does not have membership fees until May 2, 2022.

Further, the proposed membership fees are identical to membership fees assessed by GEMX.[76] The proposed fees are designed to reflect the benefits of the technical, regulatory, and administrative services provided to a Member by the Exchange, and the fees remain competitive with similar fees offered on other options exchanges. The Exchange does not believe that assessing different fees for EAMs, PMMs, and CMMs, creates an undue burden on competition.

With respect to the CMM Trading Rights Fee, the proposed fees compare favorably with those of other options exchanges.[77] Like other options exchanges, the Exchange is proposing a tiered pricing model because it may encourage CMM firms to purchase additional Trading Rights and quote more issues because subsequent trading rights are priced lower than the initial Trading Right. The Exchange notes that it is not proposing Trading Right Fees for PMMs. As compared to CMMs, PMMs have additional obligations on MRX. PMMs are required to open options series in which they are assigned each day on MRX. Specifically, PMMs must submit a Valid Width Quote each day to open their assigned options series.[78] PMMs are integral to providing liquidity during MRX's Opening Process.[79] Intra-day, PMMs must provide two-sided quotations in a certain percentage of their assigned options series.[80] In contrast, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs.[81] While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. The Exchange desires to encourage Members to compete for appointments as PMMs in an options series. The Exchange believes that PMMs serve an important role on MRX in opening an option series and ensuring liquidity in that option series throughout the trading day. This liquidity benefits the market through, for example, more robust quoting.

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

The foregoing rule change has become effective pursuant to section

[69] *Id.* at 71677.

[70] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 at 71669 (November 10, 2020) (SR–CBOE–2020–105).

[75] *Id.* at 71680.

[76] *See* GEMX Options 7, Section 6.A. (Access Fees) and Section 6.B. (CMM Trading Rights Fees).

[77] *See* NYSE Arca Fees and Charges, General Options and Trading Permit (OTP) Fees (comparing CMM Trading Rights Fees to the Arca Market Maker fees).

[78] *See* Options 3, Section 8(c)(1) and 8(c)(3).

[79] The Exchange notes that most options markets do not require their primary or lead market maker to open their assigned options series.

[80] *See* Options 2, Section 5(e)(2) which states, ''Primary Market Makers, associated with the same Member, are collectively required to provide two-sided quotations in 90% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading. Primary Market Makers shall be required to make two-sided markets pursuant to this Rule in any Quarterly Options Series, any Adjusted Options Series, and any option series with an expiration of nine months or greater for options on equities and ETFs or with an expiration of twelve months or greater for index options.''

[81] *See* Options 2, Section 5(e)(1) which states, that ''On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . .''.

19(b)(3)(A)(ii) of the Act.[82] 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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MRX–2022–19 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–MRX–2022–19. 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 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–MRX–2022–19 and should be submitted on or before November 8, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[83]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22558 Filed 10–17–22; 8:45 am]

BILLING CODE 8011–01–P

[82] 15 U.S.C. 78s(b)(3)(A)(ii).

[83] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17667 and #17668; Florida Disaster Number FL–00180]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA–4673–DR), dated 10/03/2022.

Incident: Hurricane Ian.

Incident Period: 09/23/2022 and continuing.

DATES: Issued on 10/11/2022.

Physical Loan Application Deadline Date: 12/02/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 07/03/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Florida, dated 10/03/2022, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Glades, Okeechobee.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22546 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17667 and #17668; Florida Disaster Number FL–00180]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA–4673–DR), dated 10/03/2022.

Incident: Hurricane Ian.

Incident Period: 09/23/2022 and continuing.

DATES: Issued on 10/10/2022.

Physical Loan Application Deadline Date: 12/02/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 07/03/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of FLORIDA, dated 10/03/2022, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Brevard, Orange, Osceola.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22552 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17440 and #17441; New Mexico Disaster Number NM–00080]

Presidential Declaration Amendment of a Major Disaster for the State of New Mexico

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of New Mexico (FEMA–4652–DR), dated 05/04/2022.

Incident: Wildfires, Straight-line Winds, Flooding, Mudflows, and Debris Flows directly related to the Wildfires.

Incident Period: 04/05/2022 through 07/23/2022.

DATES: Issued on 10/07/2022.

Physical Loan Application Deadline Date: 11/07/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 02/06/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of New Mexico, dated 05/04/2022, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 11/07/2022.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22545 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17649 and #17650; Puerto Rico Disaster Number PR–00043]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Puerto Rico

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Puerto Rico (FEMA–4671–DR), dated 09/29/2022.

Incident: Hurricane Fiona.

Incident Period: 09/17/2022 through 09/21/2022.

DATES: Issued on 10/07/2022.

Physical Loan Application Deadline Date: 11/28/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 06/29/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Puerto Rico, dated 09/29/2022, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Adjuntas, Aguada, Aguas Buenas, Aibonito, Anasco, Barranquitas, Caguas, Canovanas, Ciales, Cidra, Comerio, Fajardo, Humacao, Juana Diaz, Lares, Las Marias, Las Piedras, Manati, Maricao, Moca, Morovis, Naguabo, Naranjito, San Lorenzo, Santa Isabel, Vega Alta.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22547 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17644 and #17645; Florida Disaster Number FL–00178]

Presidential Declaration Amendment of a Major Disaster for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA–4673–DR), dated 09/29/2022.

Incident: Hurricane Ian.

Incident Period: 09/23/2022 and continuing.

DATES: Issued on 10/11/2022.

Physical Loan Application Deadline Date: 11/28/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 06/29/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of FLORIDA, dated 09/29/2022, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Brevard, Hendry, Monroe, Okeechobee.

Contiguous Counties (Economic Injury Loans Only): FLORIDA: Saint Lucie.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22550 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17644 and #17645; Florida Disaster Number FL–00178]

Presidential Declaration Amendment of a Major Disaster for the State of Florida

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA–4673–DR), dated 09/29/2022.

Incident: Hurricane Ian.

Incident Period: 09/23/2022 and continuing.

DATES: Issued on 10/07/2022.

Physical Loan Application Deadline Date: 11/28/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 06/29/2023.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance,

U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of FLORIDA, dated 09/29/2022, is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Palm Beach.

Contiguous Counties (Economic Injury Loans Only):

Florida: Martin.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Rafaela Monchek,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–22549 Filed 10–17–22; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 11877]

Request for Stakeholder Input on Options for Combating International Deforestation Associated With Commodities

ACTION: Notice of request for information.

SUMMARY: Pursuant to an Executive Order on Strengthening the Nation's Forests, Communities, and Local Economies, the Department of State is seeking public feedback on options, including recommendations for proposed legislation, for a whole-of-government approach to combating international deforestation that includes: an analysis of the feasibility of limiting or removing specific commodities grown on lands deforested either illegally, or legally or illegally after December 31, 2020, from agricultural supply chains; and an analysis of the potential for public-private partnerships with major agricultural commodity buyers, traders, financial institutions, and other actors to voluntarily reduce or eliminate the purchase of such commodities and incentivize sourcing of sustainably produced agricultural commodities.

DATES: Comments must be received on or before December 2, 2022. Early submissions are appreciated.

ADDRESSES: Send comments as a PDF or Word attachment in an email to *DeforestationRFI@state.gov*.

FOR FURTHER INFORMATION CONTACT: Melissa Gallant, Sustainable Landscapes Analyst, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Global Change, (202) 256–1301; Christine Dragisic, Foreign Affairs Officer, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Office of Global Change; *ClimateNature@state.gov*.

SUPPLEMENTARY INFORMATION: Under this Executive Order, the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Homeland Security (through the Commissioner of U.S. Customs and Border Protection), the Administrator of the Small Business Administration, the Administrator of the United States Agency for International Development, the United States Trade Representative, and the Special Presidential Envoy for Climate, will submit a report to the President within one year on the above topic.

The Executive Order also references the Biden Administration's commitment to deliver, by 2030, on collective global goals to end natural forest loss and to restore at least an additional 200 million hectares of forests and other ecosystems, while showcasing new economic models that reflect the services provided by critical ecosystems around the world, as described in the *Plan to Conserve Global Forests: Critical Carbon Sinks.* The plan recognizes that conserving and restoring global forest and peatland ecosystems, particularly in the Amazon, Congo Basin, and Southeast Asia, can provide significant global greenhouse gas emissions mitigation, both by preventing the emissions caused by deforestation and by increasing the amount of carbon dioxide captured from the atmosphere and stored in soils and forest biomass. The Administration is also committed to combating illegal logging and stopping trade in illegally sourced wood products including through the Lacey Act, and to addressing the related importation of commodities sourced from recently deforested land.

In addition to any general input, the Department is interested in responses to the questions posed below. The Department may use this information to inform potential future actions including, but not limited to, preparation of a report to the President addressing the above topics. The Department welcomes any relevant comments, including on related topics that may not be specifically mentioned but that a commenter believes should be considered.

Respondent information. Please note the following information is not required but will assist us in contextualizing responses. If possible, in your submission, please include: institution name; and type of institution (suggested responses might include U.S. government agency; U.S. Congress; U.S. subnational government; foreign government; U.S.-based soft commodity producer; foreign-based soft commodity producer; U.S.-based soft commodity trader; foreign-based soft commodity trader; U.S.-based soft commodity user; foreign-based soft commodity user; U.S.-based retailer; foreign-based retailer; U.S.-based financer; foreign-based financer; U.S.-based civil society organization; foreign-based civil society organization; U.S.-based academia; foreign-based academia; international organization; or Other); for foreign-based entities, please specify country/ies in which the institution is headquartered; if your organization engages with commodities, please specify which commodity (cattle, oil palm, soy, cocoa, coffee, wood fiber, rubber, and/or other)

Specific topics and questions: The Department is interested in any information respondents believe would be useful in preparing a report to the President corresponding to E.O. paragraph 3.b evaluating options, including recommendations for proposed legislation, for a whole-of-government approach to combating international deforestation. In addition to general comments, the Department is interested in respondents' answers to any or all of the questions listed below. Please fully explain your answers and include additional reasoning, context, and other information as appropriate.

Approach To Identifying Deforested Lands

1. Should the United States government apply tools within its authorities to limit or remove specific commodities grown on illegally deforested lands from agricultural supply chains? What are the potential benefits or negative effects of this approach?

2. Should the United States government apply tools within its authorities to limit or remove specific commodities grown on lands deforested, legally or illegally, after a specific cut-off date (for example December 31, 2020) from agricultural supply chains? What are the potential benefits or negative effects of this approach?

3. For any approach to addressing commodities grown on deforested land that focuses on lands deforested after a specific date, is December 31, 2020 the

most appropriate date? Is another date more appropriate, and if yes, what might that be and why?

4. For U.S.-based respondents: If trade in commodities grown on lands deforested either illegally or, (legally or illegally) after December 31, 2020 (and products containing those commodities) were prohibited in the United States, what, if any, effect would that have on your operations (*e.g.,* demand for your product, costs, revenue, supply chains, etc.)?

Approach To Addressing Deforestation Associated With Commodities

5. Which of the following approaches should the United States federal government consider following in advancing efforts to limit or remove specific commodities grown on deforested lands from agricultural supply chains: (a) tax incentives; (b) expanded application of existing regulations and authorities; (c) public procurement policy; (d) enhanced transparency on deforestation and/or commodity flows; (e) enhanced commodity traceability; (f) development of voluntary or mandatory third party or federal standards or certification programs; (g) partnerships with countries or subnational governments to address commodity-driven deforestation; (h) public-private partnerships. For each approach selected, please provide details on the most effective potential measures that might be applied, and whether new legislation or amendment of existing legislation would contribute to effective measures. For approaches not selected, please specify why such an approach is not recommended. If you believe that a modification of an approach or a different approach that is not listed here would be more effective, please describe. (Note throughout ''commodities'' may also be read to apply to derivative products.)

6. Which of the following substantive approaches by the U.S. federal government might be most effective in limiting or removing specific commodities grown on deforested lands from agricultural supply chains? For each approach selected, please provide details on the most effective potential measures that might be applied. For approaches not selected, please specify why such an approach is not recommended.

- Restricting the importation of commodities grown on lands deforested either illegally or after a specific cut-off date;
- Requiring covered entities to conduct due care for transparency and traceability to eliminate or minimize the risk that commodities in agricultural supply chains, or the products produced from such commodities, were grown on lands deforested either illegally or after a specific cut-off date; (Please specify how such due diligence might be conducted; whether audits of due care for transparency and traceability by independent, recognized third parties should be required; and if and how entitles would provide notice or documentation);
- Requiring covered entities to have full traceability of covered commodities. (Please specify the level of proposed traceability [*e.g.,* to the farm/forest/ranch, municipality, processing plant]; information that should be collected and retained at each point in the supply chain; potential data sources, collection methods and retention rules; potential costs and impacts on agricultural supply chains), and how this might be verified by importers to assure compliance;
- Incentivizing the use of commodities produced in jurisdictions (*e.g.,* country, state or province) with low deforestation rates, or disincentivizing the use of commodities produced in jurisdictions with high deforestation rates; and
- Enhancing transparency around commodity flows and deforestation to inform investors and importers. If recommending this option, please elaborate how this could be done, benefits and limitations;
- Phasing in substantial penalties for non-compliance with any approach the federal government would take (including but not limited to those listed above) to limit or remove specific commodities grown on deforested lands from agricultural supply chains.

7. What substantive approaches by the private sector might be most effective in limiting or removing specific commodities grown on deforested lands from agricultural supply chains? For each approach, please provide details on the most effective potential measures that might be applied. Please specify if there are approaches not recommend and why.

8. For corporate respondents: Several other governments have adopted, or proposed, due care for traceability and transparency requirements to address the risk of commodity-driven deforestation. Can you provide any evidence on the cost of documenting traceability and transparency, whether related to these requirements or voluntary systems? If yes, can these costs be broken down by specific commodities? Can you provide any evidence on the benefits to businesses of documenting due care for, traceability and transparency, including for specific commodities? If yes, can these benefits be quantified? Please provide details.

Definitions

9. In defining deforestation, should a single definition of forests be used? Or should ecosystem- or country-specific definitions be used, for example the definition of a forest submitted by each country to the FAO?

10. If a single definition of forests is used, which existing definition is most applicable? E.g., FAO Global Forest Resource Assessment 2020: ''Land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of more than 10 percent, or trees able to reach these thresholds in situ'' (plus explanatory notes)? Other?

11. Which existing definition of deforestation is most applicable or appropriate? E.g., FAO Global Forest Resource Assessment 2020: ''The conversion of forest to other land use independently whether human-induced or not.'' (plus explanatory notes) Others? How should illegal deforestation be defined?

12. For any proposed definition of deforestation (other than illegal deforestation), are there any exceptions that should be made for certain types of deforestation?

Data and Information

13. In assessing the feasibility of addressing commodities produced on land deforested illegally, how might legality be assessed? Which global or regional data sets might be used to identify illegally deforested lands? What process precedents exist for assessing national legal frameworks to identify the legality, or illegality, of an action? What are the benefits or limitations of such precedents and approaches? Which actors might identify illegal deforestation, and through which channels? Is this approach feasible given the diversity of legal regimes?

14. In assessing the feasibility of addressing commodities produced on land deforested after December 31, 2020, or another specific date, which global or regional data sets might be used to identify lands deforested before, or after, this date?

15. Would there be value in the United States making publicly available a map or other dataset of lands worldwide assessed to be deforested either illegally, or before a specific date? If yes, what value would this provide to relevant stakeholders? How should such a map, or dataset, be made publicly available?

16. Would there be value in the United States requiring some

declaration upon import of the location from which the commodity derived?

Covered Commodities

17. Assessments have identified that around three-fifths of deforestation worldwide is associated with seven commodities: cattle, oil palm, soy, cocoa, coffee, wood fiber, and rubber,[1] though dynamics vary by country. Should the United States (1) address deforestation associated with all soft commodities (those that are grown, rather than extracted or mined); (2) address deforestation associated with all soft commodities, but start with the seven listed above, or (3) address deforestation associated with all soft commodities, but start with a smaller subset of commodities, or different commodities, or (4) only address deforestation associated with a subset of soft commodities?

18. For corporate respondents: Which harmonized tariff codes, if any, associated with cattle, oil palm, soy, cocoa, coffee, wood fiber, and rubber are associated with the commodities you import, or processed goods you manufacture or trade?

Covered Entities

19. What entities should be covered by an approach the United States takes to address global deforestation associated with commodities? Please identify which of the following categories should be covered, and explain why each category should or should not be included: (a) direct importers; (b) commodity traders; (c) consumer goods companies; (d) retailers; (e) financers of the above companies; (f) other (please identify).

Prioritization of Resources

20. How could the United States most effectively address global deforestation associated with commodities, using a finite set of resources? Please explain.

(A) Focusing on the countries with the highest rates of deforestation;

(B) Focusing on the countries with the highest volume, or value, of soft commodities imported to the United States;

(C) Focusing on the tariff codes or industries associated with commodities of greatest impact?

(D) Focusing on the countries with the highest risk for illegal land clearing and deforestation based on a set of factors (*i.e.,* level of criminality/corruption; weak law enforcement; unclear land tenure/land conflict)?

(E) Another approach to prioritizing resources?

21. Should countries be excluded or deemphasized if they: (a) maintain forest cover above a specific threshold, (b) export soft commodities to the United States below a specific threshold, and/or (c) for another reason (current forest cover, etc.)? Should tariff codes by excluded or deemphasized if they account for under a certain percent of covered commodity imports? Should there be a de minimus exception to any measure implemented? If yes to any of the above, please specify the reason and the appropriate minimum threshold.

22. Should covered entities be excluded or deemphasized if they: (a) import soft commodities to the United States below a specific threshold or volume, (b) maintain integrity of intact natural forest above a certain threshold, (c) import the covered commodities to the United States below a specific threshold or volume, (d) have U.S. revenue below a specific threshold, or (e) have global revenue below a specific threshold? Should entities with revenue below a specific threshold have simplified requirements, for example for due care for traceability and transparency? If yes, please specify the reason and the appropriate minimum threshold.

Monitoring and Traceability

23. Some approaches to address global deforestation associated with commodities may entail traceability of commodities. In your experience, for which of the following commodities is traceability from the farm/forest/ranch level to the final product technically possible: cattle, oil palm, soy, cocoa, coffee, wood fiber, and/or rubber? At what level of precision and unit? Where it is possible, which systems are used, and what is the cost per volume (*e.g.,* ton)? Where traceability from the farm to the finished product is not possible, at what level is traceability feasible (*e.g.,* municipality, processing plant, final distributor, country), using which systems, and at what cost per volume? Why is it not traceable to the farm/forest/ranch? What standards/features of traceability systems are needed to help ensure a high degree of compliance with the system? In your experience, is full traceability from the farm to the finished product the only way to ensure the commodities grown on deforested land or illegally deforested land is removed from supply chains?

24. For corporate respondents: To what level can you currently trace the commodities you use (*e.g.,* from the farm/forest/ranch, municipality, processing plant, country to where)? In five years time, to what level could you trace the commodities you use? To which end points? What is considered best practice in your industry regarding traceability? What would be the cost implications of full traceability from the farm/forest/ranch level to the finished product? Please feel free to disaggregate by commodity.

Certification Schemes

25. A number of schemes or programs have been developed for certifying the sustainability of agricultural commodities. These include both voluntary standards (*e.g.,* those developed by commodity-specific roundtables, other industry groups, or non-governmental organizations) as well as mandatory government compliance standards.

26. Which, if any, voluntary or compliance (*e.g.,* government) commodity certification systems currently includes within its certification standard (a) illegal deforestation, or (b) deforestation after a specific cut-off date?

27. Have voluntary or compliance certification schemes been effective in reducing commodity-driven deforestation? Which ones?

28. What are the factors that contribute to the effectiveness of these certification schemes in reducing deforestation, or create obstacles that impede their effectiveness?

29. How can certification schemes be improved to ensure they are effective in reducing commodity-driven deforestation?

Public Private Partnerships

30. A number of public-private partnerships to reduce deforestation associated with commodities have been developed to promote collaboration across sectors and leverage the relative strengths of different actors.

31. Which partnerships been effective in reducing commodity-driven deforestation? What are the factors that contribute to the effectiveness of these public private partnerships, or present obstacles that impede their effectiveness?

Resources

32. Do you recommend any further collection of evidence to verify

[1] World Resources Institute. (2020). *Estimating the Role of Seven Commodities in Agriculture-linked Deforestation: Oil Palm, Soy, Cattle, Wood Fiber, Cocoa, Coffee, and Rubber.* Retrieved from: *https://files.wri.org/d8/s3fs-public/estimating-role-seven-commodities-agriculture-linked-deforestation.pdf.* See e.g. Goldman, E., M.J. Weisse, N. Harris, and M. Schneider. 2020. ''Estimating the Role of Seven Commodities in Agriculture-Linked Deforestation: Oil Palm, Soy, Cattle, Wood Fiber, Cocoa, Coffee, and Rubber.'' Technical Note. Washington, DC: World Resources Institute. Available online at: *wri.org/publication/estimating-the-role-of-seven- commodities-in-agriculture-linked-deforestation.*

deforestation associated with commodities, globally or in specific countries? Please specify if you believe this is an information gap or, if this evidence exists, please provide detail on the source(s) of this evidence (*i.e.,* citations).

33. Do you recommend any further resources to assess the legal frameworks related to deforestation and land use in specific countries, or data sets of legally or illegally deforested lands? Please specify if you believe this is an information gap or, if this evidence exists, please provide detail on the source(s) of this evidence (*i.e.,* citations).

34. Do you recommend any further resources related to the impacts (economic, trade or markets, and otherwise) of deforestation associated with commodities, globally or in specific contexts? Please specify if you believe this is an information gap or, if this evidence exists, please provide detail on the source(s) of this evidence (*i.e.,* citations).

We welcome additional information related to addressing the link between soft commodities and deforestation.

Christine Dragisic,

Branch Director, OES/EGC, Department of State.

[FR Doc. 2022–22541 Filed 10–17–22; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 11879]

60-Day Notice of Four Proposed Information Collections: Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, Maintenance of Records by DDTC Registrants, Annual Brokering Report, Brokering Prior Approval (License)

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to December 19, 2022.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2022–0034'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: DDTCPublicComments@state.gov.*
- *Regular Mail:* Send written comments to: The public may mail comments to the Directorate of Defense Trade Controls, Department of State, 2401 E St NW, Suite H1205, Washington, DC 20522.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrea Battista, who may be reached at *battistaal@state.gov* or 202–992–0973.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements.
- *OMB Control Number:* 1405–0093.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* PM/DDTC.
- *Form Number:* No form.
- *Respondents:* Business, nonprofit organizations, or persons who intend to furnish defense services or technical data to a foreign person.
- *Estimated Number of Respondents:* 580.
- *Estimated Number of Responses:* 4,430.
- *Average Time per Response:* 2 hours.
- *Total Estimated Burden Time:* 8,860 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to obtain or retain a benefit.
- *Title of Information Collection:* Maintenance of Records by Registrants.
- *OMB Control Number:* 1405–0111.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Directorate of Defense Trade Controls (PM/DDTC).
- *Form Number:* No form.
- *Respondents:* Persons registered with DDTC who conduct business regulated by the International Traffic in Arms Regulations (ITAR, 22 CFR parts 120–130).
- *Estimated Number of Respondents:* 9,100.
- *Estimated Number of Responses:* 9,100.
- *Average Time per Response:* 20 hours.
- *Total Estimated Burden Time:* 182,000 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Mandatory.
- *Title of Information Collection:* Annual Brokering Report.
- *OMB Control Number:* 1405–0141.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* No form.
- *Respondents:* Respondents are any person/s who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles.
- *Estimated Number of Respondents:* 1,200.
- *Estimated Number of Responses:* 1,200.
- *Average Time per Response:* 2 hours.
- *Total Estimated Burden Time:* 2,400 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Required to obtain or retain benefit.
- *Title of Information Collection:* Brokering Prior Approval.
- *OMB Control Number:* 1405–0142.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Directorate of Defense Trade Controls (DDTC).
- *Form Number:* DS–4294.
- *Respondents:* Respondents are U.S. and foreign persons who wish to engage in International Traffic in Arms Regulations (ITAR)-controlled brokering of defense articles and defense services.
- *Estimated Number of Respondents:* 170.
- *Estimated Number of Responses:* 170.
- *Average Time per Response:* 2 hours.
- *Total Estimated Burden Time:* 340 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to obtain benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

DDTC regulates the export and temporary import of defense articles and services enumerated on the USML in accordance with the Arms Export Control Act (AECA) (22 U.S.C. 2751 *et seq.*) and the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). In accordance with ITAR § 124.1, any person who intends to furnish defense services or technical data to a foreign person must submit a proposed technical assistance, manufacturing, or distribution license agreement and obtain prior authorization from DDTC for such agreement. Amendments to existing agreements must also be submitted for approval. The electronic mechanism utilized for submitting, reviewing, and approving agreement proposals is the Defense Export Control and Compliance System, DECCS. Specifically, this process utilizes the DSP–5 license application as the primary instrument or ''vehicle'' for transmitting agreements and their respective amendments from one phase of the adjudication process to the next.

The ITAR requires persons registered with DDTC to maintain records pertaining to defense trade-related transactions. This information collection approves the record-keeping requirements imposed on registrants by the ITAR. Respondents to this collection may submit their records to DDTC as supporting documentation for disclosures of potential violations of the AECA. The method by which respondents submit these records is approved under OMB control no. 1405–0179. DDTC uses these records to analyze industry compliance processes and procedures, and to help assess whether the activity in question might merit administrative sanctions or referral to the Department of Justice for possible criminal prosecution.

In accordance with part 129 of the ITAR, U.S. and foreign persons required to register as a broker shall provide annually a report to DDTC enumerating and describing brokering activities by quantity, type, U.S. dollar value, purchaser/recipient, and license number for approved activities and any exemptions utilized for other covered activities. This information is currently used in the review of munitions export and brokering license applications and to ensure compliance with defense trade statutes and regulations. As appropriate, such information may be shared with other U.S. Government entities.

In accordance with part 129 of the International Traffic in Arms Regulations (ITAR), U.S. and foreign persons who wish to engage in ITAR-controlled brokering activity of defense articles and defense services must first register with DDTC. Brokers must then submit a written request for approval to DDTC and must receive DDTC's consent prior to engaging in such activities unless exempted. This information is currently used in the review of the brokering request submitted for approval and to ensure compliance with defense trade statutes and regulations. It is also used to monitor and control the transfer of sensitive U.S. technology.

Methodology

Respondents will submit information as attachments to relevant license applications or requests for other approval.

Respondents may maintain records in any format consistent with the provisions in ITAR § 122.5.

Brokering Reports are submitted annually with Statement of Registration renewals.

Applicants are referred to ITAR part 129 for guidance on information to submit regarding proposed brokering activity. Applicants may submit a Brokering Prior Approval Request electronically via DDTC's Defense Export Control and Compliance System (DECCS), using the DS–4294.

Michael Miller,

Deputy Assistant Secretary, Directorate of Defense Trade Controls, Department of State.

[FR Doc. 2022–22584 Filed 10–17–22; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Receipt of Noise Compatibility Program Update and Request for Review; Fort Lauderdale-Hollywood International Airport (FLL), Fort Lauderdale, Florida

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces that it is reviewing a proposed Noise Compatibility Program (NCP) Update submitted by Broward County, Florida, through its Aviation Department, for Fort Lauderdale-Hollywood International Airport and has found it in compliance with applicable requirements. This NCP Update was submitted subsequent to a determination by the FAA that the associated Noise Exposure Maps (NEMs) for the Fort Lauderdale-Hollywood International Airport, were prepared in compliance with applicable requirements. The NCP Update will be approved or disapproved (other than the proposed use of flight procedures for noise control) on or before April 10, 2023. Finally, this notice announces that the proposed NCP Update will be available for public review and comment for 60 days from the publication date of this notice.

DATES: The effective start date of the FAA's 180-day review period for the associated NCP Update is October 12, 2022. The FAA must issue an approval or disapproval of the NCP Update (other than the proposed use of flight procedures for noise control) on or before April 10, 2023. The public review and comment period ends 60 days from the publication date of this notice.

FOR FURTHER INFORMATION CONTACT: Peter Green, Federal Aviation Administration, Orlando Airports District Office, 8427 SouthPark Circle, Suite 524, Orlando, Florida 32819, (407) 487–7296. Comments on the proposed NCP Update should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed NCP Update for the Fort Lauderdale-Hollywood International Airport. As required by Title 14 Code of Federal Regulations part 150 (hereinafter referred to as Part 150), the NCP Update will be approved or disapproved (other than the proposed use of flight procedures for noise control) on or before April 10, 2023. Measures that involve changes to flight procedures require further analysis and are not subject to the 180-day statutory decision deadline. This notice also announces the availability of this NCP Update for public review and comment for 60 days from the publication date of this notice.

Under the Aviation Safety and Noise Abatement Act (49 U.S.C. 47501 *et seq.*), an airport operator (hereinafter referred to as Sponsor) who has submitted NEMs

that are found by the FAA to be in compliance with the requirements of Part 150 may submit for FAA approval a NCP or NCP Update that sets forth the measures the Sponsor has taken, or proposes to take, to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses within the area covered by the NEMs.

The FAA has formally received the NCP Update for the Fort Lauderdale-Hollywood International Airport, effective on October 12, 2022. Broward County, Florida, through its Aviation Department, requested the FAA review this material and that the noise mitigation measures, to be implemented jointly by the Sponsor and surrounding communities, be approved as a NCP Update under the Act. Preliminary review of the submitted material indicates that it conforms to Part 150 requirements for the submittal of an NCP, but that further review is necessary prior to approval or disapproval of the NCP Update. The formal review period, limited by law to a maximum of 180 days, will be completed on or before April 10, 2023, with the exception of NCP measures that propose the use of flight procedures for noise control. A public hearing on the NCP was held by the Sponsor on April 21, 2021

The FAA's detailed evaluation will be conducted under the provisions of part 150, 105.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety or create an undue burden on interstate or foreign commerce, and whether they are reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Each airport NCP/NCP Update developed in accordance with part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the Sponsor with respect to which measures should be recommended for action. The FAA's approval or disapproval of each specific measure proposed by a Sponsor in an NCP/NCP Update is determined by applying approval criteria prescribed in § 150.35(b) of Part 150. Only measures that meet the approval criteria can be approved and considered for Federal funding eligibility. FAA approval or disapproval of a measure only indicates whether that measure would, if implemented, be consistent with the purposes of Part 150. When a measure is disapproved by the FAA, Sponsors are encouraged to work with their communities and the FAA, outside of the part 150 process as necessary, to implement initiatives that provide noise benefits for the surrounding community.

Interested persons are invited to comment on the proposed NCP Update with specific reference to these factors. To maximize the effectiveness of comments and the FAA's understanding of them, comments should be as specific as possible, identifying the concern(s) as well as suggested or desired resolution to the concern(s). When possible, quote text and cite details such as page and section numbers, NCP Update measure number, etc. to which the comment(s) pertain. This commenting procedure is intended to ensure that substantive comments and concerns are made available to the FAA in a timely manner so that the FAA has an opportunity to address them in its Record of Approval. All comments in their entirety become part of the public record, including any personal information provided in the comment including name, address, phone number, etc. All relevant comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable.

Copies of the the proposed NCP Update are available for examination online at *www.fllpart150.com* and by appointment at the following location: Federal Aviation Administration, Orlando Airports District Office, 8427 SouthPark Circle, Suite 524, Orlando, Florida 32819.

Please direct questions or requests to arrange an appointment to review the NCP Update document to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT**.

Issued in Orlando Airports District Office, Orlando, Florida on October 12, 2022.

Rebecca Henry Harper,

Acting Manager, FAA/Orlando Airports District Office.

[FR Doc. 2022–22537 Filed 10–17–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Limitation on Claims Against a Proposed Public Transportation Project—Midvalley Connector Bus Rapid Transit Project

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) regarding the Midvalley Connector Bus Rapid Transit (BRT) Project in the Cities of Murray, Taylorsville, and West Valley, Salt Lake County, Utah. The purpose of this notice is to publicly announce the FTA's environmental decisions on the subject project and to activate the limitation on any claims that may challenge these final environmental actions.

DATES: A claim seeking judicial review of FTA actions announced herein for the listed public transportation project will be barred unless the claim is filed on or before March 17, 2023.

FOR FURTHER INFORMATION CONTACT: Kathryn Loster, Assistant Chief Counsel, Office of Chief Counsel, (312) 705–1269, or Saadat Khan, Environmental Protection Specialist, Office of Environmental Programs, (202) 366–9647. FTA is located at 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 9:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions subject to 23 U.S.C. 139(l) by issuing certain approvals for the public transportation project listed below. The actions on the project, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA) and in other documents in the FTA environmental project files for the project. Interested parties may contact either the project sponsor or the relevant FTA Regional Office for more information. Contact information for FTA's Regional Offices may be found at *https://www.transit.dot.gov*.

This notice applies to all FTA decisions on the listed project as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, NEPA (42 U.S.C. 4321–4375), Section 4(f) requirements (23 U.S.C. 138, 49 U.S.C. 303), section 106 of the National Historic Preservation Act (54 U.S.C. 306108), Endangered Species Act (16 U.S.C. 1531), Clean Water Act (33 U.S.C. 1251), Uniform Relocation and Real Property Acquisition Policies Act (42 U.S.C. 4601), and the Clean Air Act (42 U.S.C. 7401–7671q). This notice does not, however, alter or extend the limitation period for challenges of project decisions subject to previous notices published in the **Federal Register**. The project and actions that are the subject of this notice follow:

Project name and location: Midvalley Connector Bus Rapid Transit Project (the Project) in the Cities of Murray, Taylorsville, and West Valley, Salt Lake County, Utah. *Project Sponsor:* The Utah Transit Authority (UTA), Salt Lake City, Utah. *Project description:* The Project includes construction of a new 7-mile BRT service route from Murray Central Station in Murray to the West Valley Central Station in West Valley City, travelling predominantly in mixed traffic lanes, with the exception of 1.4 miles in dedicated bus lanes. The Project includes construction of 15 new stations consisting of sheltered seating with real-time transit information and off-board fare collection vending machines. The Project also involves transit signal priority, Complete Streets initiatives such as pedestrian and bicycle amenities, and associated infrastructure improvements along the BRT route.

Final agency actions: Section 4(f) *de minimis* impact determination, dated October 15, 2021; Section 106 No Adverse Effect determination, dated October 15, 2021; and Midvalley Connector Bus Rapid Transit Project Finding of No Significant Impact (FONSI), dated September 23, 2022. *Supporting documentation:* The Midvalley Connector Bus Rapid Transit Project Environmental Assessment (EA), dated June 28, 2022. The FONSI, EA and associated documents can be viewed and downloaded from: *http://midvalleyconnector.com/.*

Authority: 23 U.S.C. 139(l)(1).

Mark A. Ferroni,

Deputy Associate Administrator for Planning and Environment.

[FR Doc. 2022–22598 Filed 10–17–22; 8:45 am]

BILLING CODE 4910–57–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Event

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public event.

SUMMARY: Notice is hereby given of the following open public event of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a virtual public release of its 2022 Annual Report to Congress in Washington, DC on November 15, 2022.

DATES: The release is scheduled for Tuesday, November 15, 2022 at 10:30 a.m.

ADDRESSES: Members of the public will be able to view a live webcast via the Commission's website at *www.uscc.gov.* Please check the Commission's website for possible changes to the event schedule and instructions on how to submit questions or participate in the question and answer session. Reservations are not required to attend.

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the event should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; telephone: 202–624–1496, or via email at *jcunningham@uscc.gov. Reservations are not required to attend.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham at 202–624–1496, or via email at *jcunningham@uscc.gov.* Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Topics to Be Discussed: The Commission's 2022 Annual Report to Congress addresses key findings and recommendations for Congressional action based upon the Commission's hearings, research, and review of the areas designated by Congress in its mandate, including focused work this year on: the Chinese Communist Party's decision-making and Xi Jinping's centralization of authority; China's trade practices; China's energy plans and practices; U.S. supply chain vulnerabilities and resilience; China's cyber capabilities; China's activities and influence in South and Central Asia; Taiwan; Hong Kong; and a review of economics, trade, security, politics, and foreign affairs developments in 2022.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Public Law 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Public Law 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: October 13, 2022.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2022–22614 Filed 10–17–22; 8:45 am]

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Part II

Department of The Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding for the Kern Plateau Salamander; Threatened Species Status With Section 4(d) Rule for the Kern Canyon Slender Salamander and Endangered Species Status for the Relictual Slender Salamander; Designation of Critical Habitat; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2022–0081; FF09E21000 FXES1111090FEDR 223]

RIN 1018–BF83

Endangered and Threatened Wildlife and Plants; 12-Month Finding for the Kern Plateau Salamander; Threatened Species Status With Section 4(d) Rule for the Kern Canyon Slender Salamander and Endangered Species Status for the Relictual Slender Salamander; Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; announcement of 12-month findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce 12-month findings on a petition to list the Kern Plateau salamander (*Batrachoseps robustus*), the Kern Canyon slender salamander (*Batrachoseps simatus*), and the relictual slender salamander (*Batrachoseps relictus*), three salamander species from the southern Sierra Nevada Mountains in California, under the Endangered Species Act of 1973, as amended (Act). We find that listing the Kern Canyon slender salamander and the relictual slender salamander is warranted. Accordingly, we propose to list the Kern Canyon slender salamander as a threatened species with a rule issued under section 4(d) of the Act (''4(d) rule''), and we propose to list the relictual slender salamander as an endangered species. We also propose to designate critical habitat under the Act for both of these species in Kern County, California. For the Kern Canyon slender salamander, approximately 2,051 acres (ac) (830 hectares (ha)) fall within the boundaries of the proposed critical habitat designation, and for the relictual slender salamander, approximately 2,685 ac (1,087 ha) fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis (DEA) of the proposed designations of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander. After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to list the Kern Plateau salamander. We ask the public to submit to us at any time new information relevant to the status of the Kern Plateau salamander or its habitat.

DATES: For the proposed rule to list the Kern Canyon slender salamander and the relictual slender salamander and designate critical habitat for these species and for the draft economic analysis for this proposed rulemaking action, we will accept comments received or postmarked on or before December 19, 2022. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by December 2, 2022.

Petition finding for the Kern Plateau salamander: For the Kern Plateau salamander, the finding in this document was made on October 18, 2022.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R8–ES–2022–0081, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R8–ES–2022–0081, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: For the proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at *https://www.regulations.gov* at Docket No. FWS–R8–ES–2022–0081. Additional supporting information that we developed for this proposed critical habitat designation, including a draft economic analysis, is also available at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Fris, Field Supervisor, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Sacramento, CA 95825; telephone 916–414–6700. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered in the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the Kern Canyon slender salamander meets the definition of a threatened species and that the relictual slender salamander meets the definition of an endangered species; therefore, we are proposing to list them as such and proposing a designation of their critical habitat. Both listing a species as an endangered or threatened species and making a critical habitat determination can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We find that listing the Kern Plateau salamander as an endangered or threatened species is not warranted. We propose to list the Kern Canyon slender salamander as a threatened species and the relictual slender salamander as an endangered species, and we propose the designation of critical habitat for these two species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

We have determined that the Kern Canyon slender salamander is facing threats due to grazing, recreation, fire,

and climate change, and that these threats will increase such that the species is likely to become endangered in the foreseeable future; therefore, we are proposing to list it as a threatened species. We have determined that the relictual slender salamander is facing threats from roads, grazing, fire, timber harvest, and hazard tree removal that put the species in danger of extinction throughout all of its range. The relictual slender salamander exists in a very narrow area in a limited ecological setting, and a single catastrophic event could result in extinction of the species. Therefore, we are proposing to list it as an endangered species.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Information Requested

For the Kern Plateau salamander, we ask the public to submit to us at any time new information relevant to the species' status or its habitat.

For the Kern Canyon slender salamander and the relictual slender salamander, we intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns, including the locations of any additional populations of these species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, their habitats, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status of these species.

(5) Information on regulations that are necessary and advisable to provide for the conservation of the Kern Canyon slender salamander and that we can consider in developing a 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule.

(6) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information regarding the following factors that the regulations identify as reasons why designation of critical habitat may be not prudent:

(a) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or

(b) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat.''

(7) Specific information on:

(a) The amount and distribution of Kern Canyon slender salamander and relictual slender salamander habitat;

(b) Any additional areas occurring within the range of the species in Kern County that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species; and

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

(8) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(9) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(10) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and any additional information regarding probable economic impacts that we should consider.

(11) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. If you think we should exclude any areas, please provide information supporting a benefit of exclusion.

(12) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the

basis of the best scientific and commercial data available, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the Kern Canyon slender salamander is endangered instead of threatened, that the relictual slender salamander is threatened instead of endangered, or we may conclude that either or both species do not warrant listing as either endangered species or threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, and may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species.

In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the proposed 4(d) rule for the Kern Canyon slender salamander if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely, we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

List of Acronyms and Abbreviations

We use many acronyms and abbreviations in this rule. For the convenience of the reader, we define some of them here:

ac = acres
BLM = Bureau of Land Management
CAL FIRE = California Department of Forestry and Fire Protection
CESA = California Endangered Species Act
cm = centimeters
CNDDB = California Natural Diversity Database
ft = feet
ha = hectares
in = inches
km = kilometers
IPCC = Intergovernmental Panel on Climate Change
m = meters
mi = miles
OHV = off-highway vehicle
RCP = Representative Concentration Pathways
SSA = Species Status Assessment
USFS = U.S. Forest Service

Previous Federal Actions

On July 11, 2012, the Center for Biological Diversity (CBD 2012, entire) submitted a petition to list 53 species of reptiles and amphibians including the relictual slender salamander (*Batrachoseps relictus*), Kern Canyon slender salamander (*Batrachoseps simatus*), and Kern Plateau salamander (*Batrachoseps robustus*) as threatened or endangered species under the Act. On July 1, 2015, we published a 90-day finding that the petition presented substantial scientific and commercial information that the listing of the relictual slender salamander and the Kern Canyon slender salamander may be warranted (80 FR 37568). On September 18, 2015, we published a 90-day finding that the petition presented substantial scientific and commercial information that the listing of the Kern Plateau salamander may be warranted (80 FR 56423).

Supporting Documents

A species status assessment (SSA) team composed of Service biologists, in consultation with species experts, prepared an SSA report for the Kern Plateau salamander, the Kern Canyon slender salamander, and the relictual slender salamander (Service 2022a, entire). The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought the expert opinions of four appropriate specialists regarding the SSA. We received two responses.

I. Finding for the Kern Plateau Salamander

Under section 4(b)(3)(B) of the Act, we are required to make a finding whether or not a petitioned action is warranted within 12 months after receiving any petition that we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded. ''Warranted but precluded'' means that (a) the petitioned action is warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened species, and (b) expeditious progress is being made to add qualified species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) and to remove from the Lists species for which the protections of the Act are no longer necessary. Section 4(b)(3)(C) of the Act requires that, when we find that a petitioned action is warranted but precluded, we treat the petition as though resubmitted on the date of such finding; accordingly, a subsequent finding must be made within 12 months of that date. We must publish these 12-month findings in the **Federal Register**.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an endangered species or a threatened species.

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future, which appears in the statutory definition of ''threatened species.'' The regulatory language that is applicable to determinations of the foreseeable future is contained in the regulations at 50 CFR 424.11(d) promulgated in 2019 (*In re: Washington Cattlemen's Ass'n,* No. 22–70194 (9th Cir. Sept. 21, 2022) (staying the district court's vacatur of the 2019 regulations pending resolution of the motion for reconsideration) (Washington Cattlemen's)). However, those regulations remain the subject of ongoing litigation, and their continued applicability is therefore uncertain. If the litigation results in vacatur of the 2019 regulations, the regulations that were in effect before those 2019 regulations (the pre-2019 regulations) would again become the governing law for listing decisions. Because of the uncertainty surrounding the legal status of the regulations, we undertook two analyses of the foreseeable future for the Kern Plateau salamander: one under the 2019 regulations and one under the pre-2019 regulations, which may be reviewed in the 2018 edition of the Code of Federal Regulations at 50 CFR 424.11(d). Those pre-2019 regulations did not include provisions clarifying the meaning of ''foreseeable future,'' so we applied a 2009 Department of the Interior Solicitor's opinion (M–37021, ''The Meaning of 'Foreseeable Future' in Section 3(2) of the Endangered Species Act'' (Jan. 16, 2009) (M–37021).

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the Kern Plateau salamander (Service 2022b, entire) currently meets the definition of ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial data available regarding threats, regulatory mechanisms, conservation measures, current condition, and future condition. We reviewed the petition, information available in our files, and other available published and unpublished information. This evaluation includes information from recognized experts; Federal, State, and Tribal governments; academic institutions; private entities; and other members of the public. After comprehensive assessment of the best scientific and commercial data available, we determined that the Kern Plateau salamander does not meet the definition of an endangered or a threatened species.

The SSA Report for the Three Slender Salamanders and the Species Assessment Form for the Kern Plateau salamander contain more detailed biological information regarding the Kern Plateau salamander, a thorough description of the factors influencing the species' viability, and the current and future conditions of the species (Service 2022a, entire; Service 2022b, entire). This supporting information can be found on the internet at *https://www.regulations.gov* under docket number FWS–R8–ES–2022–0081. The following is a summary of our determination for the Kern Plateau salamander.

Summary of Finding

The Kern Plateau salamander is a slender salamander that has a broad, robust body with 16–17 costal grooves and a relatively short tail. The salamander is known from 35 sites, spread across areas of Sequoia National Forest and Inyo National Forest and privately owned land on the eastern slope of the Sierra Nevada, located in Inyo and Kern Counties, California.

The Kern Plateau salamander requires bodies of surface water such as seeps, springs, streams, and associated riparian and mesic habitat. In addition, the salamander requires the presence of sufficient refugia consisting of materials such as woody debris, bark, leaf litter, rocks, and other cover objects within mesic and riparian habitats. Abundant interstitial spaces must be available

underneath debris or cover objects to facilitate resting, foraging, and movement of salamanders. Microclimates underneath debris or cover objects must be cool and moist as the Kern Plateau salamander is susceptible to desiccation.

In the SSA report (Service 2022a, pp. 12–15), the range of the Kern Plateau salamander was divided into three geographic groups: the Kern Plateau geographic group in the southwestern Sierra Nevada in Kern County, CA; the Inyo geographic group on the eastern slope of Sierra Nevada in Inyo County, CA; and the Scodie Mountain geographic group in the Scodie Mountains in Kern County, CA. The Kern Plateau and Scodie Mountain geographic groups are entirely within the Sequoia National Forest. The Scodie Mountain geographic group also falls within the Kiavah Wilderness. The Inyo geographic group includes areas in the Inyo National Forest and outside of the National Forest in Owens and Indian Wells Valleys.

Kern Plateau Salamander: Status Throughout All of Its Range

The Kern Plateau salamander is an endemic species currently known from 35 sites across a 302,035-ha (746,347-ac) range, with no identified reductions in historical range, redundancy, or representation. In the SSA report and the SAF, we analyzed ten potential threats impacting the species and its habitat. Currently, habitat supporting the Kern Plateau salamander is primarily affected by habitat degradation from roads (Factor A), recreation (Factor A), grazing (Factor A), timber harvest and hazard tree removal (Factor A), fire (Factor A), and climate change (Factor E). These threats continue to degrade the seep and spring habitat, and in some rare cases may result in direct mortality of individual Kern Plateau salamanders.

Fire (Factor A) currently presents one of the largest risks to the Kern Plateau salamander. The fire threat as measured by CAL FIRE is high to very high at most of the sites occupied by the Kern Plateau salamander on the Kern Plateau and Scodie Mountain geographic groups, and moderate to high at sites in the Inyo geographic group (Service 2022a, figure 27). There are few regulatory mechanisms available to address the risk of catastrophic wildfire to the species. The Scodie Mountain geographic group previously experienced a high-severity fire in 1997 that altered the habitat type and likely degraded the seep and stream microhabitat. In addition to all sites being subjected to fire risk, most sites across the species' range are further subject to habitat degradation through grazing, with a majority of sites within grazing allotments (Factor A).

The threat from the impact of roads (Factor A), recreation (Factor A), and timber harvest and hazard tree removal (Factor A) to the Kern Plateau salamander varies throughout the species' range. Habitat in the Inyo geographic group is more isolated from roads and recreation, and timber harvest does not take place in the area (additionally, hazard tree removal may not be carried out in isolated areas). Timber harvest has not occurred within the Scodie Mountains, but within this area there are roads and trails in proximity to the occupied sites, and the nearby McIver's Cabin is a popular destination for OHV recreationists and hikers. Within the Kern Plateau geographic group, there are areas that have frequent motorized recreation use, tree harvest, and hazard tree removal. In the parts of geographic groups found within Inyo and Sequoia National Forests, the effects associated with some of the threats impacting the species are being reduced in magnitude due to implemented regulatory mechanisms (Factor D) within the national forests due to the Kern Plateau salamander being a USFS species of conservation concern.

After evaluating threats to the Kern Plateau salamander and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we find that though the Kern Plateau salamander currently has some reduced population resiliency in two of the geographic groups, population resiliency is maintained from historical levels at the third geographic group (Inyo), and, overall, the species is still extant at multiple sites throughout the range. Additionally, species redundancy is currently maintained at its historical condition throughout the two largest geographic groups. The Kern Plateau salamander is a narrow endemic and does not have a broad range that encompasses large environmental variability; however, because the species is still distributed throughout its historical range, which includes a range of elevations (1,434–2,804 m (4,705–9,200 ft)) and climatic conditions, the Kern Plateau salamander maintains ecological representation. Thus, after assessing the best available information, we conclude that the Kern Plateau salamander is not in danger of extinction throughout all of its range.

Therefore, we proceed with determining whether the Kern Plateau salamander is likely to become endangered within the foreseeable future throughout all of its range. In considering the foreseeable future as it relates to the status of the Kern Plateau salamander, we considered the timeframes applicable to the relevant risk factors (threats) to the species and whether we could draw reliable predictions about future exposure, timing, and scale of negative effects and the species' response to these effects. We considered whether we could reliably assess the risk posed by the threats to the species, recognizing that our ability to assess risk is limited by the variable quantity and quality of available data about effects to the Kern Plateau salamander and its response to those effects.

The SSA report's analysis of future scenarios over a 50-year timeframe encompasses the best available information for projected future changes in climate change and its effect on modified hydrology across the range of the Kern Plateau salamander. This 50-year timeframe enabled us to consider the threats/stressors acting on the species and to draw conclusions on the species' response to those factors. In our future conditions analysis, we considered the ''intermediate'' emissions scenario of RCP 4.5 (Scenario 1) and the ''very high'' emissions scenario of RCP 8.5 (Scenario 2). Under Scenario 1, the resiliency of the Inyo, Kern Plateau, and Scodie geographic groups will be reduced from the current condition. The resiliency of the Scodie Mountain geographic group will be the furthest reduced, and the Scodie Mountain geographic group will be more vulnerable to stochastic events. However, the representation and redundancy of the Kern Plateau salamander will be maintained from current levels. Under Scenario 2, decreased resiliency, representation, and redundancy is projected for the three geographic units, with the Scodie Mountain geographic group again being the most vulnerable to stochastic events. Despite a decline in resiliency under both scenarios and a decline in representation and redundancy under Scenario 2, the Kern Plateau salamander is projected to maintain its distribution throughout the major areas that it historically occupied, with the Inyo and Kern Plateau geographic groups retaining more suitable habitat and occupied sites than the Scodie Mountain geographic group. Even considering threats impacting the species and the species' response, the Kern Plateau salamander will likely maintain enough resiliency, representation, and redundancy to

maintain viability into the foreseeable future.

After assessing the best available information on the factors affecting the species (threats) within our future scenarios and the species' response to those factors, we conclude that the Kern Plateau salamander is not likely to become endangered within the foreseeable future throughout all of its range.

Kern Plateau Salamander: Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that the Kern Plateau salamander is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for the Kern Plateau salamander, we chose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species may be endangered or threatened.

For the Kern Plateau salamander, we considered the following 10 threats: Roads (Factor A), recreation (Factor A); grazing (Factor A); timber harvest (Factor A); hazard tree removal (Factor A); infrastructure development (Factor A); fire (Factor A); overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); effects associated with small population size (Factor E); and climate change (Factor E). We also evaluated existing regulatory mechanisms (Factor D). Most of these threats are site-specific or affect only individual salamanders; thus, they do not rise to the level of affecting the species at a biologically meaningful scale. However, we now further consider the impact of climate change, fire, grazing, and timber harvest of dead trees, because these four threats occur across the range of the species, though there may be some local variation in magnitude.

Next, we consider if any portions of the range may be uniquely vulnerable to those threats. As we noted above, the Scodie Mountain geographic group has a reduced ability to withstand and recover from normal stochastic variation, relative to historical conditions and will have reduced condition in the foreseeable future as compared to other geographic groups. However, the impact of these threats listed above is only slightly higher in the Scodie Mountain geographic group than in the Kern Plateau geographic group. Additionally, the entirety of the Scodie Mountain geographic group falls within the boundary of the Sequoia National Forest; thus, the magnitude of threats is reduced by measures to reduce impacts to seeps and springs from threats such as grazing and from hazard tree removal. The land management plan outlines desired habitat management conditions for riparian areas which, upon implementation, would reduce the risks of catastrophic wildfire and climate change in the area. Though there are a limited number of occurrences in the Scodie Mountain geographic group, scientists have detected salamanders even post-fire, indicating that despite degraded habitat conditions, it still maintains the ability to withstand stochastic events. Thus, we found no concentration of threats at a biologically meaningful scale anywhere in the Kern Plateau salamander's range, and we conclude that there is no portion of the range where the status of the species differs from any other portion of the species' range.

Therefore, we find that the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014), including the definition of ''significant'' that those court decisions held to be invalid.

Kern Plateau Salamander: Determination of Status

Our review of the best available scientific and commercial information indicates that the Kern Plateau salamander does not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. Therefore, we find that listing the Kern Plateau salamander is not warranted at this time. A detailed discussion of the basis for this finding can be found in the Kern Plateau salamander species assessment form (Service 2022b, entire) and other supporting documents, such as the accompanying SSA report (Service 2022a, entire) (see *https://www.regulations.gov* under docket number FWS–R8–ES–2022–0081).

II. Proposed Listing Determination for the Kern Canyon Slender Salamander and the Relictual Slender Salamander

Background

A thorough review of the taxonomy, life history, and ecology of the Kern Canyon slender salamander and the relictual slender salamander is presented in the SSA report (Service 2022a, pp. 2–14).

The Kern Canyon slender salamander and the relictual slender salamander are lungless, terrestrial salamanders that are found in the southern Sierra Nevada. Slender salamanders are within the genus Batrachoseps and are known for their long, thin bodies, small limbs, and projectile tongues that they use to catch small invertebrate prey (Stebbins and McGinnis 2012, pp. 124–140). Relictual slender salamanders are small (1.3–1.9 in (3.3–4.7 cm) snout-vent length) with 18–19 costal grooves and have blackish brown coloration with a red, yellow, or brown dorsal stripe (Jockusch et al. 2012, p. 14; Stebbins and McGinnis 2012, p. 139). Kern Canyon slender salamanders are larger (1.6–2.2 in (4.0–5.6 cm) snout-vent length) with broader head and limbs and 20–21 costal grooves (Stebbins and McGinnis 2012, p. 130). The ventral surfaces and sides of Kern Canyon slender salamanders are dark brown with flecks of lighter color, and the dorsal surfaces are mottled bronze and red. Many of the life-history characteristics of the relictual and Kern Canyon slender salamanders are

unknown but are assumed to be similar to other species of slender salamanders.

Slender salamanders are thought to lay eggs terrestrially in protected areas, hatch from eggs as miniature adults, reach reproductive maturity in 2–4 years, and live for a maximum of 8–10 years (Hendrickson 1954, p. 19; Stebbins 1985, p. 39; Wake and Castanet 1995, p. 63; Jockusch and Mahoney 1997, entire; Wake 2017, entire). Slender salamanders are active on the surface seasonally when conditions are favorable for performing skin and buccopharyngeal respiration (oxygen is taken up simply by diffusion or by the contraction and relaxation of the muscles of the cheeks or mouth and throat). At lower elevations, the relictual slender salamanders and Kern Canyon slender salamanders have been found active on the surface from January to May; at higher elevations, they are active from March to early November (Jockusch et al. 2012, p. 17; Jockusch 2021a, pers. comm.). When these species are active on the surface, they are usually found under cover objects, such as rocks, woody debris, and leaf litter, that are in proximity to seeps, springs, or streams (Stebbins 1985, p. 39; Jockusch and Mahoney 1997, entire; Wake 2017, entire). When conditions are not favorable on the surface, slender salamanders are thought to shelter in underground burrows (Cunningham 1960, p. 95; Lannoo 2005, pp. 688–693).

The Kern Canyon slender salamander was known historically from 18 occupied sites to the southwest of the Isabella Lake reservoir in Kern County, California. Kern Canyon slender salamanders are found within Sequoia National Forest in the lower Kern River Canyon and outside of Sequoia National Forest within the Erskine Creek and Bodfish Creek drainages. Kern Canyon slender salamanders occur in narrow canyons in rocky habitat within the margins of seeps and streams or talus slopes (Lannoo 2005, pp. 691–693). They are found under rocks and woody debris in areas that retain soil moisture. Kern Canyon slender salamanders are associated with pine-oak woodlands with overstory of foothill pine (*Pinus sabiniana*), interior live oak (*Quercus wislizeni*), canyon live oak (*Quercus chrysolepis*), California buckeye (*Aesculus californica*), Freemont cottonwood (*Populus fremontii*), sycamore (*Platanus racemosa*), and willow (*Salix* spp.). Historically, Kern Canyon slender salamanders may have also been found in open grasslands.

The relictual slender salamander has historically been documented at 13 sites within a small area of Sequoia National Forest in Kern County, California. Within this limited range, the species is found in small patches of moist, rocky habitat within the margins of seeps, springs, and streams. Relictual slender salamanders have been observed submerged in seeps and springs and under cover objects that have water beneath them (Lannoo 2005, p. 687; Jockusch et al. 2012, p. 17). Consequently, the species has been described as semi-aquatic and is thought to have a closer association with water than other species of slender salamanders. Two communal nests of relictual slender salamanders have been found during the spring and early summer in rocky habitat at the edge of seep and stream habitat (Jockusch 2021a, pers. comm.). In the lower Kern River Canyon, the relictual slender salamander is found in valley foothill riparian habitat and blue oak woodland with limited tree cover of oaks (*Quercus* spp.), buckeyes (*Aesculus* spp.), and sycamores. On Breckenridge Mountain, the species is found in Sierran mixed-conifer forest with closed canopies of pine (*Pinus* spp.), fir (*Abies* spp.), and oak (*Quercus* spp.).

Information on occurrences for the Kern Canyon slender salamander and the relictual slender salamander is limited, as widespread systematic surveys for the species have not been conducted. Therefore, the best available information on the Kern Canyon slender salamander and the relictual slender salamander comes from recorded incidental observations and opportunistic searches over limited areas. Due to the nature of these records of observations, the survey effort for the two species is not standard from one site to another, across geographic groups, or from species to species. At some of the sites where salamanders have been observed, the sites have not been searched for the species over the last 30–40 years. In these cases, there is considerable uncertainty as to whether the species continues to occupy the sites. In the absence of more recent information, if conditions at the site are still suitable to support the species, we assume that the species continues to occupy these sites but recognize that there is uncertainty associated with this assumption.

There is no available information on population structure or population sizes of either the Kern Canyon slender salamander or the relictual slender salamander. Therefore, we divide the sites of each species into geographic groups to aid our analysis in our SSA report and this proposed rule. The Kern Canyon slender salamander has historically been documented in 18 sites in the Lower Kern River Canyon and Erskine Creek geographic groups; only 9 of those sites are currently considered extant (table 1), although 2 have not had surveys reported to CNDDB in the last 30–40 years. The relictual slender salamander has been documented from 13 sites in the Lower Kern River Canyon geographic group, the Lucas Creek geographic group, and the Squirrel Meadow geographic group. All five sites in the Lower Kern River Canyon geographic group are considered to be extirpated, and eight sites in the other two geographic groups are currently considered extant. In 2019, a search of mesic habitat on Breckenridge Mountain led to the discovery of four sites (Flying Dutchman Drainage, Mill Creek Drainage A, Mill Creek Drainage B, Mill Creek Drainage C) occupied by the relictual slender salamander. At two of those sites more than 20 individuals were found; however, we do not have specific information on which of the 4 sites had more than 20 individuals (Figure 1; Jockusch 2021a, pers. comm.).

TABLE 1—KERN CANYON SLENDER SALAMANDER SITES IN CALIFORNIA

[CNDDB 2022, unpaginated; Jockusch 2021a, pers. comm]

Site	Geographic group	Range of number observed	Year first observed	Year last observed	Year last surveyed	Presumed extant?
Cow Flat Creek	Lower Kern River Canyon	0–5	1952	1970	1979 *	No **
Stark Creek	Lower Kern River Canyon	1–7	1960	1979	1979 *	No **
SE of HWY 178	Lower Kern River Canyon	2–11	1960	1978	1979 *	No **
Unnamed drainage (SW Democrat Hot Springs).	Lower Kern River Canyon	1	1970	1970	1970 *	No **
Dougherty Creek	Lower Kern River Canyon	1–8	1970	1991	1991 *	No **
Lucas Creek	Lower Kern River Canyon	20	1975	1975	1975 *	No **
Mill Creek	Lower Kern River Canyon	1	1979	1979	1979 *	No **

TABLE 1—KERN CANYON SLENDER SALAMANDER SITES IN CALIFORNIA—Continued

[CNDDB 2022, unpaginated; Jockusch 2021a, pers. comm]

Site	Geographic group	Range of number observed	Year first observed	Year last observed	Year last surveyed	Presumed extant?
Miracle Hot Springs	Lower Kern River Canyon	1–12	1979	2008	2008 †	Yes
Seep N of Cow Flat Creek	Lower Kern River Canyon	1	1991	1991	1991 *	No **
NE of Hobo Campground	Lower Kern River Canyon	1	2007	2018	2018	Yes
S Cow Flat Rd	Lower Kern River Canyon	1	2010	2010	2010	No **
Erskine Creek A	Erskine Creek Canyon	3	1981	1981	1981	Yes ‡
Erskine Creek B	Erskine Creek Canyon	12	1981	1981	1981	Yes ‡
Erskine Creek C	Erskine Creek Canyon	2–3	1992	1993	1993	Yes
Bodfish Creek A	Erskine Creek Canyon	2	2001	2001	2001	Yes
Erskine Creek D	Erskine Creek Canyon	1	2010	2010	2010	Yes
Eagle Peak	Erskine Creek Canyon	1	2019	2019	2019	Yes
Bodfish Creek B	Erskine Creek Canyon	1	2021	2021	2021	Yes
Geographic Group Summary	Lower Kern River Canyon	0–20	1952	2018	2018	Yes
Geographic Group Summary	Erskine Creek Canyon	1–12	1981	2021	2021	Yes

* More recent negative surveys have not been reported to CNDDB.

** A species expert indicates the Kern Canyon slender salamander may be largely or entirely gone from the site.

† A species expert indicates the Kern Canyon slender salamander has been observed at this site since 2008. However, the year of more recent observations has not been reported to CNDDB.

‡ Surveys for the Kern Canyon slender salamander at this site have not been reported to CNDDB in the last 30–40 years, so there is uncertainty as to whether the species is present.

TABLE 2—RELICTUAL SLENDER SALAMANDER SITES IN CALIFORNIA

[CNDDB 2022, unpaginated; Jockusch 2021a, pers. comm]

Site	Geographic group	Range of number observed	Year first observed	Year last observed	Year last surveyed	Presumed extant?
Cow Flat Creek	Lower Kern River Canyon	0–12	1955	1968	1979 *	No
Lucas Creek A	Lower Kern River Canyon	0–6	1960	1960	1975 *	No
Unnamed Tributary (E Democrat Hot Springs).	Lower Kern River Canyon	0–8	1964	1964	1964 *	No
Stark Creek	Lower Kern River Canyon	0–4	1964	1964	1964 *	No
Unnamed Tributary (SW Democrat Hot Springs).	Lower Kern River Canyon	0–3	1967	1967	1967 *	No
Lucas Creek B **	Lucas Creek	1–8	2001	2019	2019	Yes
Tributary to Lucas Creek A	Lucas Creek	2	2017	2017	2017	Yes
Tributary to Lucas Creek B	Lucas Creek	1	2021	2021	2021	Yes
NE of Squirrel Meadow	Squirrel Meadow	0–30	1977	2021	2021	Yes
Flying Dutchman Drainage	Squirrel Meadow	Information not available	2019	2021	2021	Yes
Mill Creek Drainage A	Squirrel Meadow	Information not available	2019	2021	2021	Yes
Mill Creek Drainage B	Squirrel Meadow	Information not available	2019	2021	2021	Yes
Mill Creek Drainage C	Squirrel Meadow	Information not available	2019	2019	2019	Yes
Geographic Group Summary	Lower Kern River Canyon	0–12	1955	1968	1979 *	No
Geographic Group Summary	Lucas Creek	1–8	2001	2021	2021	Yes
Geographic Group Summary	Squirrel Meadow	0–30	1977	2021	2021	Yes

* This site has been searched for the species since the year identified as the ''year last surveyed'' (Hansen 1997, entire; Jennings and Hayes 1994, p. 22; Lannoo 2005, p. 687). However, the more recent negative surveys have not been reported to CNDDB.

** This site encompasses two CNDDB occurrence points on Lucas Creek that are considered to be one site (Jockusch 2021b, pers. comm.).

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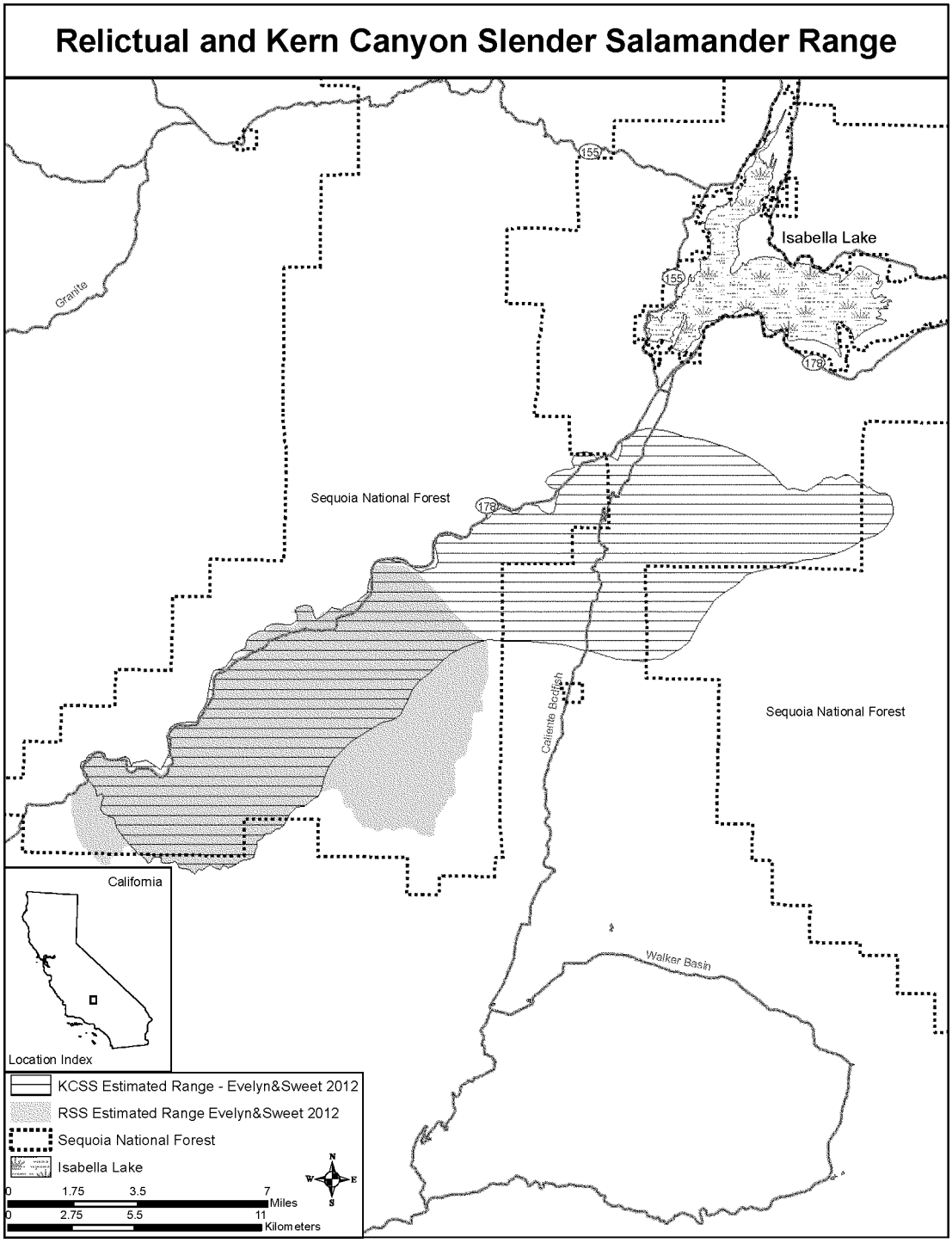

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Figure 1—Estimated Range of the Kern Canyon Slender Salamander and the Relictual Slender Salamander

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for threatened and endangered species. In 2019, jointly with the National Marine Fisheries Service, the Service issued final rules that revised the regulations in 50 CFR parts 17 and 424 regarding how we add, remove, and reclassify threatened and endangered species and the criteria for designating listed species' critical habitat (84 FR 45020 and 84 FR 44752; August 27, 2019). At the same time the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (collectively, the 2019 regulations).

However, as discussed under I. Finding for the Kern Plateau Salamander, the U.S. District Court for the Northern District of California vacated the 2019 regulations (*Center for Biological Diversity* v. *Haaland,* No. 4:19–cv–05206–JST, Doc. 168 (N.D. Cal. July 5, 2022) (*CBD* v. *Haaland*)), reinstating the regulations that were in effect before the effective date of the 2019 regulations as the law governing species classification and critical habitat decisions. Accordingly, in developing the analysis contained in this proposal, we applied the pre-2019 regulations, which may be reviewed in the 2018 edition of the Code of Federal Regulations at 50 CFR 17.31, 17.71, 424.02, 424.11(d)–(e), and 424.12(a)(1) and (b)(2)). Because of the ongoing litigation regarding the court's vacatur of the 2019 regulations, and the resulting uncertainty surrounding the legal status of the regulations, we also undertook an analysis of whether the proposal would be different if we were to apply the 2019 regulations. That analysis, which we described in a separate memo in the decisional file and posted on *https://www.regulations.gov,* concluded that we would have reached the same proposal if we had applied the 2019 regulations. For both species, the relevant critical habitat regulations we considered were (1) critical habitat prudency (424.12(a)(1)), (2) unoccupied critical habitat (424.12(b)(2)), and (3) the definition of physical or biological features (PBFs)(424.12.02). For the Kern Canyon slender salamander, we also considered (1) foreseeable future and (2) the 4(d) rule.

On September 21, 2022, the U.S. Circuit Court of Appeals for the Ninth Circuit stayed the district court's July 5, 2022, order vacating the 2019 regulations until a pending motion for reconsideration before the district court is resolved (*In re: Cattlemen's Ass'n,* No. 22–70194). The effect of the stay is that the 2019 regulations are currently the governing law. Because a court order requires us to submit this proposal to the **Federal Register** by September 30, 2022, it is not feasible for us to revise the proposal in response to the Ninth Circuit's decision. Instead, we hereby adopt the analysis in the separate memo that applied the 2019 regulations as our primary justification for the proposal. However, due to the continued uncertainty resulting from the ongoing litigation, we also retain the analysis in this preamble that applies the pre-2019 regulations and we conclude that, for the reasons stated in our separate memo analyzing the 2019 regulations, this proposal would have been the same if we had applied the pre-2019 regulations For the Kern Canyon slender salamander, we conclude that the decision would have been the same if we had applied the 2019 regulations at 50 CFR 424.11(d) because the data regarding timeframes used in our analysis pertaining to the threats and species' responses to those threats are based on the best available science, and supports our analysis that the threats and species' responses to those threats are likely (2019 regulations) and supports our ability to make reasonably reliable predictions about the future (2009 M-Opinion). Under either regulatory scheme we find that critical habitat is prudent for the relictual slender salamander and the Kern Canyon slender salamander and that unoccupied critical habitat is essential for the conservation of both species. In order to recover the species, connecting corridors of suitable habitat need to be maintained between areas occupied by the species. It is reasonably certain that the unoccupied units will contribute to the conservation of the species by providing additional areas for recovery actions and providing connectivity between occupied areas. The unoccupied units contain one or more of the physical or biological features that are essential to the conservation of the species and have the abiotic and biotic features that currently or periodically contain the resources and conditions necessary to support one or more life processes of the salamanders.

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' With the vacatur of the 2019 regulation regarding foreseeable future, we refer to a 2009 Solicitor's Opinion (M–37021), which states that the foreseeable future ''must be rooted in the best available data that allow predictions into the future'' and extends as far as those predictions are ''sufficiently reliable to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.''

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes

applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R8–ES–2022–0081 and on *https://www.regulations.gov*.

To assess Kern Canyon slender salamander and relictual slender salamander viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of each species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on both species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Species Needs for the Kern Canyon Slender Salamander and the Relictual Slender Salamander

Individual Needs

The Kern Canyon slender salamander and the relictual slender salamander require bodies of surface water such as seeps, springs, and streams and associated riparian and mesic habitat. In addition, the salamanders require the presence of sufficient refugia consisting of debris such as woody debris, bark, leaf litter, rocks, and other cover objects within mesic and riparian habitats. There must be abundant interstitial spaces underneath debris or cover objects to facilitate resting, foraging, and movement of salamanders. Microclimates underneath debris or cover objects must be cool and moist as the Kern Canyon slender salamander and the relictual slender salamander are susceptible to desiccation.

For the purpose of the SSA report and this proposed rule, the habitat factors considered most significant for the Kern Canyon slender salamander and the relictual slender salamander are seeps, springs, and streams; debris including woody debris, bark, leaf litter; and rocks that provide refugia within riparian and mesic habitats; cool and damp microhabitat conditions; and small invertebrate prey. Additionally, the Kern Canyon slender salamander and the relictual slender salamander require access to mates to carry out breeding (Service 2022a, p. 15; table 4).

Population Needs

At the population level, we used the best available information to assess the resources and circumstances that most influence the resiliency of Kern Canyon slender salamander and relictual slender salamander populations. The population needs that we evaluate for this species are survival, dispersal, fecundity, and abundance. Because information is not available on population structure or size for either species, we consider geographic groups as a proxy for populations and thus discuss resiliency by geographic group. We do note that, since we have no information on population structure or dispersal, analyzing resiliency by geographic groups may over-estimate the resiliency of the Kern Canyon slender salamander and the relictual slender salamander, as the extent of geographic groups is greater than estimated average dispersal distance of the salamanders.

With regard to survival, most of the individual needs identified above influence survival in a geographic group. Survival may be limited by both the quantity and quality of available habitat including the presence of seeps, springs, and streams; debris that provides refugia; and cool and damp microhabitats. However, we do not know how much suitable habitat is required to sustain geographic groups of either the Kern Canyon slender salamander or the relictual slender salamander. Survival is also affected by the availability of prey.

No information is available on the dispersal distances of the Kern Canyon slender salamander and the relictual slender salamander. In general, slender salamanders are thought to have small home ranges and to be highly sedentary. The maximum distances traveled by

other species of slender salamanders such as the Pacific slender salamander (*Batrachoseps pacificus*) and the California slender salamander (*Batrachoseps attenuatus*) is of 3.0–18.3 m (9.8–60.0 ft) (Hendrickson 1954, p. 12; Anderson 1960, p. 369; Cunningham 1960, p. 96). The salamanders may travel to participate in communal nesting or to find mates. In order for dispersal to be successful, connected mesic and riparian habitats must contain sufficient prey and debris for refugia to allow juveniles or adults to move across the landscape, rest, forage, find mates, and begin breeding. However, we do not know how much habitat connectivity is required to sustain the geographic groups of the Kern Canyon slender salamander and relictual slender salamander. The Kern Canyon slender salamander and the relictual slender salamander have patchy distribution and there may be barriers to dispersal between areas of suitable habitat. Barriers to dispersal for the Kern Canyon slender salamander and the relictual slender salamander may include roads, activities that cause ground disturbance such as construction or trampling, and a lack of surface water or moist riparian habitat that act as corridors.

Not much is known about the reproduction of the Kern Canyon slender salamander or the relictual slender salamander. In general, lungless salamanders (family: Plethodontidae) produce one clutch annually. The clutch sizes of the relictual slender salamander and the Kern Canyon slender salamander are unknown. However, visual counts indicate that gravid relictual slender salamanders carry between 16–22 eggs (Jockusch 2021a, pers. comm.; Jockusch 2021b, pers. comm.). Many of the individual needs of the Kern Canyon slender salamander and the relictual slender salamander are expected to influence fecundity of the species, including availability of suitable aquatic and riparian habitats, debris for refugia, small invertebrate prey, and mates.

While we do not have population estimates or a robust understanding of the abundance of the Kern Canyon slender salamander and the relictual slender salamander, many of the individual needs for the two species are expected to influence abundance. A variety of factors may regulate the numbers of the Kern Canyon slender salamander and the relictual slender salamander in each geographic group. These factors may be density-dependent (habitat quality, habitat abundance) or density-independent (climate). The salamanders require sufficient habitat to support population sizes large enough to recover from harmful events such as storms, droughts, or fires (environmental stochasticity). We discuss the potential impacts of such factors below, but we lack information regarding the amount of habitat and resulting population size that a single population would require to minimize such risks.

Species Needs

At the species level, we consider the needs of the Kern Canyon slender salamander and the relictual slender salamander in terms of redundancy and representation. In this SSA report and this proposed rule, we evaluate the redundancy of the Kern Canyon slender salamander and the relictual slender salamander by considering the number and distribution of sites occupied by each species in relation to the scale of catastrophic events that are likely to occur, such as the average size of fires in the region.

Regarding representation, in the absence of genetic data for the Kern Canyon slender salamander and the relictual slender salamander, we consider the breadth of environmental diversity for the species. In general, these salamander species are narrow endemics and do not have broad ranges that encompass large environmental variability. However, each of the salamander species occurs over a range of different elevations (Kern Canyon slender salamander: 451–1,676 m (1,480–5,500 ft); relictual slender salamander: 1,219–1,920 m (4,000–6,300 ft)). Due to the differences in climate found throughout the range of elevation occupied by each species, slender salamanders are active on the surface during different seasons. These differences in climatic conditions and temporal behaviors may indicate genetic variability between geographic groups, which may help the Kern Canyon slender salamander and the relictual slender salamander adapt to future environmental variability.

Threats

Following are summary evaluations of eight threats analyzed in the SSA report for the Kern Canyon slender salamander and the relictual slender salamander: roads (Factor A), recreation (Factor A), grazing (Factor A), timber harvest (Factor A), hazard tree removal (Factor A), infrastructure development (Factor A), fire (Factor A), and climate change (Factor E). We also evaluate existing regulatory mechanisms (Factor D) and ongoing conservation measures.

In the SSA, we also considered four additional threats: Overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and effects associated with small population size (Factor E). We concluded that, as indicated by the best available scientific and commercial information, these threats are currently having little to no impact on either the Kern Canyon slender salamander or the relictual slender salamander, and thus their overall effect now and into the future is expected to be minimal. Therefore, we will not present summary analyses of those threats in this document, but we will consider them in our cumulative assessment of impacts to the species. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2022a, pp. 21–34).

In considering the foreseeable future as it relates to the status of the Kern Canyon slender salamander, we considered the timeframes applicable to the relevant risk factors (threats) to the species and whether we could draw reliable predictions about future exposure, timing, and scale of negative effects and the species' response to these effects. We considered whether we could reliably assess the risk posed by the threats to the species, recognizing that our ability to assess risk is limited by the variable quantity and quality of available data about effects to the Kern Canyon slender salamander and its response to those effects. For the purposes of this assessment, we consider the foreseeable future for the Kern Canyon slender salamander to be 50 years. This time period represents our best professional judgment of the foreseeable future conditions related to the range of available climate change models and for reasonable extrapolations of current trends and the species' responses to those conditions.

Roads

Roads may alter seeps, springs, and drainages and reduce microhabitat features that support the Kern Canyon slender salamander and the relictual slender salamander, such as soil moisture and cover objects, especially during road construction or maintenance projects (Marsh and Beckman 2004, pp. 1889–1890; Clipp and Anderson 2014, p. 2690). Hydrologic effects are likely to persist for as long as the road remains a physical feature altering flow routing; these effects can often persist long after abandonment and revegetation of the road surface. Additionally, undersized or impaired culverts can degrade salamander habitat by flooding areas, changing stream dynamics, or rerouting

water such that it is no longer available to salamanders (Anderson et al. 2014, pp. 278–279). Roads can also act as barriers to movement and effectively isolate populations (Marsh et al. 2005, pp. 2006–2007). Furthermore, motor vehicle strikes may cause direct mortality of salamanders. However, because they are sedentary and nonmigratory, slender salamanders are considered to be at low risk of direct mortality by vehicle strikes (Brehme et al. 2018, p. 924).

Numerous County and USFS roads throughout Sequoia National Forest and on privately owned land may impact the two salamander species and their habitat. Most notably, State Route 178 is a heavily trafficked road that passes through the historical range of the relictual slender salamander and the current range of the Kern Canyon slender salamander in the Lower Kern River Canyon. Construction of State Route 178 in 1933 and subsequent repair, maintenance, and widening of the road altered drainages and degraded habitat occupied by the salamanders (Lannoo 2005, pp. 688–693; USFS 2011a, p. 39). The highway's construction may have contributed to the extirpation of the relictual slender salamander from the Lower Kern River Canyon (Lannoo 2005, pp. 688–690; USFS 2011a, p. 39). The Kern Canyon slender salamander may also have been extirpated from sites in the Lower Kern River Canyon due in part to degradation of habitat from construction and enhancement of State Route 178 (Lannoo 2005, p. 693; USFS 2011a, p. 39).

Additionally, road construction associated with timber harvest in Sequoia National Forest has historically degraded habitat for the relictual slender salamander. On Breckenridge Mountain in the early 1980s, a USFS logging road was rerouted through a portion of a seep occupied by the relictual slender salamander. The construction considerably modified the structure and hydrology of the seep and the number of relictual slender salamanders found at the site was reduced for the following 20 years (Jennings and Hayes 1994, p. 24; Jockusch et al. 2012, p. 18). The current land management plan for the Sequoia National Forest outlines standards to minimize the impact of existing roads on natural hydrologic flow and the impact of the construction of roads on wetlands, and to decommission and rehabilitate low-priority roads (USFS 2004, pp. 63, 65; USFS 2019a, p. 1555).

Currently, there are no plans to construct additional roads in the range occupied by the species. Still, existing roads are impacting the Kern Canyon slender salamander and the relictual slender salamander through degradation of seep and spring habitat. Direct mortality also occurs through roadkill; however, because slender salamanders are sedentary and nonmigratory, they are considered to be at low risk of direct mortality by vehicle strikes. Though these effects are site-specific and are not expected to rise to the level of population impacts, they are expected to continue into the foreseeable future.

Recreation

Recreation that results in ground disturbance within occupied habitat may have direct and indirect impacts on the Kern Canyon slender salamander and the relictual slender salamander. Recreation that could impact slender salamanders includes dispersed camping (camping outside designated sites), hiking, and OHV use. Trails that pass through meadows, seeps, or springs have the potential to alter hydrology and reduce habitat suitability for the Kern Canyon slender salamander and the relictual slender salamander. Trails adjacent to occupied habitat have the potential to alter hydrology, which may result in the loss of mesic habitat or increased runoff and sedimentation that may negatively impact water quality and seep and spring habitat (Sack and da Luz 2003, entire; Meadows et al. 2008, entire). Additionally, trampling by hikers, bikers, pets, and OHVs on trails within occupied habitat has the potential to directly kill individual slender salamanders.

Sequoia National Forest offers a variety of recreation activities for the public, including OHV trails, hiking, and camping; it receives more than one million visitors a year (USFS 2019a, p. 72). The Lower Kern River Canyon includes areas within the historical range of the relictual slender salamander and the current range of the Kern Canyon slender salamander that are high-use recreation areas. Parts of the eastern portion of Breckenridge Mountain within the range of the relictual slender salamander are moderate-use recreation areas (USFS 2019a, figure 23, p. 129). Additionally, OHV trails are located by sites occupied by the relictual slender salamander on Breckenridge Mountain and the Kern Canyon slender salamander in the Lower Kern River Canyon.

For most USFS trails, considerations have been made to determine the environmental impacts of the trails and adjustments have been made to minimize impacts (USFS 2004, pp. 59, 63, 65; USFS 2019a, p. 85). In the Lower Kern River Canyon within the historical range of the relictual slender salamander and the range of the Kern Canyon slender salamander, some areas have been gated off from OHVs to protect sensitive riparian habitat (USFS 2013, p. 7). In the 1980s, dispersed camping was restricted from some Sequoia National Forest lands in the Lower Kern River Canyon within the historical range of the relictual slender salamander and the range of the Kern Canyon slender salamander, but these lands remain open to OHVs and foot traffic (USFS 2011a, p. 43). On Breckenridge Mountain in Sequoia National Forest within the range of the relictual slender salamander, dispersed camping is permitted and there is a designated primitive campground. Additionally, illegal user-made OHV trails are continually established in the Sequoia National Forest on Breckenridge Mountain within the range of the relictual slender salamander (USFS 2019b, pp. 109, 115).

Recreation is currently impacting the Kern Canyon slender salamander and the relictual slender salamander through degradation of seep and spring habitat and possibly direct mortality of individuals, although these effects are site-specific. Though measures reducing the impact of this threat are in place due to forest management plans and effects are not occurring at the population level, some effects on seeps and springs and individual salamanders are expected to continue into the foreseeable future.

Grazing

Cattle grazing and associated infrastructure (water troughs, corrals, loading chutes, and fences) have the potential for direct and indirect impacts to the Kern Canyon slender salamander and the relictual slender salamander. The mesic habitat used by salamanders is often in areas that livestock congregate in to seek shade, cooler bedding, and water (USFS 2011a, p. 45). Grazing can cause erosion of stream channels and can damage and reduce vegetative cover (Kauffman and Krueger 1984, pp. 431–434; Armour et al. 1994, pp. 9–12). Loss of vegetative cover from grazing has the potential to lower groundwater tables and summer flows (Kauffman and Krueger 1984, pp. 431–434; Armour et al. 1994, pp. 9–12). To provide water for livestock, water is sometimes diverted from springs and streams, limiting the extent of wet in-channel and riparian habitat. Formerly perennial seeps, springs, and streams may become intermittent or dry due to loss of water storage capacity in the aquifers that formerly sustained them. Further, heavy grazing or grazing

incompatible with managing sensitive habitats can alter vegetative species composition and contribute to expansion of lodgepole pine (*Pinus contorta*) into areas that were formerly treeless (Ratliff 1985, pp. 33–36; Cole and Landres 1996, p. 171). Additionally, loss of vegetation cover caused by grazing and trampling can increase soil temperature and reduce soil moisture, thereby impacting the availability of suitable microclimate conditions for the Kern Canyon slender salamander and the relictual slender salamander (Riedel et al. 2008, entire).

In past decades, cattle grazing has severely degraded salamander habitat as grazing is concentrated at the bottom of narrow ravines where salamanders are found near the surface in higher densities (Lannoo 2005, pp. 688–693; USFS 2011a, p. 44). The rangelands of the Sequoia National Forest within the range of the Kern Canyon slender salamander and the relictual slender salamander have been grazed by livestock since the late 1800s (USFS 2019a, p. 5). Currently, grazing occurs throughout Sequoia National Forest, and most of the sites occupied by the Kern Canyon slender salamander and the relictual slender salamander are within grazing allotments. Grazing is managed by the current land management plan for the Sequoia National Forest (USFS 2004, pp. 55–56, 65–66). The plan includes management strategies that limit grazing in fens, meadows, and riparian areas and may therefore benefit the Kern Canyon slender salamander and the relictual slender salamander (USFS 2004, pp. 65–66). Specific measures include inventorying of fens prior to reissuing of grazing permits to ensure desired species richness and implementing grazing limitations or suspensions necessary in the event of habitat degradation. In the last 20 years, some riparian areas within the Lower Kern River Canyon and on Breckenridge Mountain have been fenced off to exclude livestock. Additionally, some sites occupied by the species within grazing allotments are in incidental use areas and may not be accessible to livestock because of rocky terrain.

Grazing is currently impacting the Kern Canyon slender salamander and the relictual slender salamander through degradation of seep and spring habitat. The impact of grazing is particularly severe in some habitat types more than others, though grazing within USFS lands is managed to reduce impacts to sensitive riparian features. Still, grazing is occurring throughout the range of both species, and we expect it will continue to occur and impact Kern Canyon slender salamander and the relictual slender salamander populations into the foreseeable future.

Timber Harvest

Timber harvest including commercial harvest, thinning treatments to reduce risk of fire, and snag removal post-fire or beetle-kill events has the potential to impact the Kern Canyon slender salamander and the relictual slender salamander through direct mortality and indirect impacts to habitat. Direct mortality may result from timber harvest involving the use of heavy equipment within the range of the species. Heavy equipment used for timber harvest may crush salamanders that are active on the surface. Aquatic and riparian habitats are impacted by timber harvest that takes place within the watershed due to increased runoff, erosion, and sedimentation, and the resulting changes in water flow, water quality, and stream morphology (Chamberlin 1982, entire).

Additionally, timber harvest has the potential to indirectly affect the terrestrial salamanders through construction of new roads to support timber harvesting and bring in large equipment, removal of shade structure that is important for the thermal regulation of the environment and suitable microclimate conditions that support the Kern Canyon slender salamander and the relictual slender salamander and through removal of woody debris that salamanders need for refugia (Duvall and Grigal 1999; entire). No studies have focused on the effects of timber harvest on the Kern Canyon slender salamander and the relictual slender salamander, but several studies have found that the abundance of terrestrial salamanders decreases in areas that have been harvested for timber (Petranka et al. 1993, entire; deMaynadier and Hunter 1995, entire; Dupuis et al. 1995, entire; Ash 1997, entire; Herbeck and Larsen 1999, entire; Knapp et al. 2003, entire; Homyack et al. 2011, entire).

Timber harvest on national forest lands within the range of the Kern Canyon slender salamander and the relictual slender salamander is managed by the land management plan for the Sequoia National Forest. The Revised Draft Land Management Plan for the Sequoia National Forest identifies 32,276 ha (79,755 ac) as suitable for timber production (USFS 2019b, p. 85). Areas classified as suitable for timber harvest encompass 6.3 percent of the estimated historical range of the relictual slender salamander and 0.5 percent of the estimated range of the Kern Canyon slender salamander. Additionally, Sequoia National Forest has had large tree mortality events due to drought conditions and beetle outbreaks and, therefore, may experience an increase in timber harvest of dead trees (Preisler et al. 2017, p. 166).

In recent years, large tree mortality events due to drought conditions and beetle outbreaks have occurred in the Sequoia National Forest (Preisler et al. 2017, p. 166). The estimated number of dead trees in the Sequoia National Forest has increased annually for the past decade (USFS 2018, entire). It is likely that tree mortality will continue due to worsening drought conditions that will continue to weaken trees and increase susceptibility to bark beetles and disease, necessitating increased thinning to reduce the threat of fire in the National Forests (Millar and Stephenson 2015, pp. 823–826; Young et al. 2017, pp. 78, 85). However, tree mortality is expected to be lower in wetter riparian areas along the seeps, springs, and streams that provide habitat for the Kern Canyon slender salamander and the relictual slender salamander.

The majority of forest roads in the National Forests of the Sierra Nevada were built between 1950 and 1990 to support major increases in timber harvest (USFS 2001, p. 443). Most of the impact of timber harvesting and associated road development on habitats within the National Forests of the Sierra Nevada took place during the expansion period in the latter half of the 20th century. Over the last 20 years, timber harvest in the Sequoia National Forest has decreased substantially. Timber harvest is now managed by the current land management plan for the Sequoia National Forest (USFS 2019a, entire). Current forest standards and guidelines outline timber harvest practices that maintain minimum forest density requirements and increase retention of down logs and coarse woody debris, thereby possibly benefiting the Kern Canyon slender salamander and the relictual slender salamander by contributing to the availability of refugia. Current forest standards and guidelines provide protections for riparian areas, such as maintaining buffers during timber and vegetation management activities. Further, riparian areas are protected by mechanical equipment buffers and are generally not harvested. However, fire suppression has resulted in increased conifer density and decreased riparian herbaceous vegetation in riparian areas, which may lead to more timber management in riparian areas in the future (USFS 2019b, pp. 109, 115).

Although impacts to habitat from timber harvest have the potential for population-level effects on the Kern Canyon slender salamander and the relictual slender salamander, at present the best available information indicates current levels of timber harvest are not adversely affecting either species. However, the legacy effects of timber harvest activities such as roads and modified hydrology may continue to have localized impacts on the habitat condition of some sites occupied by the Kern Canyon slender salamander and the relictual slender salamander. Timber harvest to remove dead trees may also increase in the foreseeable future as a result of increased tree mortality, further impacting slender salamander habitat, though the percentage of impacted habitat is expected to be small.

Hazard Tree Removal

The current land management plan for the Sequoia National Forest may call for removal of hazard trees in areas not suitable for timber production. Dead and dying trees and living trees that are deemed a risk to people or property may be removed along roads and trails and within wildfire areas (USFS 2019a, p. 170). Hazard tree removal is carried out for safety considerations and is not considered a component of a timber harvest system or commercial timber harvest. Hazard tree removal often takes place along existing roads and trails; because this activity does not necessitate the construction of additional forest roads, it likely has less impact on salamander habitat than timber harvest. Hazard tree removal may reduce fuel loads and thereby reduce the risk of high-severity wildfire within habitat occupied by the Kern Canyon slender salamander and the relictual slender salamander. As many of the sites occupied by the salamanders are near roads and trails, hazard tree removal is expected to occur at some of these sites within habitat occupied by both species. However, despite the impacts to salamander habitat, hazard tree removal is unlikely to result in salamander mortality as it does not generally involve the use of heavy equipment off existing roads and trails.

Hazard tree removal results in localized effects on the habitat of the Kern Canyon slender salamander and the relictual slender salamander where removal of trees occurs in proximity to habitat occupied by the species and results in modification of seep, spring, or creek margin habitat. Hazard tree removal of dead and dying trees that are a risk to people or property may increase in the foreseeable future as a result of increased tree mortality, though the amount of habitat impacted by hazard tree removal is expected to be small.

Infrastructure Development

Infrastructure development has had the greatest historical impact on habitat occupied by the relictual slender salamander and the Kern Canyon slender salamander. Damming of the Lower Kern River to form Isabella Lake in 1953 flooded areas in the Lower Kern River Canyon and prompted construction and expansion of State Route 178 and ongoing recreation development along the Lower Kern River. Flumes, tunnels, roads, and trails associated with the operation of the Kern River No. 1 hydroelectric project and two placer mining claims are also present along the Lower Kern River within the historical range of the relictual slender salamander and the range of the Kern Canyon slender salamander (USGS 2021a, pp. 1–3; USGS 2021b, pp. 1–3).

Ongoing maintenance is required for utility infrastructure including communication sites in the Lower Kern River Canyon and on Breckenridge Mountain and transmission lines and an electrical subunit in the Lower Kern River Canyon within the Sequoia National Forest. Maintenance of utilities can often be carried out from roads or already disturbed corridors where the Kern Canyon slender salamander and the relictual slender salamander are not expected to be found. However, utility crews may need to access off-road sites where the salamanders are found to replace or perform work on power poles. Equipment used for utility maintenance may cause direct mortality of salamanders by crushing salamanders that are active on the surface or damage habitat by altering seeps and springs. Infrastructure development associated with recreation, roads, hydroelectric projects, and utility maintenance has the potential to cause periodic habitat disturbance to sites occupied by the relictual slender salamander and the Kern Canyon slender salamander with impacts likely concentrated within the Lower Kern River Canyon.

There has been discussion of a future large infrastructure project involving construction of a proposed reservoir within the estimated range of the Kern Canyon slender salamander; however, the project is in the preliminary planning process (Service 2022a, p. 27). Implementation of the proposed project within the range of the species could degrade seep and spring habitat. However, no information is available to suggest that infrastructure development associated with this project will take place within the habitat of the Kern Canyon slender salamander and the relictual slender salamander. Overall, though infrastructure development has affected the two species in the past, current impacts are limited to occasional maintenance activities in limited areas of the species' range, and we do not expect that there will be population-level impacts now or in the foreseeable future.

Fire

Fire is a natural ecological process, and fires within the natural range of variation are generally considered beneficial to ecosystems in the Sierra Nevada. Over the long term, small, low-severity fires can improve habitat for fire-adapted plant species, create vegetation mosaics, and support nutrient cycling, thereby increasing resiliency of slender salamander habitat (Safford et al. 2012, entire). In contrast, very large fires with patches that burn at high severity, outside the natural range of variation, can remove forest cover and fragment habitat over large areas and long time periods.

Current habitat conditions within the ranges of the Kern Canyon slender salamander and the relictual slender salamander may contribute to ongoing fire risk. Years of fire suppression in forests of the western United States have led to greater canopy cover from small and medium trees, higher biomass density, and more surface fuels (Parks and Abatzoglou 2020, p. 4). Historically, the mean fire return interval within the Sierra Nevada was 11–16 years with a mean fire size between 200–400 ha (494–988 ac) and with 5 to 15 percent of that area burning at high severity (Safford and Stevens 2017, p. 7). Fire suppression over the last 100 years combined with extended droughts has led to increased fuel loads and changes in fire behavior with larger, more severe fires, and longer wildfire seasons in recent years (Miller and Safford 2012, p. 41; Mallek et al. 2013, p. 1; Safford and Stevens 2017, pp. v–vi; Nigro and Molinari 2019, p. 20).

From 1984 to 2017, forests in the western United States have experienced an eightfold increase in the annual area burned at high severity (Parks and Abatzoglou 2020, p. 4; Service 2022a, figure 8). Current fire return intervals within the estimated ranges of the Kern Canyon slender salamander and the relictual slender salamander are 56–81 years (USFS 2011b, unpaginated). Additionally, the mean size of fires in the Sierra Nevada over the past 30 years has increased to approximately 1,400 ha (3,459 ac) with 30 to 35 percent of the

burn area at high severity (Safford and Stevens 2017, p. 8).

Little is known about the impact of fire on terrestrial salamanders and their habitat. In general, riparian areas burn less frequently and at lower severity. However, fires may have large impacts on the Kern Canyon slender salamander and the relictual slender salamander due to their low mobility and small range sizes. Fires that burn at low and moderate severity and occur at low elevations during the dry summer, when the salamanders are most likely sheltering in underground burrows, may have minimal effects. However, at higher elevations, salamanders are thought to be active on the surface during the summer, and fires that burn at low to moderate severity may result in mortality of salamanders.

Throughout the range of the Kern Canyon slender salamander and the relictual slender salamander, high-severity fires are especially likely to result in direct mortality to both salamanders on the surface and those sheltered underground, due to radiating heat and loss of soil moisture, as temperatures at the soil-litter interface can reach 482–648 °C (900–1,200 °F) (Sampson 1944, p. 62). Individuals more than a few inches below the soil surface may survive the high-severity fire but will then have reduced or no surface cover and reduced or no invertebrate prey community until the landscape recovers. Additionally, because high-severity fire can reduce canopy cover and remove insulating groundcover soil, temperatures in the top 10 centimeters (3.9 in) of soil in recently burned stands can be 5–10 °C (9–18 °F) higher than in late successional stands, affecting the availability of suitable microclimate conditions for the salamanders following fires (Liu et al. 2005, p. 8; Treseder et al. 2004, p. 1831).

Furthermore, fire residence time may also influence the impact of fires on the Kern Canyon slender salamander and the relictual slender salamander as fires that burn at low severity for a long time may result in more direct mortality of salamanders than high-severity fires that move through the area quickly. Post-fire increases in soil temperature can be accompanied by long-term decreases in soil moisture and increases in soil water repellency, which may result in dry conditions that are intolerable for the Kern Canyon slender salamander and the relictual slender salamander (DeBano 2000, p. 196; Holden et al. 2013, p. 39). After fires occur, habitat may also be degraded by increased soil erosion, runoff, and sedimentation (Benavides-Solorio and MacDonald 2001, entire; Robichaud and Waldrop 1994, entire; Spigel and Robichaud 2007, entire). More research is necessary to better understand the relationships between wildfires, salamanders, and their habitat.

Large, catastrophic fire cannot be completely addressed by regulatory mechanisms. However, some management actions can reduce the potential severity or size of wildfires (Agee and Skinner 2005, entire; Safford et al. 2009, entire). Fuel reduction treatments, such as prescribed fire and mechanical thinning, can reduce the severity of a future fire (Agee and Skinner 2005, entire; Safford et al. 2009, entire). We have a limited understanding of the trade-off between impacts from conducting fuels treatments to prevent or reduce future fires and impacts from fires themselves to salamanders and their habitat (see sections on Timber Harvest and Hazard Tree Removal above). Fuels treatments that are carried out within habitat occupied by the salamanders may cause ground disturbance or result in modification of seep, spring, or creek margin habitat. Two species of terrestrial salamanders in the Sierra Nevada, the Sierra ensatina (*Ensatina eschscholtzi platensis*) and the gregarious slender salamander (*Batrachoseps gregarius*), were found to still be present after prescribed fire applications were conducted in the spring (Bagne and Purcell 2009, entire). However, fuel reduction treatments may not prevent catastrophic damage in an extreme fire event (Peterson et al. 2003, p. 3).

Additionally, if a wildfire becomes a threat to infrastructure, fire retardant may be used in areas occupied by the Kern Canyon slender salamander and the relictual slender salamander that are in proximity to development in the Lower Kern River Canyon and on Breckenridge Mountain. Fire retardants may negatively impact the survival of salamanders as fire retardants such as polybrominated diphenyl ethers can decrease survivorship and slow development and growth in amphibians (Coyle and Karasov 2010, pp. 136–138). Furthermore, post-fire restoration involving large machinery has the potential to impact salamander habitat through ground disturbance or result in direct mortality of salamanders that are active on the surface. Fire and management activities related to fire suppression and post-fire restoration may affect the Kern Canyon slender salamander and the relictual slender salamander through degradation of aquatic, mesic, and riparian habitats, loss of suitable cool and damp microclimates, loss of prey, and possibly direct mortality of individuals.

Because of the small ranges of the Kern Canyon slender salamander and the relictual slender salamander, entire geographic groups could be extirpated by fire, thus reducing species redundancy, and potentially causing loss in ecological representation. The mean size and intensity of fires has increased in the past decades. The trend in increasing annual area burned at high severity is expected to continue into the foreseeable future as a result of increasingly warmer and drier fire seasons due to climate change (Parks and Abatzoglou 2020, p. 6).

Climate Change

Climate change is the change in the mean or variability of one or more measures of climate that persist for an extended period, whether the change is due to natural variability or human activity (IPCC 2013, p. 1450). The climate has been warming at an unprecedented rate since the 1950s, and is likely to continue to increase, causing not only warmer conditions but also an increase in the intensity of storms (IPCC 2013, p. 4). The recent changes in climate are attributed to increased greenhouse gas emissions in the atmosphere, which are likely to continue to increase (IPCC 2013, pp. 4, 11–12, 19).

In California, the annual average temperatures have increased by about 0.8 °C (1.5 °F) since 1895 (Kadir et al. 2013, p. 38). Additionally, extreme heating events have increased throughout the State (Kadir et al. 2013, p. 48). Specifically, in the Sierra Nevada region, mean annual temperatures have generally increased by around 0.5–1.4 °C (1.0–2.5 °F) over the past 75–100 years (North 2012, p. 25). These trends are projected to continue, by all modern climate models, and to accelerate during coming decades. Within the Sierra Nevada, changes in climate are expected to vary in magnitude across the region with quicker warming trends and changes in precipitation at highest elevations (Dettinger et al. 2018, p. 5). The annual mean temperatures across the region are projected to warm by 1.0 °C (2.0 °F) by 2039 and by 2.5 °C (4.5 °F) by 2040–2069 as predicted by the average of 10 climate models (Abatzoglou 2013, entire; Pierce et al. 2013, p. 844; Hegewisch et al. 2018, unpaginated). Additionally, in the summer months of June, July, and August, mean temperatures are projected to increase by 3.3 °C (5.9 °F) by 2040–2069 in the Sierra Nevada region (Pierce et al. 2013, p. 842; Hegewisch et al. 2018, unpaginated).

With increasing temperatures and less snowfall, salamanders that occur at high elevations (such as relictual slender salamanders on Breckenridge Mountain) may experience extended periods of favorable conditions and may increase the time they spend on the surface until climatic conditions approach and surpass physiological limits. While temperature increases at high elevation may be within the thermal tolerances of the Kern Canyon slender salamander and the relictual slender salamander, temperature increases at low elevation may exceed salamander tolerances (Caruso and Rissler 2019, p. 12). At higher temperatures, salamanders must increase feeding frequency to maintain energy balances (Huey and Kingsolver 2019, entire). If salamanders are not able to increase feeding frequency or if prey are not available in sufficient quantities, then increased metabolism caused by temperature increases may have geographic group-level demographic consequences, such as decreased body sizes and growth rates (Caruso et al. 2014, p. 1,757; Muñoz et al. 2016, p. 8,744). Reductions in body size could lead to delayed maturity or reduced fecundity, ultimately leading to geographic group declines.

Future precipitation is predicted to vary less than temperature; long-term mean annual changes may be no more than plus or minus 10–15 percent of current totals (Dettinger et al. 2018, p. 5). However, precipitation extremes (both as deluge and drought) are expected to increase markedly under climate change (Dettinger et al. 2018, p. 5). As a result of projected warming, the transition from rain to snow during a storm is expected to rise by 457–914 m (1,500–3,000 ft) (Dettinger et al. 2018, p. 21). Sierra Nevada snowpacks will be unlikely to form below about 1,829 m (6,000 ft) elevation, and snowpacks will be reduced by more than 60 percent across most of the Sierra Nevada by the end of the century (Dettinger et al. 2018, p. 21). Losses of snowpack may be even greater due to feedback loops with warming trends causing snow cover losses, and snow cover losses resulting in warmer land surfaces, and thus enhanced warming trends in turn (Dettinger et al. 2018, p. 5). The higher snow-dominated elevations from 2,000–2,800 m (6,560–9,190 ft) will be the most sensitive to temperature increases (Point Blue 2011, p. 23). Seeps and springs fed by snowmelt may dry out or be more ephemeral during the non-winter months (Point Blue 2011, p. 24). This pattern could influence groundwater transport, and seeps and springs may be similarly depleted, leading to lower water levels and decreased area and hydroperiod (that is, duration of water retention) to support suitable habitat for the Kern Canyon slender salamander and the relictual slender salamander. More precipitation falling as rain and increased early snow melt is also expected to result in greater winter streamflow and floods that may impact salamander habitat by causing erosion of salamander habitat in stream margins (Dettinger et al. 2018, p. 5).

As a result of warmer temperatures, with corresponding tendencies for more rainfall, less snowfall, and earlier snowmelt, water will tend to exit bodies of surface water at high elevations earlier in the year (Harpold et al. 2015, entire). Additionally, the water that remains in habitats will evaporate and be used by plants more quickly due to warmer temperatures and increased evapotranspiration rates, so that by summer, soil moisture will be low (Harpold et al. 2015, entire). The average historical climatic water deficit, or the additional water that would have evaporated or transpired had it been present in the soils given the temperature, from 1990 to 2010 in the southern Sierra Nevada within the range of the Kern Canyon slender salamander and the relictual slender salamander is 840.6 mm (33.1 in) (Hegewisch et al. 2018, unpaginated). By 2039, the 20-year average climatic water deficit is projected to increase by 2.0–69.1 mm (0.1–2.7 in) and, by 2069, the 20-year average is projected to increase by 75.6–200.9 mm (3.0–7.9 in) (Hegewisch et al. 2018, unpaginated). Furthermore, total soil moisture in the summer is expected to decrease in areas at high elevation on Breckenridge Mountain (Hegewisch et al. 2018, unpaginated).

The Kern Canyon slender salamander and the relictual slender salamander will likely be impacted by climate change, but the full extent of impacts that climate change may have on terrestrial salamanders is poorly understood. Changing climatic conditions may have direct impacts on salamander physiology, survival, reproduction, recruitment, and population growth. Additionally, climate change may have indirect impacts on the species including changes in habitat quantity and quality, and prey distribution and abundance. For the Kern Canyon slender salamander and the relictual slender salamander to successfully forage and meet their energy requirements, temperature and moisture conditions must be suitable in adequate durations. Reduced sedimentary moisture may impact the survival of the Kern Canyon slender salamander and the relictual slender salamander by further constraining the time that the salamanders can be active on the surface. Reduced ambient moisture may also decrease the amount of suitable microhabitat for breeding and rearing as the salamanders are thought to need cool and damp protected microhabitat for egg laying. Additionally, warmer, and drier fire seasons due to climate change are predicted to result in more frequent fires burning at high severity (Parks and Abatzoglou 2020, entire).

Overall, the Sierra Nevada region is likely to be much drier in the future and the climatic water deficit will increase over the next 50 years due to climate change (Dettinger et al. 2018, p. 23; Hegewisch et al. 2018, unpaginated). Climate change is expected to affect the Kern Canyon slender salamander and the relictual slender salamander through degradation of seep and spring habitat, loss of suitable microhabitat conditions, and possibly, reduction in survival and fecundity of salamanders with risk varying across habitat type and elevation.

Conservation Efforts and Regulatory Mechanisms

The Kern Canyon slender salamander is listed in the State of California as a threatened species. As a threatened species under the CESA, ''take,'' which is described as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill, of the Kern Canyon slender salamander is prohibited. The relictual slender salamander is designated as a California Species of Special Concern. The Species of Special Concern designation carries no formal legal protection; the intent of the designation is to focus attention on animals of conservation risk, stimulate research on poorly known species, and achieve conservation and recovery of these animals before they meet criteria for listing as threatened or endangered.

The Kern Canyon slender salamander and the relictual slender salamander are designated by the USFS as Species of Conservation Concern. The USFS land management plans are designed to consider the needs of the Species of Conservation Concern and guide management that sustains habitat or conditions to support or restore populations of Species of Conservation Concern. While the current draft land management plan for Sequoia National Forest does not include specific measures for the Kern Canyon slender salamander or the relictual slender salamander, the land management plan outlines desired habitat management conditions for riparian areas which,

upon implementation, will provide a habitat benefit for the species.

Current Condition

We describe the current condition of the Kern Canyon slender salamander and the relictual slender salamander by characterizing their status in terms of resiliency, redundancy, and representation. We analyze the current conditions of each geographic group of each species by considering the threats and their effects on individual and population needs. The analysis of the current condition of each geographic group, which we use as a proxy for populations due to limited data on the two species, allows us to assess geographic group resiliency.

There are no population estimates for the Kern Canyon slender salamander or the relictual slender salamander. In the absence of population estimates, our analysis of the current condition of geographic groups is limited to the available records of observations for the species and the distribution of threats across the landscape. Many of the recorded observations of the species are from sites that were surveyed only once 30–40 years ago, and we have no more current information on the presence or absence of individuals from these sites. In these cases, there is uncertainty in assessing the current condition of the salamanders at the site. The lack of information on population size and structure of the Kern Canyon slender salamander and the relictual slender salamander and the absence of robust records of observations contributes to uncertainty in the analysis of the current condition of the species.

Kern Canyon Slender Salamander Current Condition

As discussed above in Background, the Kern Canyon slender salamander is currently considered extant at 8 sites in the Lower Kern River Canyon geographic group and the Erskine Creek Canyon geographic group. Species experts indicate that the sites within the Lower Kern River Canyon have been searched for the species in recent years; however, the species has not been found during these searches (Jockusch 2021b, pers. comm.). Because survey results are reported only when the species is present (that is, a positive survey) and not reported when the species is not encountered (that is, a negative survey), our analysis of the current condition of the species is limited to only positive surveys. Without documentation of negative surveys at these locations, we are unable to determine whether the species has been extirpated from these areas or if the species is still present but the current level of survey effort is inadequate to detect them. Species experts also indicate that the abundance of the species has declined across the range of the species (Jockusch 2021b, pers. comm.). Furthermore, the Kern Canyon slender salamander is currently found in wet patches of habitat in riparian habitat and the species no longer seems to occupy open grassland habitat (Jockusch 2021b, pers. comm.).

Lower Kern River Canyon Geographic Group—The Lower Kern River Canyon geographic group is composed of 11 historically occupied sites in the small streams, seeps, and springs adjacent to the Lower Kern River, south of Isabella Lake to Stark Creek. Communication with species experts indicates that the Kern Canyon slender salamander may be largely or entirely extirpated from the nine sites within the Lower Kern River Canyon that are to the west of the two easternmost sites near Miracle Hot Springs (Jockusch 2021b, pers. comm.). Roads, recreation, grazing, infrastructure, fire, and climate change are currently impacting this geographic group.

Development and roads (including State Route 178) are present throughout the Lower Kern River Canyon. The area has high recreation use with many access roads, trails, and camping areas (Service 2022a, figure 16). Dispersed camping was prohibited at some camp sites along the Lower Kern River beginning in the 1980s; therefore, impacts of recreation in this area have likely decreased since that time. Grazing takes place throughout the Lower Kern River Canyon and sensitive canyon bottom habitat has been degraded by ground disturbance and trampling by livestock (USFS 2011a, p. 44; Service 2022a, figure 17). However, between 2003 and 2004, three springs within Dougherty Canyon were fenced to exclude livestock and to protect the riparian vegetation associated within the area of three of the sites occupied by Kern Canyon slender salamander (USFS 2011a, p. 76).

Commercial timber harvest has not occurred in the area (Service 2022a, figure 18). However, tree mortality associated with drought and insect outbreaks has occurred in proximity to occupied sites, which may result in timber harvest to remove dead trees and hazard tree removal along State Route 178, USFS roads, or trails. Additionally, there is an electrical substation within 1,100 m (3,609 ft) of the easternmost site of this geographic group, and a transmission line runs south from the substation passing within 900 m (2,953 ft) of the same site (Service 2022a, figure 20). The impact of maintenance of this utility infrastructure on Kern Canyon slender salamander habitat may be low due to the distance between the utility infrastructure and the patches of habitat occupied by the species. From 1988–2017, this geographic group experienced frequent fires at a range of severities that may have impacted the condition of habitat (Service 2022a, figure 21). Moreover, fire suppression has affected riparian habitat by increasing conifer density and decreasing riparian herbaceous vegetation (USFS 2019b, p. 104). The fire threat remains high to very high throughout the canyon (Service 2022a, figure 22).

No information is available on dispersal or the availability of mates within the Lower Kern River Canyon. However, species experts have opined that the abundance of the Kern Canyon slender salamander has declined across its range (Jockusch 2021b, pers. comm.). Additionally, all sites are 300 m (984 ft) or more apart, and a high density of roads and trails extends throughout the canyon. Therefore, dispersal and access to mates in this geographic group is likely limited given the poor dispersal ability of slender salamanders and the small numbers of individuals that have been observed in the Lower Kern River Canyon. Considering the threats currently impacting this species, the habitat characteristics of seeps, springs, and streams; cool, damp microhabitats; and debris are likely degraded.

Overall, the resiliency of the Lower Kern River Canyon geographic group is reduced from historical conditions due to the possible extirpation of the species from many sites within the geographic group and ongoing threats to habitat from road construction and maintenance, recreation, grazing, fire, infrastructure development, and climate change.

Erskine Creek Canyon Geographic Group—The Erskine Creek Canyon geographic group is made up of four sites along Erskine Creek, two sites along Bodfish Creek, and one site near Eagle Peak in the Piute Mountains. This geographic group is likely small due to the patchy habitat distribution and the small number of individuals that have been observed over limited surveys. Dispersal may be limited as the occupied sites within this geographic group are separated by 350 m (1,148 ft), which is greater than the maximum distance traveled by slender salamanders. However, due to the presence of contiguous suitable habitat between the closest occupied sites along Erskine Creek, it is possible that the creek and associated riparian habitat may facilitate dispersal of the Kern

Canyon slender salamander among sites along the creek.

This geographic group experiences many of the same threats that were described for the Lower Kern River Canyon geographic group, though the sites of this geographic group are set back and separated from State Route 178, the electrical substation, and power lines. However, dirt roads run along both Erskine Creek and Bodfish Creek. Fires of moderate and high severity in 1984 and 2010 likely degraded habitat in this geographic group (Service 2022a, figure 21), and the fire threat remains very high throughout the area (Service 2022a, figure 22). Additionally, this geographic group is outside of Sequoia National Forest, so the Kern Canyon slender salamander does not receive the same conservation measures as it does in Sequoia National Forest. Overall, the current condition of this geographic group is likely better than the Lower Kern River Canyon geographic group as habitat outside of the Lower Kern River Canyon is less impacted by recreation and grazing. However, less is known about land management outside of the National Forest. The resiliency of this geographic group is likely reduced from historical conditions due to reduced abundance across the range of the species as well as past and ongoing habitat degradation from road construction and maintenance, fire, and climate change.

Kern Canyon Slender Salamander Current Condition Summary—Overall, there is uncertainty in the current condition of both geographic groups as there is limited recent information on this species. The resiliency of the two geographic groups is likely reduced from historical conditions due to the existing threats to the species, especially within the Lower Kern River Canyon, and the decline in abundance of the species across its range. Additionally, the species may be largely or entirely gone from many sites within the Lower Kern River Canyon. The redundancy of the species is likely reduced from historical conditions, as the species currently occupies fewer sites that are distributed over a narrower range. In relation to the scale of catastrophic events that are likely to occur, such as the size of fires, the redundancy of the species is limited. In terms of representation, the species is no longer found in open grasslands. Therefore, the species may currently persist in a limited ecological setting that is reduced from historical conditions.

Relictual Slender Salamander—Current Condition

As discussed in Background, the relictual slender salamander historically occupied 13 sites that we categorized into three geographic groups: the Lower Kern River Canyon geographic group, the Lucas Creek geographic group, and the Squirrel Meadow geographic group. The relictual slender salamander is presumed to be extirpated from all sites within the Lower Kern River Canyon geographic group. The two extant geographic groups are associated with patchy mesic habitat in conifer forest and oak woodland on Breckenridge Mountain (Hansen 2021, pers. comm.). The habitat currently occupied by the species is estimated to consist of less than 0.4 ha (1 ac) (Hansen 2021, pers. comm.). The current condition of the relictual slender salamander has been impacted by road construction, grazing, timber harvest, hazard tree removal, fire, and climate change.

Lucas Creek Geographic Group—The Lucas Creek geographic group is composed of three sites near Lucas Creek on Breckenridge Mountain. Within this geographic group, relictual slender salamanders have been observed only in pairs or small numbers. It is unknown whether dispersal occurs among sites within this geographic group. The occupied sites are separated by 350 m (1,148 ft) or more, which is beyond the maximum distance traveled by slender salamanders (18.3 m (60.0 ft) (Cunningham 1960, p. 96). However, Lucas Creek and associated riparian and meadow habitats may facilitate dispersal of relictual slender salamanders to occupied sites that are found along the creek and its tributaries. Dispersal between the Lucas Creek geographic group and the Squirrel Meadow geographic group is not thought to occur regularly as the geographic groups are separated by 5 km (3.1 mi).

The threats that are likely currently impacting this geographic group are road construction and maintenance, recreation, timber harvest, hazard tree removal, grazing, fire, and climate change. A county road runs between the sites in this geographic group and there are several USFS roads and trails throughout the area (Service 2022a, figure 10). All sites are within the Breckenridge grazing allotment (Service 2022a, figure 11). Grazing is allowed from April 1 to October 15, when salamanders on Breckenridge Mountain have been found active on the surface (Stewart 2010, p. 10). USFS timber harvest has taken place near all sites within this geographic group in 1987, 1988, 1996, and 2013, and habitat at these sites may still be impacted by legacy effects of these timber harvests (Service 2022a, figure 12). Additionally, extensive tree mortality necessitating hazard tree removal has occurred near Lucas Creek and its tributaries (Service 2022a, figure 13). This geographic group has not been impacted by fire since 1984. However, the fire threat as measured by CAL FIRE is high to very high at the sites within this geographic group (Service 2022a, figure 14, figure 15).

Considering the ongoing threats to this geographic group and the impacts of these threats, the habitat characteristics of seeps, springs, and streams; cool and damp microhabitat; and debris may be degraded. Dispersal may be restricted by the distance between occupied sites and the presence of roads, trails, and timber harvest. Regarding resiliency, this geographic group may be vulnerable to stochastic events because of its small size and the ongoing threats to habitat.

Squirrel Meadow Geographic Group—The Squirrel Meadow geographic group includes five sites occupied by the relictual slender salamander on Breckenridge Mountain to the east of Lucas Creek. We lack specific information on the exact location of the three sites associated with Mill Creek and the site within the Flying Dutchman drainage (table 1). At the site northeast of Squirrel Meadow, the relictual slender salamander is found within a strip of moist habitat about 1 m (3.3 ft) wide that is sustained by a seep (Jockusch 2021a, pers. comm.). The habitat at this site was damaged when a logging road was rerouted through the seep in the early 1980s (Jockusch et al. 2012, p. 18). Following these events, only four relictual slender salamanders were found at the site in 1983 and no individuals were found at the site during targeted searches over the following 20 years (Jennings and Hayes 1994, p. 24; Jockusch et al. 2012, p. 18; CNDDB 2022, unpaginated). A subsequent wildfire in 1988 that burned at low and moderate severity further compromised habitat at the site (Service 2022a, figure 14; Jockusch et al. 2012, p. 18).

In recent years, the relictual slender salamander appears to have rebounded at the site, as 15 salamanders were found in 2017 and 7 salamanders were observed in 2021 (Jockusch 2021a, pers. comm.; Jockusch 2021b, pers. comm; CNDDB 2022, unpaginated). Additionally, 9 of the salamanders found in 2017 were gravid females that were found associated with a communal

nest with at least 200 eggs (Jockusch 2021a, pers. comm.).

Road construction, timber harvest, hazard tree removal, fire, climate change, and possibly grazing have impacted the relictual slender salamander in this geographic group. As mentioned above, a USFS road runs directly through the seep that provides important habitat for this geographic group, and other roads are located adjacent to the site (Service 2022a, figure 10). The site northeast of Squirrel Meadow is outside of the boundaries of USFS grazing allotments (Service 2022a, figure 11). However, other sites are within the Breckenridge grazing allotment (Jockusch 2021b, pers. comm.). Additionally, timber harvest in 2013 and extensive tree mortality have occurred along the roads near the site northeast of Squirrel Meadow (Service 2022a, figure 12, figure 13). The fire threat is very high for this geographic group (Service 2022a, figure 15). Dispersal among sites in this geographic group is unknown but may be limited between sites that are within different drainages and separated by roads.

Considering the past threats that considerably altered habitat and the ongoing threats of road maintenance, grazing, fire, and climate change, the habitat characteristics of seeps, springs, and streams; cool and damp microhabitats; and debris are likely degraded. Overall, the resiliency of this geographic group is reduced from historical conditions due to habitat degradation and the ongoing threats to the habitat.

Relictual Slender Salamander Current Condition Summary—Of the three known geographic groups of the relictual slender salamander, two are extant and one is presumed to be extirpated. The two extant geographic groups, Lucas Creek and Squirrel Meadow, are both on Breckenridge Mountain and are approximately 5 km (3.1 mi) apart. The extant geographic groups are composed of only a few occupied sites that have been impacted by stressors and continue to be influenced by some stressors. Therefore, the geographic groups likely have reduced resiliency from historical conditions. In terms of redundancy, the ability of the species to withstand catastrophic events, we note that the species has reduced redundancy from historical conditions as the species occupies fewer sites that are distributed over a smaller area due to the extirpation of the Lower Kern River Canyon geographic group. In relation to the scale of catastrophic events that are likely to occur, such as the size of recent fires in the Sierra Nevada region, the redundancy of the species is very limited, and one fire could result in extinction of the species. The extirpated Lower Kern River Canyon geographic group included characteristics that were unique to the geographic group including habitat at lower elevation and salamanders that exhibited different periods of seasonal surface activity. The species may have lost genetic and ecological diversity through the extirpation of the Lower Kern River geographic group. Both extant geographic groups are found in similar habitat at high elevations on Breckenridge Mountain. Therefore, in terms of representation, the species currently exists in a limited ecological setting that is reduced from historical conditions.

Future Condition

We now will present our analysis of the future conditions of the Kern Canyon slender salamander, considering how those past and current factors discussed will continue to act on the species into the future for our foreseeable future timeframe of 50 years. While our analysis of the future conditions of the Kern Canyon slender salamander is based on the best scientific information available, substantial uncertainty remains in our understanding of these species and how they will respond to future conditions. The uncertainty in the current distribution and current condition of the Kern Canyon slender salamander contributes uncertainty to our assessment of the long-term future viability of the species.

As part of the SSA, we also developed two future condition scenarios to capture the range of uncertainties regarding future threats and the projected responses by the relictual slender salamander. Our scenarios examined possible future impacts of climate change, timber harvest, hazard tree removal, and fire. Because we determined that the current condition of the relictual slender salamander was consistent with an endangered species (see **Determination of Status for the Kern Canyon Slender Salamander and the Relictual Slender Salamander**, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2022a, pp. 42–50) for the full analysis of future scenarios.

The future scenarios consider the interactive effects of future climate change, described by RCP scenarios contributed by the Working Group III to the Fifth Assessment Report and described in the most recent Synthesis Report of the Intergovernmental Panel on Climate Change (IPCC 2014, pp. 9, 22, 57). In our future conditions analysis, we consider the ''intermediate'' emissions scenario of RCP 4.5 (Scenario 1) and the ''very high'' emissions scenario of RCP 8.5 (Scenario 2).

Under both future scenarios, the threats that interact synergistically with climate change are expected to grow in magnitude over time with increasing greenhouse gas emissions. The threat of fire is associated with the effects of climate change, such as increased drought, lower soil moisture, and decreased snowpack. Therefore, fire will continue to be a threat into the future with greater fire threat associated with increasing greenhouse emissions. We expect the pattern of increasing severity of fire and area burned in fires will continue to increase into the future under both future scenarios, with greater increases under Scenario 2. Additionally, timber harvest of dead trees and hazard tree removal will continue to increase in magnitude in the future with increasing greenhouse gas emissions, as drought conditions will continue to weaken trees and make them more susceptible to herbivory and disease. We do not have information to indicate that the existing threats of roads, recreation, grazing, and infrastructure will change in magnitude in the future. Furthermore, we have limited information on predation of the Kern Canyon slender salamander, but there is no indication that predation will increase from current levels in the future. As most of the range of the salamander is within National Forest lands where it is considered a USFS Species of Conservation Concern, the USFS is expected to continue to minimize the impacts of the threats posed by land management activities into the future. Therefore, these existing threats are expected to persist at the same magnitude as under the current condition for both future scenarios.

We examine the resiliency, redundancy, and representation of the Kern Canyon slender salamander under both plausible scenarios. Resiliency of geographic groups of this species depends on the availability of seeps, springs, and streams; cool and damp microhabitat; small invertebrate prey; and mates; and how these habitat factors influence species survival, dispersal, fecundity, and abundance. As we have a limited understanding of the species biology and the current condition of the species, our ability to predict the future condition of the species based on changes in availability of individual and population needs is somewhat limited. However, we can predict the magnitude

of threats to the species under the future scenarios and their impact on the viability of geographic groups of the Kern Canyon slender. We expect geographic groups of this salamander species to experience different changes to its habitat under these scenarios. We discuss the expected future resiliency of each geographic group based on the events that would occur under each scenario below. We then analyze the overall resiliency, representation, and redundancy of the species under each future scenario.

Under Scenario 1, with RCP 4.5 greenhouse gas emissions, moderate warming and drying will occur throughout the range of the Kern Canyon slender salamander. Reductions in soil moisture and snow water equivalent are expected to more than double within 50 years. We expect these changes in climate will result in reduced water flow and more arid conditions in slender salamander habitat. Drying will be more extreme in the high-elevation areas occupied by the species (Dettinger et al. 2018, p. 5). In these areas, the April 1st snow water equivalent will be reduced by up to 81 percent in the next 50 years. Reduction in snowpack will result in reduced water retention and runoff in the spring and summer, with runoff occurring earlier in the spring. Summer soil moisture is also projected to decline over time for all geographic groups of both species. Within 50 years, it is likely that water levels will be reduced in seeps, springs, and perennial springs, and some water sources may have truncated periods of water retention. Additionally, there may be less cool and moist microhabitat at high elevations. We expect that these changes in hydrology will reduce the suitability and availability of habitat for the Kern Canyon slender.

Additionally, under Scenario 1, both the threat of fire and the severity of fires will increase throughout the range of the Kern Canyon slender salamander. The species and its habitat will also be impacted by more frequent extreme weather events including winter storms and flooding. Increased fire and flooding will likely degrade seep, spring, and stream margin habitat and may result in direct mortality of salamanders. Additionally, increased tree mortality will lead to an increase in timber harvest of dead trees and hazard tree removal along roads and trails. The presence of roads, recreation, grazing, timber harvest, and infrastructure will continue to impact the species and their habitat over the next 50 years. The USFS will continue to minimize impacts to both species within the National Forests; however, the Kern Canyon slender salamander sites located on private lands are not afforded the same protections.

Under Scenario 2, higher greenhouse gas emissions past mid-century (RCP 8.5) will result in greater warming and drying, increased threat of fire, and greater frequency of extreme weather events than under Scenario 1. The impacts from roads, recreation, grazing, timber harvest, and infrastructure are expected to continue to pose a threat to the Kern Canyon slender salamander and its habitat at the same magnitude as under the current conditions. The USFS will continue to minimize impacts to the species within the National Forest; however, the Kern Canyon slender salamander sites located on private lands are not afforded the same protections.

Within 50 years, under Scenario 2, extreme weather events will occur more frequently. Additionally, temperatures and fire threat will increase, and April 1st snow water equivalent and summer total soil moisture will decrease to a greater degree than under Scenario 1. These changes will likely result in reduction of seep, spring, and stream habitats and suitable microhabitats. Loss of habitat will occur more often at high elevations where drying will be most severe. The April 1st snow water equivalent is predicted to decrease by up to 99 percent and summer total soil moisture is predicted to decrease by up to 27 percent at high elevations. Furthermore, prolonged droughts may reduce the time that the salamanders can be active on the surface without the risk of desiccation. At higher elevations, temperature increases may result in extended periods of favorable conditions, and salamanders may increase their surface activity. However, the dry conditions predicted under this scenario are expected to restrict the surface activity of salamanders at higher elevations despite increased temperatures. At lower elevations, temperature increases may exceed the tolerances of the species, resulting in restricted surface activity. Restricted surface activity at all elevations would limit the ability of salamanders to find prey and mates resulting in lower survival and fecundity.

The following sections summarize the conditions of the Kern Canyon slender salamander under both future scenarios based upon the best available information.

Kern Canyon Slender Salamander—Future Condition

Under Scenario 1 within 50 years, we expect that the water level of the seeps, springs, and streams that provide habitat for the Kern Canyon slender salamander will decline resulting in reduced condition of habitat. Habitat will also continue to be impacted by roads, heavy recreation use, grazing, infrastructure, and more frequent fires. We anticipate that the resiliency of both geographic groups will likely be slightly reduced from the current condition due to this habitat degradation. In 50 years, we expect that reductions in the quantity and quality of suitable habitat will result in minor reductions in the survival and abundance of Kern Canyon slender salamander within both geographic groups. We expect that the resiliency of both geographic groups of Kern Canyon slender salamander will be slightly reduced from the current condition. Both geographic groups are expected to retain occupied sites and, therefore, the species will maintain its current level of redundancy. We anticipate the Kern Canyon slender salamander will also retain ecological representation that is similar to the current condition. However, the Kern Canyon slender salamander will continue to be vulnerable to catastrophic events such as fires that are expected to occur more frequently under Scenario 1.

Under Scenario 2 within 50 years, we expect that the water level of the seeps, springs, and streams that provide habitat for the Kern Canyon slender salamander will decline. Additionally, as most sites occupied by the Kern Canyon slender salamander are located within narrow canyons along the margins of creeks and streams, habitat within both geographic groups of the Kern Canyon slender salamander will likely be degraded by more frequent higher volume precipitation and flooding events. We expect that this loss of habitat combined with habitat degradation from the continued impact of high recreation use, grazing, road, infrastructure, and increased incidence of fire, will likely result in reductions in survival and abundance of the Kern Canyon slender salamander within 50 years. As a result, the resiliency of both geographic groups will likely be reduced from the current condition. We expect that habitat loss will result in fewer occupied sites within 50 years. Therefore, within 50 years, we expect that the redundancy and representation of the species will be further reduced from the current condition, as the species will occupy fewer sites and exist in a further limited ecological setting. We anticipate Kern Canyon slender salamander will be more vulnerable to

extirpation from catastrophic events under this scenario.

Determination of Status for the Kern Canyon Slender Salamander and the Relictual Slender Salamander

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

In this proposed rule, we present summary evaluations of eight threats for the Kern Canyon slender salamander and the relictual slender salamander: roads (Factor A), recreation (Factor A), grazing (Factor A), timber harvest (Factor A), hazard tree removal (Factor A), infrastructure development (Factor A), fire (Factor A), and climate change (Factor E). We also evaluate existing regulatory mechanisms (Factor D) and ongoing conservation measures.

In the SSA, we also considered four additional threats: Overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); and effects associated with small population size (Factor E). We concluded that, as indicated by the best available scientific and commercial information, these threats are currently having little to no impact on either the Kern Canyon slender salamander or the relictual slender salamander, and thus their overall effect now and into the future is expected to be minimal. However, we consider them in the determination for each species, because although these minor threats may have low impacts on their own, combined with impacts of other threats, they could further reduce the already low number of Kern Canyon slender salamanders and relictual slender salamanders. For full descriptions of all threats and how they impact the species, please see the SSA report (Service 2022a, pp. 20–31).

For the purposes of this assessment, we considered the foreseeable future to be 50 years. This time period represents our best professional judgment of the foreseeable future conditions related to the range of available climate change models and for reasonable extrapolations of current trends.

Kern Canyon Slender Salamander: Status Throughout All of Its Range

The Kern Canyon slender salamander is a narrow endemic that inhabits a limited range, with individuals recorded from a small number of sites along the Lower Kern River Canyon and associated creeks. The species has been extirpated from multiple historically occupied sites within the Lower Kern River Canyon due in part to effects associated with road construction from the widening of State Route 178 (Factor A). The species also has reduced representation from historical conditions, as it is no longer found in grassland habitats.

Currently, habitat supporting the Kern Canyon slender salamander is affected by recreation (Factor A), grazing (Factor A), and continuing hydrologic effects associated with roads. These threats continue to degrade the seep and spring habitat, and in some rare cases may result in direct mortality of individual Kern Canyon slender salamanders. Occupied areas in the lower Kern River Canyon are particularly affected by recreation and OHV use. Commercial timber harvest (Factor A) is having only a minimal impact on the Kern Canyon slender salamander, as less than one percent of the species' range is subject to timber harvest. Hazard tree removal (Factor A) and timber harvest of dead trees is currently minimally impacting the Kern Canyon slender salamander as hazard tree removal only impacts small areas of habitat and is unlikely to result in mortality. Fire (Factor A) currently presents one of the largest risks to the Kern Canyon slender salamander. The threat of fire in Kern Canyon slender salamander habitat is high to very high throughout the range of the species, and few regulatory mechanisms are available to address the risk of catastrophic wildfire to the species.

Many of the effects associated with the other threats impacting the species are being reduced in magnitude due to regulatory mechanisms (Factor D) implemented by Sequoia National Forest. Sensitive riparian areas have been gated from OHVs and fenced off from livestock.

Although the Kern Canyon slender salamander is currently being impacted by these threats and has been extirpated from some sites in the Kern Canyon geographic group, the species continues to occupy habitat spread throughout multiple drainages and at a range of elevations (2,350–5,500 ft (716–1,676 m)). Therefore, the species currently has sufficient redundancy and representation to withstand loss from a catastrophic event such as wildfire. Although the threats described above are continuing to degrade the seep, spring, and stream habitat that supports the Kern Canyon slender salamander, the species maintains some population resiliency, redundancy, and representation. Additionally, regulatory mechanisms implemented by the Sequoia National Forest are reducing the magnitude of threats, and State listing under CESA provides additional take prohibitions for the species. For that reason, we found that the Kern Canyon slender salamander is not endangered throughout all of its range. However, we expect that threats affecting the species will increase in magnitude into the future. We analyzed threats under two plausible future scenarios: the ''intermediate'' emissions scenario of RCP 4.5 (Scenario 1) and the ''very high'' emissions scenario of RCP 8.5 (Scenario 2). Under both plausible future scenarios, climate change (Factor E) is expected to reduce the water level of the seeps and springs that support the Kern Canyon slender salamander. Habitat will also continue to be impacted by roads, recreation, and grazing. Climate change is expected to intensify tree mortality and fire, potentially increasing the need for timber harvest and hazard tree removal. Given the high risk of fire in the species' range, more populations could be lost to fire, and under Scenario 2, more populations are likely to be lost. In all future scenarios, we expect there will be further reductions in population resiliency and species redundancy.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we find that although the Kern Canyon slender salamander has reduced population resiliency and species redundancy and representation from its historical condition, it is not currently in danger of extinction throughout all of its range. However, the magnitude of all threats across the species' range is expected to increase in the foreseeable future, particularly as effects associated with climate change increase the frequency and severity of fire and the need for hazard tree removal, and the cumulative effect of those threats. Thus, after assessing the best available

information, we conclude that the Kern Canyon slender salamander is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Kern Canyon Slender Salamander: Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (hereafter ''Final Policy''; 79 FR 37578; July 1, 2014) that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.,* endangered). In undertaking this analysis for the Kern Canyon slender salamander, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For the Kern Canyon slender salamander, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. We examined the following threats: Roads (Factor A), recreation (Factor A); grazing (Factor A); timber harvest (Factor A); hazard tree removal (Factor A); infrastructure development (Factor A); fire (Factor A); overutilization due to recreational, educational, and scientific use (Factor B); disease (Factor C); predation (Factor C); effects associated with small population size (Factor E); and climate change (Factor E). We also evaluated existing regulatory mechanisms (Factor D). We found that the Kern Canyon geographic group may have a concentration of threats, as it faces additional threats due to roads, recreation, and infrastructure. However, the impact of these threats is only slightly higher in the Kern Canyon geographic group than in the Erskine Creek geographic group. Additionally, the Kern Canyon geographic group is within the boundary of Sequoia National Forest, so although some threats are of a higher magnitude there, ongoing measures undertaken by the National Forest are decreasing the impacts of grazing and roads. Thus, neither geographic group is so reduced or faces such threats that it would be likely to be in danger of extinction now. Overall, we found no concentration of threats in any portion of the Kern Canyon slender salamander's range at a biologically meaningful scale.

Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not need to consider whether any portions are significant and, therefore, did not apply the aspects of the Final Policy's definition of ''significant'' that those court decisions held were invalid.

Kern Canyon Slender Salamander: Determination of Status

Our review of the best available scientific and commercial information indicates that the Kern Canyon slender salamander meets the definition of a threatened species. Therefore, we propose to list the Kern Canyon slender salamander as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Relictual Slender Salamander: Status Throughout All of Its Range

The relictual slender salamander has a very narrow range; it is currently found from 8 sites, and the two extant geographic groups are separated by less than 5 km (3.1 mi). Historically, the relictual slender salamander occupied additional sites along route 178 in the Lower Kern River Canyon, but repeated searches of the area have failed to find the species, and species experts consider the relictual slender salamander to be extirpated from that area.

Currently, habitat supporting the relictual slender salamander is affected by recreation (Factor A), including a known primitive campsite on Breckenridge Mountain, grazing (Factor A), and continuing hydrologic effects associated with the small roads that pass through occupied areas (Factor A). These threats continue to degrade the seep and spring habitat that supports the species. Grazing is currently occurring in areas on Breckenridge Mountain during the times when the slender salamander is active on the surface, further degrading suitable habitat for the species. Commercial timber harvest (Factor A) has occurred in both geographic groups, and historical effects of logging may still be present in occupied habitat. Hazard tree removal (Factor A) and timber harvest of dead trees also have substantial impact on the species, particularly in the Lucas Creek area, which has experienced a high level of tree mortality. Existing sites in both extant geographic groups, particularly the Lucas Creek geographic group, are also far enough apart that relictual slender salamanders may not be able to disperse between occupied sites.

Fire (Factor A) currently presents one of the largest risks to the relictual slender salamander. The threat of fire in the Lucas Creek geographic group is particularly high, and the area has not burned since before 1984. However, effects associated with the other threats impacting the species are being reduced in magnitude due to regulatory mechanisms (Factor D) implemented by Sequoia National Forest; for example, some areas on Breckenridge Mountain have been fenced off from livestock grazing. However, few regulatory mechanisms are available to address the risk of catastrophic wildfire to the species, and the range of the species is limited enough that a single fire could cause the extinction of the species.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1)

factors, we find that the resiliency, redundancy and representation of the relictual slender salamander have been reduced from historical conditions. Effects of historical threats along with ongoing impacts from roads, grazing, fire, timber harvest, and hazard tree removal are continuing to degrade the habitat that supports the species, causing further reductions in resiliency and redundancy. The relictual slender salamander exists in a very narrow area in a limited ecological setting, and a single catastrophic event could cause the species to become extinct at any time. Thus, after assessing the best available information, we determine that the relictual slender salamander is in danger of extinction throughout all of its range. We find that a threatened species status is not appropriate for the relictual slender salamander because the magnitude and imminence of the threats acting on the species now result in the relictual slender salamander meeting the definition of an endangered species.

Relictual Slender Salamander: Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the relictual slender salamander is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the relictual slender salamander warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) because that decision related to significant portion of the range analyses for species that warrant listing as threatened, not endangered, throughout all of their range.

Relictual Slender Salamander: Determination of Status

Our review of the best available scientific and commercial information indicates that the relictual slender salamander meets the definition of an endangered species. Therefore, we propose to list the relictual slender salamander as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/endangered*), or from our Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (for example, restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If these species are listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of California would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Kern Canyon slender salamander and the relictual slender salamander. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Although the Kern Canyon slender salamander and the relictual slender salamander are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on these species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of

the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conferencing with the Service as described in the preceding paragraph during the time when the Kern Canyon slender salamander and the relictual slender salamander are proposed for listing include land management or other landscape-altering activities on Federal lands administered by the USFS (Sequoia National Forest) whose effects extend into the species' range, and would adversely affect either species at a scale and magnitude where their continued existence would be jeopardized (for example, widespread stream channelization or diversion, modification of spring openings, diversion of surface or ground water flow, or other activities that modify large portions of seep, spring, and stream habitat).

Once these species are listed, the requirement for consultation with the Service under 7(a)(2) applies. The threshold for consultation under 7(a)(2) is ''may affect,'' and some examples of Federal agency actions within the species' habitat that may then require consultation as described above could include management and any other landscape-altering activities on Federal lands administered by the USFS (Sequoia National Forest) and the BLM; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; construction and management of pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; construction and maintenance of roads, bridges, or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. Based on the best available information, the following actions are unlikely to result in a violation of section 9 for the relictual slender salamander, if these activities are carried out in accordance with existing regulations and permit requirements; this list is not comprehensive:

(1) Vehicle use on existing roads and trails in compliance with the Sequoia National Forest land management plan.

(2) Recreational use with minimal ground disturbance (for example, hiking, walking) in compliance with the Sequoia National Forest land management plan.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act for the relictual slender salamander if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) Destruction or alteration of the species' habitat by modification of spring opening, stream channelization or diversion, discharge of fill material, draining, ditching, tiling, or diversion of surface or ground water flow;

(3) Unauthorized modification of riparian areas or disturbance of rocks and woody debris in riparian areas in which the species is known to occur;

(4) Incompatible livestock grazing that results in direct or indirect destruction of riparian habitat; and

(5) Introduction of nonnative species that compete with or prey upon the relictual slender salamander species, such as the introduction of competing, nonnative aquatic animals to the State of California.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Regarding the Kern Canyon slender salamander, the Act allows the Secretary to promulgate protective regulations for threatened species pursuant to section 4(d) of the Act. The discussion below regarding protective regulations for the Kern Canyon slender salamander under section 4(d) of the Act complies with our policy.

III. Proposed Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened species. The U.S. Supreme Court has noted that statutory language similar to the language in section 4(d) of the Act authorizing the Secretary to take action that she ''deems necessary and advisable'' affords a large degree of deference to the agency (see *Webster* v. *Doe,* 486 U.S. 592, 600 (1988)). Conservation is defined in the Act to mean the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence

grants particularly broad discretion to the Service when adopting one or more of the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld, as a valid exercise of agency authority, rules developed under section 4(d) that included limited prohibitions against takings (see *Alsea Valley Alliance* v. *Lautenbacher,* 2007 WL 2344927 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* 2002 WL 511479 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

In the early days of the Act, the Service published at 50 CFR 17.31 a general protective regulation that would apply to each threatened wildlife species, unless we were to promulgate a separate species-specific protective regulation for that species. In the wake of the court's *CBD* v. *Haaland* decision vacating a 2019 regulation that had made 50 CFR 17.31 inapplicable to any species listed as a threatened species after the effective date of the 2019 regulation, the general protective regulation applies to all threatened species, unless we adopt a species-specific protective regulation. As explained below, we are adopting a species-specific rule that sets out all of the protections and prohibitions applicable to the Kern Canyon slender salamander.

The provisions of this proposed 4(d) rule would promote conservation of the Kern Canyon slender salamander by encouraging management of the habitat for the species in ways that facilitate conservation for the species. The provisions of this proposed rule are one of many tools that we would use to promote the conservation of the Kern Canyon slender salamander. This proposed 4(d) rule would apply only if and when we make final the listing of the Kern Canyon slender salamander as a threatened species.

As mentioned previously in Available Conservation Measures, section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of Federal actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

These requirements are the same for a threatened species with a species-specific 4(d) rule. For example, a Federal agency's determination that an action is ''not likely to adversely affect'' a threatened species will require the Service's written concurrence. Similarly, a Federal agency's determination that an action is ''likely to adversely affect'' a threatened species will require formal consultation and the formulation of a biological opinion.

Provisions of the Proposed 4(d) Rule

Exercising the Secretary's authority under section 4(d) of the Act, we have developed a proposed rule that is designed to address the Kern Canyon slender salamander's conservation needs. As discussed previously in Summary of Biological Status and Threats, we have concluded that the Kern Canyon slender salamander is likely to become in danger of extinction within the foreseeable future primarily due to grazing, recreation, fire, and climate change. Section 4(d) requires the Secretary to issue such regulations as she deems necessary and advisable to provide for the conservation of each threatened species and authorizes the Secretary to include among those protective regulations any of the prohibitions that section 9(a)(2) of the Act prescribes for endangered species. We find that, if finalized, the protections, prohibitions, and exceptions in this proposed rule as a whole satisfy the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the Kern Canyon slender salamander.

The protective regulations we are proposing for the Kern Canyon slender salamander incorporate prohibitions from section 9(a)(1) to address the threats to the species. Section 9(a)(1) prohibits the following activities for endangered wildlife: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce. This protective regulation includes all of these prohibitions for the Kern Canyon slender salamander because the species is at risk of extinction in the foreseeable future and putting these prohibitions in place will help to prevent further declines, preserve the species' remaining populations, and decrease synergistic, negative effects from other ongoing or future threats.

In particular, this proposed 4(d) rule would provide for the conservation of the Kern Canyon slender salamander by prohibiting the following activities, unless they fall within specific exceptions or are otherwise authorized or permitted: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce.

Under the Act, ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating take would help preserve the species' remaining populations and

decrease synergistic, negative effects from other ongoing or future threats. Therefore, we propose to prohibit take of the Kern Canyon slender salamander, except for take resulting from those actions and activities specifically excepted by the 4(d) rule.

Exceptions to the prohibition on take would include all of the general exceptions to the prohibition against take of endangered wildlife, as set forth in 50 CFR 17.21 and certain other specific activities that we propose for exception, as described below.

The proposed 4(d) rule would also provide for the conservation of the species by allowing exceptions that incentivize conservation actions or that, while they may have some minimal level of take of the Kern Canyon slender salamander, are not expected to rise to the level that would have a negative impact (that is, would have only de minimis impacts) on the species' conservation. The proposed exceptions to these prohibitions include:

(1) Fuels management activities that are expected to have negligible impacts to the Kern Canyon slender salamander and its habitat, as long as they are conducted or authorized by the Federal agency with jurisdiction over the land where the activities occur. This includes fuels management activities developed by a Federal, State, county, or other entity to reduce the risk or severity of fire in Kern Canyon slender salamander habitat and to protect and maintain habitat that supports the species. These activities should be in accordance with established and recognized fuels management plans that include measures to minimize impacts to the species and its habitat, and:

(2) Fuels management activities on private lands where there is no Federal nexus. This exception applies to those situations, whether currently existing or that may develop in the future, where fuels management activities are essential to reduce the risk of catastrophic wildfire, and when such activities will be carried out in accordance with an established and recognized fuels or forest management plan that includes measures to minimize impacts to the species and its habitat.

Despite these prohibitions regarding threatened species, we may under certain circumstances issue permits to carry out one or more otherwise-prohibited activities, including those described above. The regulations that govern permits for threatened wildlife state that the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened species. These include permits issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act (50 CFR 17.32). The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to the conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we must cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve the Kern Canyon slender salamander that may result in otherwise prohibited take without additional authorization.

Nothing in this proposed 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or our ability to enter into partnerships for the management and protection of the Kern Canyon slender salamander. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between us and other Federal agencies, where appropriate. We ask the public, particularly State agencies and other interested stakeholders that may be affected by the proposed 4(d) rule, to provide comments and suggestions regarding additional guidance and methods that we could provide or use, respectively, to streamline the implementation of this proposed 4(d) rule (see Information Requested, above).

IV. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features.

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat,

the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We note that the court in *CBD* v. *Haaland* vacated the provisions from the 2019 regulations regarding unoccupied critical habitat. Therefore, the regulations that now govern designations of critical habitat are the implementing regulations that were in effect before the 2019 regulations.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act and in the 4(d) rule for the Kern Canyon slender salamander. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that a designation of critical habitat is not prudent when any of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or

(ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat.''

As discussed earlier in this document, no imminent threat of collection or vandalism identified under Factor B currently exists for these species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA report and proposed listing determination for both the Kern Canyon slender salamander and the relictual slender salamander, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to both the Kern Canyon slender salamander and the relictual slender salamander. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met, we have determined that the designation of critical habitat is prudent for both the Kern Canyon slender salamander and the relictual slender salamander.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Kern Canyon slender salamander and the relictual slender salamander is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical

habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of these two species and habitat characteristics where the species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Kern Canyon slender salamander and the relictual slender salamander.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species, and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features'' as the features that support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Space for Individual and Population Growth and for Normal Behavior

The Kern Canyon slender salamander and the relictual slender salamander are endemic to, and occur exclusively within, humid habitat associated with seeps, springs, and streams in the Greenhorn and Piute Mountains in the southern Sierra Nevada in Kern County. Both species' habitat is constrained to riparian zones adjacent to seeps, springs, and streams due to the narrow physiological tolerances of both species. Habitat within larger fast-moving bodies of water, such as the Kern River, are not suitable habitat and do not contain the physical or biological features that support the Kern Canyon slender salamander or the relictual slender salamander.

Primary habitat for the Kern Canyon slender salamander is composed of wet stream and seep margins within rocky, narrow canyons supporting chapparal shrubs, sycamore (*Platanus racemosa*), California buckeye (*Aesculus californica*), willow (*Salix* spp.), Fremont cottonwood (*Populus fremontii*), interior live oak (*Quercus wislizeni*), canyon live oaks (*Quercus chrysolepis*), and foothill pine (*Pinus sabiniana*). Historically, the Kern Canyon slender salamander was found on exposed hillsides and open grasslands, but the primary habitat of the species is now limited to riparian habitats or other moist microsites (Lannoo 2005, p. 692; Jockusch 2021b, pers. comm.).

Primary habitat for the relictual slender salamander is composed of seeps, perennial springs, and streams in rocky habitat supporting limited tree cover of oaks (*Quercus* spp.), buckeyes (*Aesculus* spp.), sycamores (*Platanus racemosa*), pines (*Pinus* spp.), and firs (*Abies* spp.).

We do not know how much suitable habitat and habitat connectivity is required to sustain viability of either the Kern Canyon slender salamander or the relictual slender salamander. There may be distinct, non-interbreeding populations or there may be some level of dispersal between localities associated with the same streams or different aquatic features providing at least a low level of connectivity between individual populations. The minimum number of populations necessary to sustain the salamanders is unknown. The distribution and quantity of available suitable habitat across the range necessary to support populations of either the Kern Canyon slender salamander or the relictual slender salamander are unknown.

While the amount of habitat necessary to support Kern Canyon slender salamander and relictual slender salamander individual and population growth and normal behavior is unknown, preservation of these features is essential for the species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The diets of the Kern Canyon slender salamander and the relictual slender salamander are assumed to be similar to other *Batrachoseps* species such as the California slender salamander and the Pacific slender salamander, which prey upon small invertebrates, earthworms, and slugs (Cunningham 1960, p. 98; Adams 1968, p. 171; Stebbins and McGinnis 2012, p. 127). The prey-related requirements (abundance, diversity, range, etc.) to sustain populations of either species are unknown.

Water is essential for survival of the Kern Canyon slender salamander and the relictual slender salamander. We have no specific information on the amount of water they require; however, both species are restricted to patches of humid habitat near sources of water such as small seeps, springs, and streams. The relictual slender salamander has a closer association with water than other species of terrestrial salamanders as relictual slender salamanders have been found submerged in water and under cover objects with water beneath them. During time of drought, water sources may become scarce, and associated riparian areas may become hot and dry. The relictual slender salamander and the Kern Canyon slender salamander may need to expend more energy and time in search of new water sources and humid habitat or may restrict surface activity and foraging time to seek shelter in subterranean refugia to avoid desiccation during time of drought.

Cover or Shelter

Kern Canyon slender salamanders and relictual slender salamanders require refugia to regulate body temperature,

forage for prey, and to escape and hide from predators. When active on the surface, Kern Canyon slender salamanders and relictual slender salamanders shelter under rocks, woody debris, bark, and leaf litter with sufficient interstitial spaces to allow for movement of salamanders. During dry and hot or cold seasons, Kern Canyon slender salamanders and relictual slender salamanders likely shelter in subterranean refugia consisting of passages made by other animals or produced by root decay, soil shrinkage, or water erosion (Cunningham 1960, p. 95; Lannoo 2005, pp. 688–693). The Kern Canyon slender salamander and the relictual slender salamander perform buccopharyngeal respiration (oxygen is taken up simply by diffusion or by the contraction and relaxation of the muscles of the cheeks or mouth and throat) and are susceptible to cutaneous water loss and desiccation. Therefore, a cool, moist microhabitat, either shielded from the sun by a cover object or subterranean, is likely preferred refugia to properly maintain suitable body temperature and moisture levels, forage for prey, and escape from predators.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Virtually no information is available concerning the life cycle of the Kern Canyon slender salamander. Two communal nests of the relictual slender salamander containing numerous gravid females and approximately 125–200 eggs within each nest were observed during the months of March and June (Wake et al. 2002, p. 1026; Jockusch et al. 2012, p. 17; Jockusch 2021a, pers. comm.). These nests were associated with rocks adjacent to seeps (Jockusch 2021a, pers. comm.). Field observations of relictual slender salamanders indicate that gravid females may carry 16–22 eggs (Jockusch 2021b, pers. comm.). In general, female *Batrachoseps* produce one clutch annually (Jockusch 2021b, pers. comm.).

No information is available as to whether eggs or juvenile Kern Canyon slender salamanders and relictual slender salamanders require different habitat than adults. However, based on their small size and limited range, they likely are found in the same habitat.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the Kern Canyon slender salamander and the relictual slender salamander from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the SSA report (Service 2022a, entire; available on *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0081). We have determined that the following physical or biological features are essential to the conservation of the Kern Canyon slender salamander and the relictual slender salamander:

(1) Aquatic habitat consisting of seeps, springs, and streams.

(2) Riparian habitat consisting of terrestrial areas adjacent to seeps, springs, and streams that contain:

a. Sufficient refugia consisting of woody debris, leaf litter, and rocks with abundant interstitial spaces to facilitate safe resting, foraging, and movement;

b. Suitable prey to allow for survival, growth, and reproduction; and

c. Riparian vegetation that provides shade cover contributing to cool and moist surface conditions for maintaining homeostasis, foraging opportunities, and physical structure for predator avoidance.

(3) Corridors of aquatic habitat or riparian habitat that provide connectivity between patches of occupied habitat to allow for movement of individuals.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Kern Canyon slender salamander and relictual slender salamander may require special management considerations or protection to reduce threats posed by: Destructive fires; climate change; and activities that cause surface disturbance including forest management activities (for example, fuels reduction, hazard tree management, forest restoration, prescribed fire), inappropriate livestock grazing, recreational activities, road construction and maintenance, and development.

Management activities that could ameliorate these threats include (but are not limited to): Maintaining existing populations and suitable habitat within population areas; restoring historical habitat and establishing new populations in the lower Kern River Canyon; use of best management practices designed to reduce erosion and bank destruction; protection of riparian corridors and woody vegetation; fencing to exclude livestock from occupied riparian areas; establishing and enhancing connectivity between currently occupied populations and adjacent suitable habitat; and developing habitat management plans based on site-specific conditions for Kern Canyon slender salamander and relictual slender salamander habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

We are proposing to designate critical habitat in areas within the geographical area occupied by the Kern Canyon slender salamander and the relictual slender salamander at the time of listing. We also are proposing to designate specific areas outside the geographical area occupied by the Kern Canyon slender salamander and the relictual slender salamander because we have determined that those areas are essential for the conservation of the species. The currently occupied habitat for the Kern Canyon slender salamander and the relictual slender salamander is limited. Therefore, we identified suitable habitat within the estimated historical range of the Kern Canyon slender salamander and the relictual slender salamander that meets the definition of critical habitat and that is essential to provide for species redundancy into the foreseeable future.

Sources of data for these two species and their habitat requirements include the CNDDB, peer-reviewed articles on these species and/or related species, and communication with species experts.

For areas within the geographic areas occupied by the Kern Canyon slender salamander and the relictual slender salamander at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

We determined occupied areas for each species by reviewing the CNDDB occurrence records for the species and peer-reviewed articles. Systematic surveys have not been carried out for both species, and no recent searches have been conducted for these species at some localities where these species were previously detected. As discussed above in Background, both species are

cryptic and shelter under cover objects when they are active on the surface. Because of their cryptic nature and the scarcity of occurrence records for both species, we determined that if suitable habitat containing the physical or biological features was still present in an area where a Kern Canyon slender salamander or a relictual slender salamander was previously detected and if there is no record of repeated negative searches for the species in that area, that there was a high likelihood that the species would still be present even if it had not been recently detected. Therefore, based on the best available information, we considered all the CNDDB Element Occurrences (occurrences) for the Kern Canyon slender salamander as occupied areas for the species. Based on the best available information, we considered the occurrences of the relictual slender salamander within the lower Kern River Canyon to be extirpated or unoccupied areas for the species and we considered all other occurrences of the relictual slender salamander as occupied areas for the species.

(1) We selected all suitable habitat (habitat that contained the physical or biological features) within a 300-ft (91-m) radius of an occurrence record. A 300-ft (91-m) radius was based on the riparian conservation areas in Sequoia National Forest outlined in the Land Management Plan for Sequoia National Forest (USFS 2019a, p. 16).

(2) We selected additional contiguous suitable habitat consisting of stream segments downstream of occurrence records and associated riparian areas within a 300-ft (91-m) radius that contain the physical or biological features to include dispersal areas and corridors of habitat connectivity for the two species.

(3) We then constrained the boundary of a critical habitat unit based on potential effects of physical barriers (for example, residential housing developments) that cause habitat fragmentation and prevent connectivity and dispersal opportunities, as we consider that individuals of either species would be unable or unlikely to pass such barriers.

We conclude that the occupied areas we are proposing for critical habitat provide for the conservation of both species because they are habitat that contain all of the physical or biological features for the extant occurrences that have been reported to CNDDB and that facilitate connectivity and dispersal opportunities within and among occurrences.

As previously stated, we also identified unoccupied areas for the Kern Canyon slender salamander and the relictual slender salamander. We have determined that in order to recover the Kern Canyon slender salamander, connecting corridors of suitable habitat need to be maintained between areas occupied by the species. Therefore, we identified two stream segments and riparian habitat associated with small streams in the Kern Canyon within the estimated range of the Kern Canyon slender salamander that provide corridors of suitable habitat (that contain the physical or biological features) between areas occupied by the species. For the unoccupied areas for the Kern Canyon slender salamander, we selected areas within 20 ft (6 m) of the center flowline of the two stream segments and north-facing riparian areas in the Kern Canyon within 20 ft (6 m) of the center flowline of the Kern River (the Kern Canyon slender salamander is currently only found on the south side of the Kern River). The Kern River is not considered critical habitat for the Kern Canyon slender salamander. We include these unoccupied areas as proposed critical habitat for the Kern Canyon slender salamander for the purpose of maintaining habitat connectivity between areas occupied by the species, which is essential to the conservation of the species. Habitat connectivity is necessary to maintain the redundancy of the species and reduce the chance that a catastrophic event would eliminate all populations in an area.

We have determined that in order to recover the relictual slender salamander, additional populations will need to be reestablished in areas historically occupied by the species and connecting corridors of suitable habitat will need to be maintained. Therefore, we identified areas outside the geographic area occupied by the relictual slender salamander at the time of proposed listing that were historically occupied by the relictual slender salamander. For the relictual slender salamander, we selected all suitable habitat (habitat that contained the physical or biological features) within a 300-ft (91-m) radius of the occurrence records that are presumed extirpated in the Kern Canyon. We selected additional contiguous suitable habitat consisting of stream segments downstream of the occurrence records and associated riparian areas within a 300-ft (91-m) radius of the streams to include areas for reestablishment and corridors of habitat connectivity. We then selected north-facing riparian areas in the Kern Canyon that contain the physical or biological features to include connecting corridors of suitable habitat between areas for reestablishment and areas occupied by the relictual slender salamander at the time of listing. The Kern River is not considered habitat for the relictual slender salamander. We include these unoccupied areas as proposed critical habitat for the relictual slender salamander for the purpose of reestablishing populations, which are essential to the conservation of the species since few extant populations remain. The addition of reestablished populations would increase the redundancy and representation of the species and reduce the chance that a catastrophic event would eliminate all populations.

We conclude that these unoccupied areas for the Kern Canyon slender salamander and the relictual slender salamander will contribute to the conservation of these species, and they contain the physical or biological features for the species.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Kern Canyon slender salamander and the relictual slender salamander. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (that is, currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support the Kern Canyon slender salamander and the relictual slender

salamander's life-history processes. For the Kern Canyon slender salamander, the three occupied units contain all of the identified physical or biological features and support multiple life-history processes, and the one unoccupied unit contains only some of the physical or biological features necessary to support the Kern Canyon slender salamander's particular use of that habitat. For the relictual slender salamander, the two occupied units contain all of the identified physical or biological features and support multiple life-history processes, and the one unoccupied unit contains only some of the physical or biological features necessary to support the relictual slender salamander's particular use of that habitat. The unoccupied units for both species have aquatic habitat containing seeps, springs, and streams that support the life history needs of the species. The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in Proposed Critical Habitat Designation for the Kern Canyon Slender Salamander and Proposed Critical Habitat Designation for the Relictual Slender Salamander. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R8–ES–2022–0081.

Proposed Critical Habitat Designation for the Kern Canyon Slender Salamander

We are proposing to designate four units as critical habitat for the Kern Canyon slender salamander, for a total of approximately 2,051 ac (830 ha). The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Kern Canyon slender salamander. The areas we propose as critical habitat are: (1) Bodfish Creek, (2) Erskine Creek, (3) Kern Canyon Tributaries, and (4) Kern Canyon Tributaries and Connecting Creeks. Table 3 shows the proposed critical habitat units and the approximate area of each unit. Unit 3 overlaps with proposed critical habitat for the relictual slender salamander.

TABLE 3—PROPOSED CRITICAL HABITAT UNITS FOR THE KERN CANYON SLENDER SALAMANDER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit	Occupied?
1. Bodfish Creek	Federal Unclassified/Private	125 ac (50 ha) 19 ac (8)	Yes.
2. Erskine Creek	Federal Unclassified/Private	182 ac (74 ha) 259 ac (105 ha)	Yes.
3. Kern Canyon Tributaries	Federal Unclassified/Private	1,377 ac (557 ha) 32 ac (13 ha)	Yes.
4. Kern Canyon Tributaries and Connecting Creeks.	Federal Unclassified/Private	25 ac (10 ha) 32 ac (13 ha)	No.
Total		2,051 ac (830 ha)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Kern Canyon slender salamander, below.

Unit 1: Bodfish Creek

This unit encompasses 144 ac (58 ha) within Kern County to the south of the Isabella Lake reservoir. This unit stretches along Bodfish Creek, approximately from river mile 3.5 to 5.2 (5.6 kilometers [km] from the confluence of Bodfish Creek and the Kern River to 8.4 km from the confluence of Bodfish Creek and the Kern River). Habitat within this unit is largely undeveloped and unfragmented. The majority of habitat is federally owned by the USFS and BLM. A small area in the southern portion of this unit is within Sequoia National Forest. General land use activities on the Federal lands within this unit include forest management (for example, fuels reduction, hazard tree management, forest restoration, prescribed fire) and grazing. Smaller tracts of land in rural areas in the northern portion of this unit are owned by private entities and have a small amount of residential development and may be used for livestock grazing. Wildfire and climate change are the primary ongoing threats to habitat within this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with forest management, recreational development, residential development, and grazing. This unit contains extant occurrences of the species and encompasses aquatic features and riparian habitat that are at higher elevation and are not fragmented by roads. This unit includes all the physical or biological features. This unit is considered occupied.

Unit 2: Erskine Creek

This unit encompasses 441 ac (178 ha) within Kern County to the south of Isabella Lake, a census-designated place in the Kern Canyon south of the Isabella Lake reservoir. This unit stretches along Erskine Creek, approximately from river mile 2.8 to 7.2 (4.6 km from the confluence of Erskine Creek and the Kern River to 11.6 km from the confluence of Erskine Creek and the Kern River). This unit is in a rural area and is sparsely fragmented by single lane roads. The majority of habitat within this unit is owned by private entities, and the remainder of the habitat is federally owned by the BLM. The privately owned parcels within this unit contain some residential development, and general land-use activities may include livestock grazing. General land use activities on the Federal lands within the unit include forest management (for example, fuels reduction, hazard tree management, forest restoration, prescribed fire), roads, and recreational development. Wildfire and climate change are the primary ongoing threats to habitat within this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with forest management, roads, recreational development, residential development, and grazing. This unit includes all the physical or biological features. This unit is considered occupied.

Unit 3: Kern Canyon Tributaries

This unit encompasses 1,409 ac (570 ha) within Kern County in Sequoia National Forest in the Kern Canyon.

This unit includes segments of streams and small tributaries that feed into the Kern River and associated riparian habitat on the south side of the Kern Canyon. Small streams within steep ravines and narrow canyons provide habitat for the Kern Canyon slender salamander within this unit. The mainstem of the Kern River is not considered to be habitat for the Kern Canyon slender salamander within this unit. Some of the habitat within this unit is fragmented by highway California State Route 178, single lane roads, and recreational development. The majority of habitat in this unit is federally owned by the USFS. General land use activities on Federal lands within the unit include forest management (for example, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, highway maintenance, and recreational development. Smaller tracts of habitat are owned by private entities and contain a small amount of residential and recreational development. Wildfire and climate change are the primary ongoing threats to habitat within this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with California State Route 178 and other roads, forest management, recreational development, residential development, and grazing. This unit includes all the physical or biological features. This unit is considered occupied.

Unit 4: Kern Canyon Tributaries and Connecting Creeks

This unit encompasses 57 ac (23 ha) within Kern County in the Kern Canyon and along segments of Bodfish Creek and Erskine Creek to the south of the Kern Canyon. This unit includes habitat along streams and small tributaries that feed into the Kern River and associated riparian habitat within a narrow area in the Kern Canyon. This unit also contains the segment of Bodfish Creek from the confluence of the creek and the Kern River to Bodfish Creek river mile 3.5 (5.6 km from the confluence of Bodfish Creek and the Kern River) and a narrow area of riparian habitat associated with the creek. This unit also contains the segment of Erskine Creek from the confluence of the creek with the Kern River to Erskine Creek river mile 2.8 (4.6 km from the confluence of Erskine Creek and the Kern River) and a narrow area of riparian habitat associated with the creek. The mainstem of the Kern River is not considered to be habitat for the Kern Canyon slender salamander within this unit. The majority of the land within this unit in the Kern Canyon is under Federal landownership (USFS and BLM). General land use activities on these Federal lands include forest management (for example, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, highway maintenance, and recreational development. The segments of Bodfish Creek and Erskine Creek included in this unit pass through smaller tracts of land that are owned by private entities and contain residential and commercial development. Wildfire and climate change are the primary ongoing threats to habitat within this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with forest management, California State Route 178 and other roads, recreational development, residential development, and grazing. This unit includes the physical or biological features of aquatic habitat required by the species (seeps, springs, and streams; riparian habitat; and prey) as well as corridors of aquatic habitat that provide connectivity between patches of occupied habitat. This unit is considered unoccupied but is essential for the conservation of the species because it contains aquatic and riparian features that support connectivity between occupied habitat at lower elevations in the Kern Canyon and occupied habitat at higher elevations along Bodfish and Erskine Creeks.

Proposed Critical Habitat Designation for the Relictual Slender Salamander

We are proposing three units as critical habitat for the relictual slender salamander, for a total of approximately 2,685 ac (1,087 ha). The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the relictual slender salamander. The three areas we propose as critical habitat are: (1) Kern Canyon Tributaries, (2) Lucas Creek, and (3) Mill Creek. Table 4 shows the proposed critical habitat units and the approximate area of each unit. Unit 1 overlaps with proposed critical habitat for the Kern Canyon slender salamander.

TABLE 4—PROPOSED CRITICAL HABITAT UNITS FOR THE RELICTUAL SLENDER SALAMANDER

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Size of unit	Occupied?
1. Kern Canyon Tributaries	Federal Unclassified/Private	713 ac (289 ha) 10 ac (4 ha)	No.
2. Lucas Creek	Federal Unclassified/Private	761 ac (308 ha) 2 ac (1 ha)	Yes.
3. Mill Creek	Federal Unclassified/Private	1,190 ac (481 ha) 9 ac (4 ha)	Yes.
Total		2,685 ac (1,087 ha)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the relictual slender salamander, below.

Unit 1: Kern Canyon Tributaries

This unit encompasses 723 ac (293 ha) within Kern County in the Kern Canyon within Sequoia National Forest. This unit includes segments of small streams and associated riparian habitat on the south side of the Kern Canyon. The mainstem of the Kern River is not considered to be habitat for the relictual slender salamander within this unit. Some habitat within this unit is fragmented by a highway (California State Route 178), single-lane roads, and recreational development. The majority of habitat in this unit is federally owned by the USFS, and a small area of habitat is privately owned. General land use activities on Federal lands within this unit include forest management (for example, fuels reduction, hazard tree management), grazing, highway maintenance, and recreational development. Wildfire and climate change are the primary ongoing threats to habitat in this unit. This unit

includes aquatic habitat and riparian habitat for the relictual slender salamander, including seeps, springs, and streams. This unit is considered unoccupied as the relictual slender salamander is thought to be extirpated from all sites in the Kern Canyon (Jennings and Hayes 1994, p. 22; Lannoo 2005, p. 688; Jockusch et al. 2012, p. 17). This unit is essential for the conservation of the species because it encompasses historically occupied habitat that previously supported multiple occurrences of the species and reestablishment of the species in the habitat within this unit is needed to increase the redundancy of the species.

Unit 2: Lucas Creek

This unit encompasses 763 ac (309 ha) within Kern County to the south of the Kern Canyon in Sequoia National Forest. This unit extends south from the Kern Canyon along Lucas Creek and two unnamed tributaries to Lucas Creek on Breckenridge Mountain. Land within this unit is largely undeveloped and only sparsely fragmented by single-lane roads, recreational development, and small parcels that contain residential development. Most of the habitat in this unit is federally owned by the USFS. General land use activities on Federal lands within the unit include forest management (for example, fuels reduction, timber harvest, hazard tree management, forest restoration, prescribed fire), grazing, road maintenance, and recreational development. Wildfire and climate change are the primary ongoing threats to the habitat in this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with forest management, roads, recreational development, residential development, and grazing. This unit includes all the physical or biological features. This unit is considered occupied.

Unit 3: Mill Creek

This unit encompasses 1,199 ac (485 ha) within Kern County to the south of the Kern Canyon in Sequoia National Forest. This unit extends south from the Kern Canyon along Mill Creek and an unnamed tributary to Mill Creek on Breckenridge Mountain. Land within this unit is largely undeveloped and only sparsely fragmented by single-lane roads and some recreational development. The majority of habitat in this unit is federally owned by the USFS, and a small area of habitat is owned by private entities. General land use activities on Federal lands within this unit include forest management (for example, timber harvest, fuels reduction, hazard tree management, forest restoration, prescribed fire), grazing, road maintenance, and recreational development. Wildfire and climate change are the primary ongoing threats to the habitat in this unit. Physical or biological features in this unit may require special management considerations or practices to protect them from impacts associated with forest management, roads, recreational development, and grazing. This unit includes all the physical or biological features. This unit is considered occupied.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on February 11, 2016 (81 FR 7214). Although we also published a revised definition after that (84 FR 44976, August 27, 2019), the 2019 definition was subsequently vacated by the court in *CBD* v. *Haaland*. Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (a) if the amount or extent

of taking specified in the incidental take statement is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action.

In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinitiate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to: Construction or maintenance of roads, maintenance of recreation sites and trails, and land development that require clearing, digging, and/or otherwise altering suitable habitat. Clearing of vegetation and digging could remove vegetation, alter hydrology of seeps, springs, or streams, and remove rocks or woody debris, which would contribute to losses of shelter, prey, ability to thermoregulate, and conditions for a cool, moist microhabitat. Additionally, development, roads, and construction projects can fragment tracts of suitable habitat, and may inhibit dispersal of the Kern Canyon slender salamander and the relictual slender salamander between remaining areas of suitable habitat. Activities that are not expected to destroy or adversely modify critical habitat include alteration of flows within the Kern River, as faster moving parts of the river do not contain the physical or biological features that support the Kern Canyon slender salamander or the relictual slender salamander (see *Space for Individual and Population Growth and for Normal Behavior* above).

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation for either the Kern Canyon slender salamander or the relictual slender salamander.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the ''2016 Policy''; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. We describe below the process that we undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred

regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a ''significant'' rulemaking and requires additional analysis, review, and approval if met. The criteria relevant here is whether the designation of critical habitat may have an economic effect of greater than $100 million in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander (IEc 2022, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (that is, absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas will also jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. Therefore, the screening analysis focuses on areas of unoccupied critical habitat. If there are any unoccupied units in the proposed critical habitat designation, the screening analysis assesses whether any additional management or conservation efforts may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Kern Canyon slender salamander and the relictual slender salamander; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander, first we identified, in the IEM dated March 1, 2022, probable incremental economic impacts associated with the following categories of activities: fuels management, recreation, utilities management, roads, and grazing. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. If we list these species, in areas where the Kern Canyon slender salamander or the relictual slender salamander is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect these species. Moreover, if we finalize the proposed critical habitat designations, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (that is, the difference between the jeopardy and adverse modification standards) for the Kern Canyon slender salamander's and the relictual slender salamander's critical habitat. Because the designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander is being proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of occupied critical habitat are also likely to adversely affect the species itself. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Kern Canyon slender salamander totals 2,051 ac (830 ha) in four units, one of which is unoccupied. The proposed critical habitat designation for the relictual slender salamander totals 2,685 ac (1,087 ha) in three units, one of which is unoccupied.

The screening analysis concluded that, for all occupied areas, the economic costs of critical habitat designations will most likely be limited

to additional administrative efforts to consider adverse modification in section 7 consultations, as the listing of both species is happening concurrently with critical habitat designation, and all occupied units would still need to undergo section 7 consultation due to listing regardless of critical habitat designation. For occupied units, we anticipate that recommendations to avoid adverse modification would be similar to those recommendations to avoid jeopardizing the species. For the unoccupied units, section 7 consultations would not occur if not for the presence of critical habitat, so additional costs would occur (IEc 2022, p. 9). The screening analysis forecasts a total of nine consultations per year for the relictual slender salamander (two formal and seven informal) and seven consultations per year for the Kern Canyon slender salamander (all informal). Including additional costs for consultation in unoccupied critical habitat, the total cost is anticipated to be $86,600 per year for the relictual slender salamander and $45,000 per year for the Kern Canyon slender salamander (IEc 2022, exhibit 9). Overall, the additional administrative burden is anticipated to fall well below the $100 million annual threshold for each species.

We are soliciting data and comments from the public on the DEA discussed above, as well as on all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of these species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, the Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security. However, if through the public comment period we receive information regarding impacts on national security or homeland security from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs)—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

We have not identified any areas to consider for exclusion from critical habitat based on other relevant impacts because there are no HCPs or other management plans for the Kern Canyon slender salamander or the relictual slender salamander that may be impaired by designation of or exclusion from critical habitat, and the proposed designation does not include any Tribal lands or trust resources. However, during the development of a final designation, we will consider all information currently available or received during the public comment period that we determine indicates that there is a potential for the benefits of exclusion to outweigh the benefits of inclusion. If we evaluate information regarding a request for an exclusion and we do not exclude, we will fully describe our rationale for not excluding

in the final critical habitat determination. We may also exercise the discretion to undertake exclusion analyses for other areas as well, and we will describe all of our exclusion analyses as part of a final critical habitat determination.

Summary of Exclusions Considered Under 4(b)(2) of the Act

In preparing this proposal, we have determined that no HCPs or other management plans for the Kern Canyon slender salamander or the relictual slender salamander currently exist that may be impaired by designation of or exclusion from critical habitat, and the proposed designation does not include any Tribal lands or trust resources or any lands for which designation would have any economic or national security impacts. Therefore, we anticipate no impact on Tribal lands, partnerships, or HCPs from this proposed critical habitat designation and thus, as described above, we are not considering excluding any particular areas on the basis of the presence of conservation agreements or impacts to trust resources.

During the development of a final designation, we will consider any additional information received through the public comment period regarding other relevant impacts to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2), our implementing regulations at 50 CFR 424.19, and the joint 2016 Policy.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial

number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. Some utility infrastructure exists in the proposed designation for critical habitat, including communication sites in the Lower Kern River Canyon and on Breckenridge Mountain and transmission lines and an electrical subunit in the Lower Kern River Canyon within Sequoia National Forest. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments. The lands being proposed for critical habitat designation are owned by Kern County, BLM, and the U.S. Forest Service. None of these government entities fits the definition of ''small governmental jurisdiction.'' Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Kern Canyon slender salamander and the relictual slender salamander in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Kern Canyon slender salamander and the relictual slender salamander, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require

approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the proposed critical habitat for the Kern Canyon slender salamander or the relictual slender salamander, so no Tribal lands would be affected by the proposed designation.

References Cited

A complete list of references cited in this proposed rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Sacramento Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Signing Authority

Martha Williams, Director of the U.S. Fish and Wildlife Service, approved this action on September 14, 2022, for publication. On September 30, 2022, Martha Williams authorized the undersigned to sign the document electronically and submit it to the Office of the Federal Register for publication as an official document of the U.S. Fish and Wildlife Service.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11 in paragraph (h) by adding entries for ''Salamander, Kern Canyon slender'' and ''Salamander, relictual slender'' to the List of Endangered and Threatened Wildlife in alphabetical order under AMPHIBIANS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
Amphibians				
*	*	*	*	*
Salamander, Kern Canyon slender.	*Batrachoseps simatus*	Wherever found	T	[**Federal Register** citation when published as a final rule]; 50 CFR 17.43(h); 50 CFR 17.95(d).[CH]

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* *	*	* *	*	* *
Salamander, relictual slender ...	*Batrachoseps relictus*	Wherever found	E	[**Federal Register** citation when published as a final rule]; 50 CFR 17.95(d).CH
* *	*	* *	*	* *

■ 3. Amend § 17.43 by adding paragraph (h) to read as follows:

§ 17.43 Special rules—amphibians.

* * * * *

(h) Kern Canyon slender salamander (*Batrachoseps simatus*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the Kern Canyon slender salamander. Except as provided under paragraph (h)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to this species:

(i) Import or export, as set forth at § 17.21(b) for endangered wildlife.

(ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.

(iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.

(iv) Interstate or foreign commerce in the course of a commercial activity, as set forth at § 17.21(e) for endangered wildlife.

(v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

(i) Conduct activities as authorized by a permit under § 17.32.

(ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.

(iii) Take as set forth at § 17.31(b).

(iv) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

(v) Take if that take is incidental to an otherwise lawful activity and is caused by fuels management activities that:

(A) Are expected to have negligible impacts to the Kern Canyon slender salamander and its habitat, as long as the activities are conducted or authorized by the Federal agency with jurisdiction over the land where the activities occur. This exception includes fuels management activities developed by a Federal, State, county, or other entity to reduce the risk or severity of fire in Kern Canyon slender salamander habitat and to protect and maintain habitat that supports the species. These activities should be in accordance with established and recognized fuels management plans that include measures to minimize impacts to the species and its habitat.

(B) Occur on private lands where there is no Federal nexus. This exception applies to those situations, whether currently existing or that may develop in the future, where fuels management activities are essential to reduce the risk of catastrophic wildfire, and when such activities will be carried out in accordance with an established and recognized fuels or forest management plan that includes measures to minimize impacts to the species and its habitat.

4. Amend § 17.95 in paragraph (d) by adding entries for ''Kern Canyon Slender Salamander (*Batrachoseps simatus*)'' and ''Relictual Slender Salamander (*Batrachoseps relictus*)'' after the entry for ''Jollyville Plateau Salamander (*Eurycea tonkawae*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Kern Canyon Slender Salamander (*Batrachoseps simatus*)

(1) Critical habitat units are depicted for Kern County, California, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Kern Canyon slender salamander consist of the following components:

(i) Aquatic habitat consisting of seeps, springs, and streams.

(ii) Riparian habitat consisting of terrestrial areas adjacent to seeps, springs, and streams that contain:

(A) Sufficient refugia consisting of woody debris, leaf litter, and rocks with abundant interstitial spaces to facilitate safe resting, foraging, and movement;

(B) Suitable prey to allow for survival, growth, and reproduction; and

(C) Riparian vegetation that provides shade cover contributing to cool and moist surface conditions for maintaining homeostasis, foraging opportunities, and physical structure for predator avoidance.

(iii) Corridors of aquatic habitat or riparian habitat that provide connectivity between patches of occupied habitat to allow for movement of individuals.

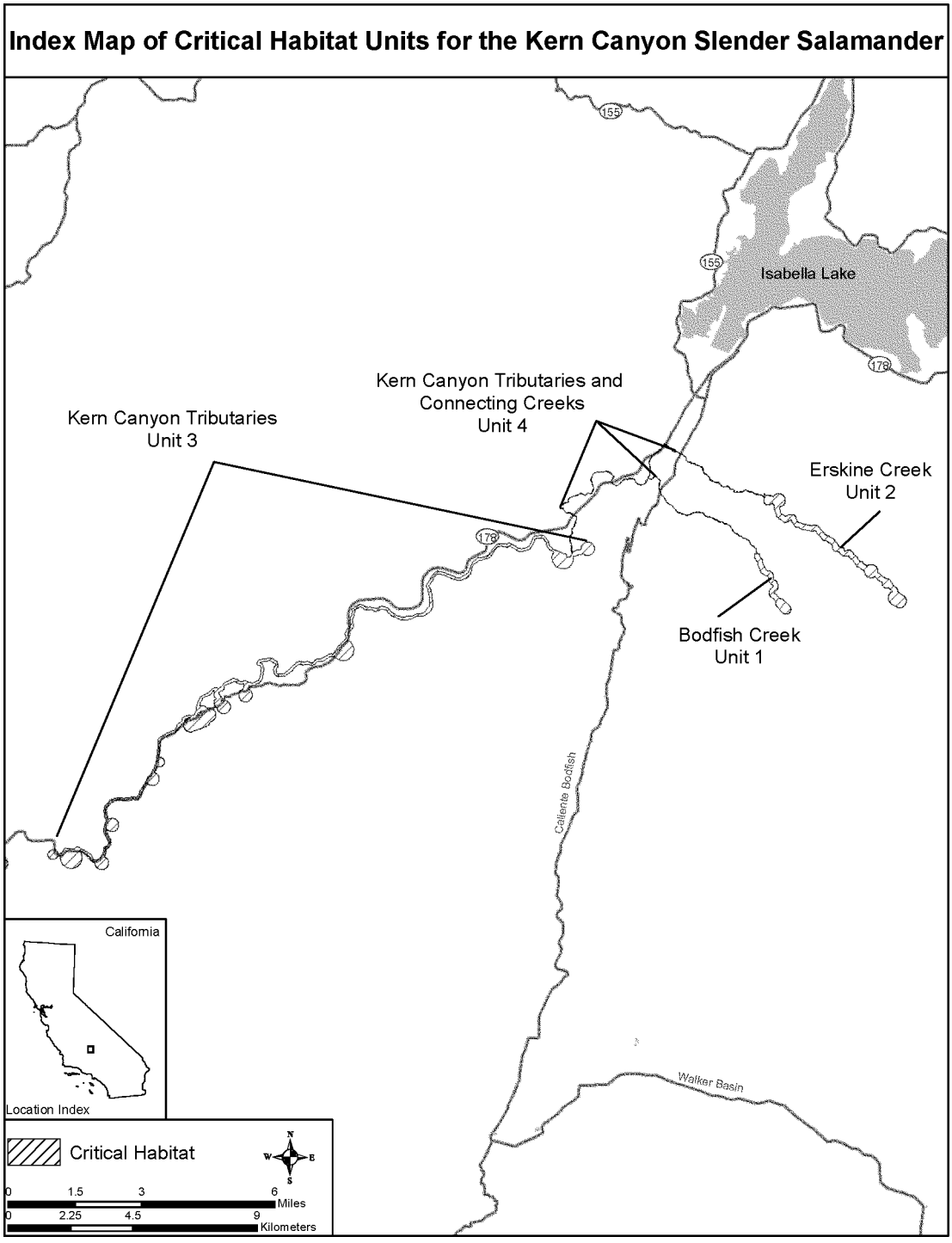
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [EFFECTIVE DATE OF RULE].

(4) Data layers defining map units were created using the National Hydrography Dataset and California Natural Diversity Database occurrence records, and critical habitat units were then mapped using Universal Transverse Mercator Zone 11N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *https://www.regulations.gov* at Docket No. FWS–R8–ES–2022–0081, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

Figure 1 to Kern Canyon Slender Salamander (*Batrachoseps simatus*) paragraph (5)

BILLING CODE 4333–15–C



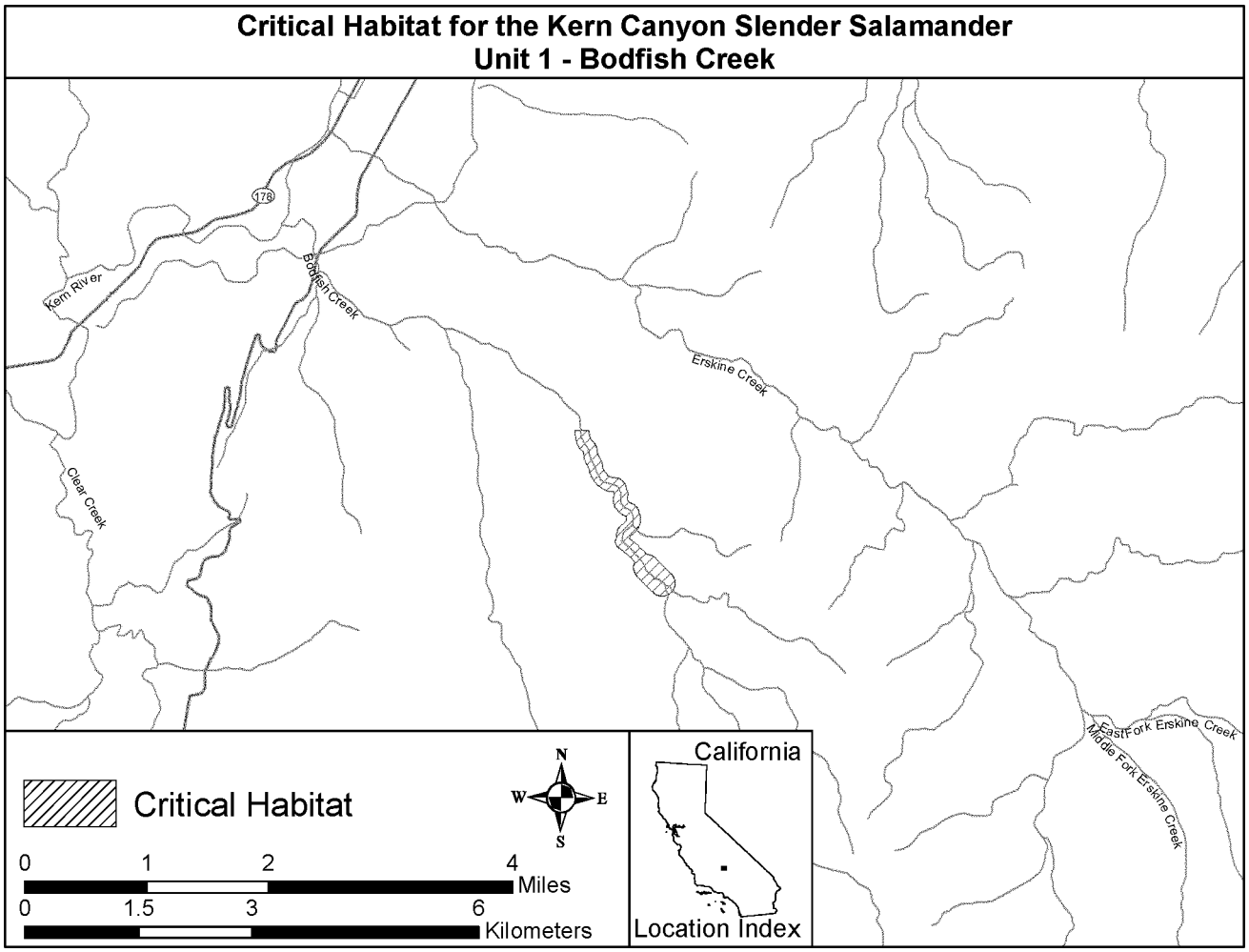
BILLING CODE 4333–15–P

(6) Unit 1: Bodfish Creek, Kern County, California.

(i) Unit 1 consists of 144 ac (58 ha) in Kern County, California. The majority of land (125 ac (50 ha)) is owned by the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM). A small portion of the southern part of the unit is within the boundaries of Sequoia National Forest.

(ii) Map of Unit 1 follows:

Figure 2 to Kern Canyon Slender Salamander (*Batrachoseps simatus*) paragraph (6)(ii)



(7) Unit 2: Erskine Creek, Kern County, California.

(i) Unit 2 consists of 441 ac (178 ha) in Kern County, California, south of the Isabella Lake Reservoir. The majority of land (259 ac (105 ha)) is owned by private entities, and the remainder (182 ac (74 ha)) is owned by BLM.

(ii) Map of Unit 2 follows:

Figure 3 to Kern Canyon Slender Salamander (*Batrachoseps simatus*) paragraph (7)(ii)

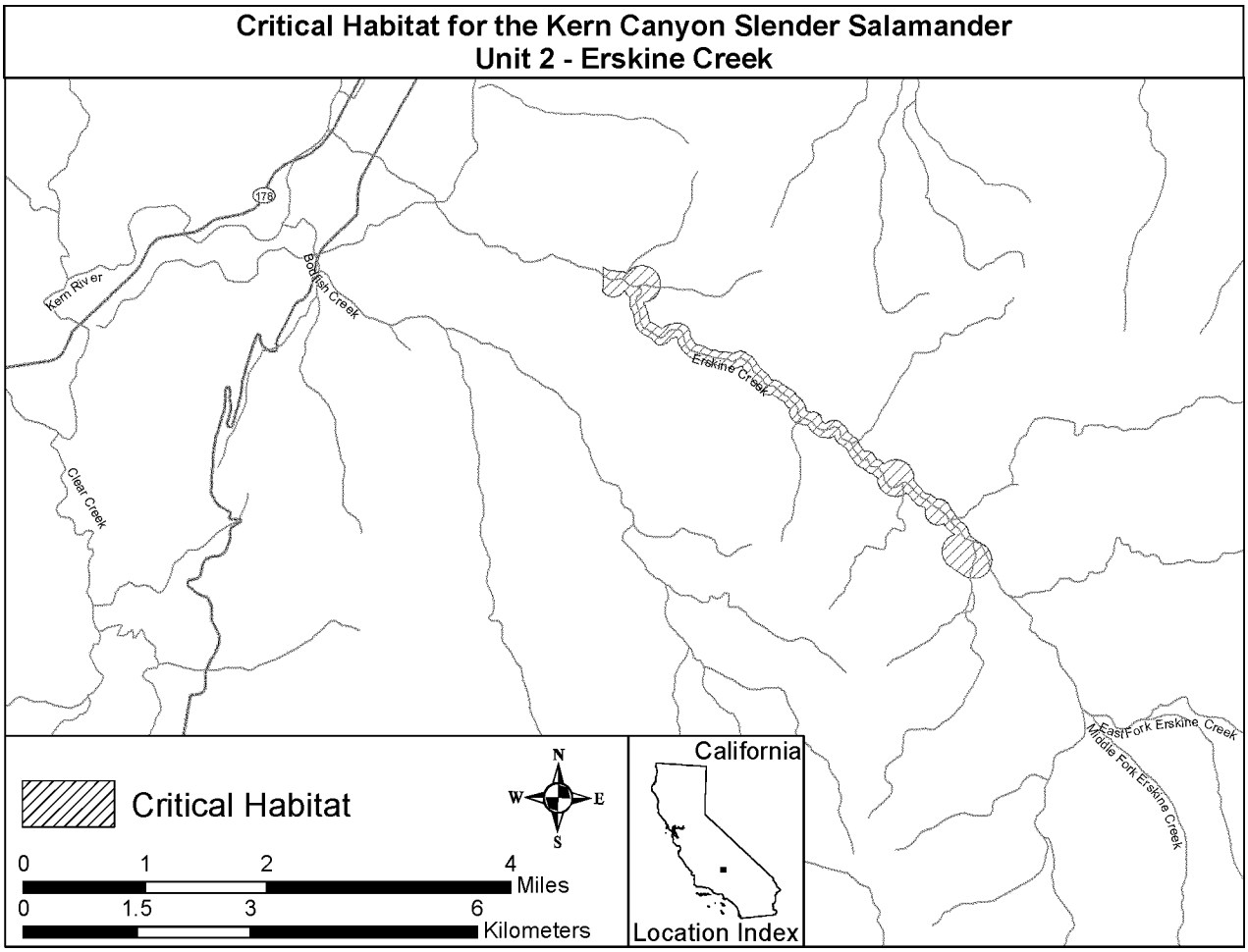
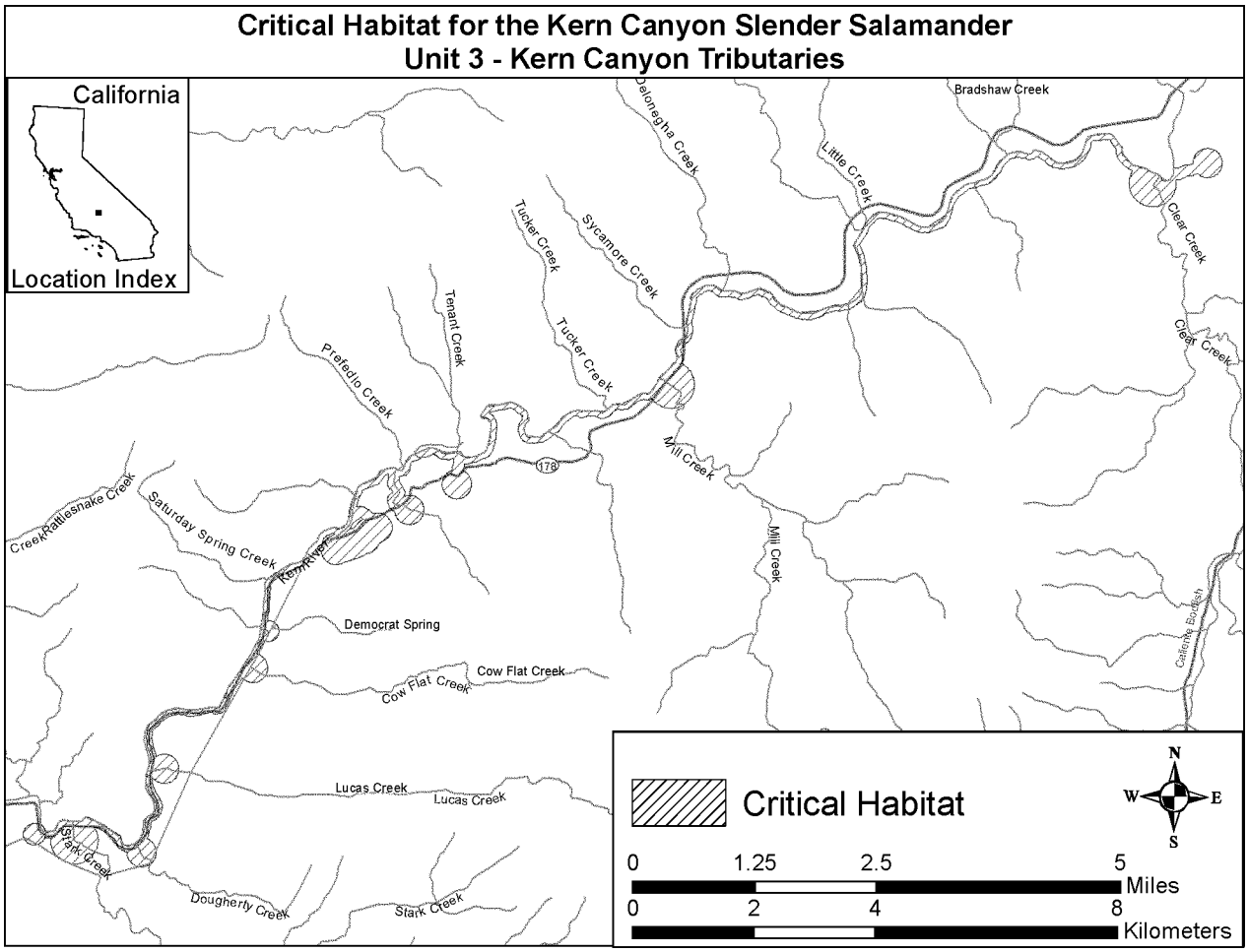


Figure 4 to Kern Canyon Slender Salamander (*Batrachoseps simatus*) paragraph (8)(ii)

(8) Unit 3: Kern Canyon Tributaries, Kern County, California.

(i) Unit 3 consists of 1,409 ac (570 ha) in Kern County, California. Nearly all land in the unit (1,377 ac (557 ha)) is owned by USFS (in Sequoia National Forest) and BLM, and the remainder is owned by private entities. This unit includes land along the southern bank of the Kern River from river mile 45.6 to 64.2.

(ii) Map of Unit 3 follows:

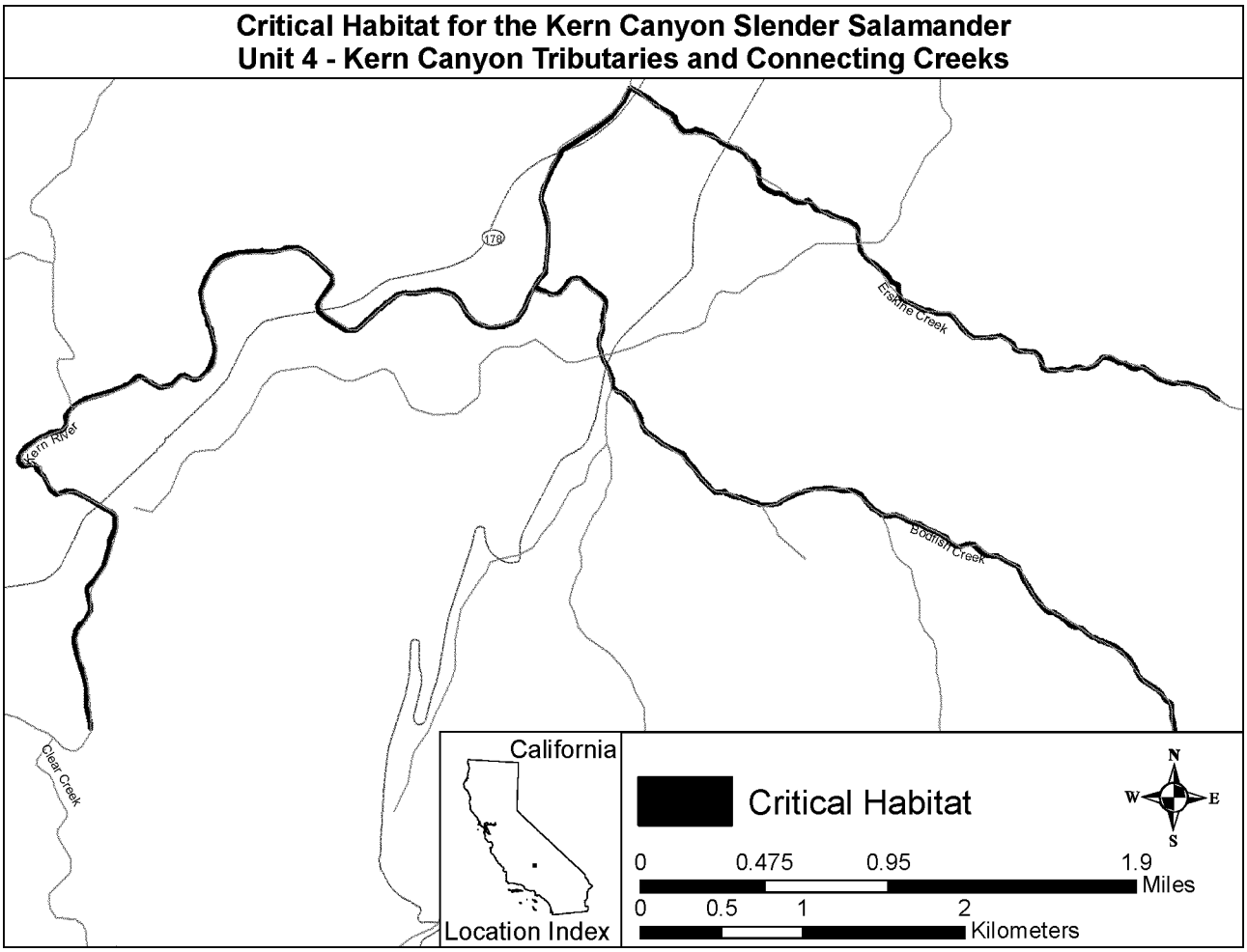


(9) Unit 4: Kern Canyon Tributaries and Connecting Creeks, Kern County, California.

(i) Unit 4 consists of 57 acres (23 ha) in Kern County, California. In total, 25 ac (10 ha) is owned by USFS and BLM, and the remainder is owned by private entities. This unit includes segments of the Kern River, Bodfish Creek, and Erskine Creek.

(ii) Map of Unit 4 follows:

Figure 5 to Kern Canyon Slender Salamander (*Batrachoseps simatus*) paragraph (9)(ii)



Relictual Slender Salamander (*Batrachoseps relictus*)

(1) Critical habitat units are depicted for Kern County, California, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the relictual slender salamander consist of the following components:

(i) Aquatic habitat consisting of seeps, springs, and streams.

(ii) Riparian habitat consisting of terrestrial areas adjacent to seeps, springs, and streams that contain:

(A) Sufficient refugia consisting of woody debris, leaf litter, and rocks with abundant interstitial spaces to facilitate safe resting, foraging, and movement;

(B) Suitable prey to allow for survival, growth, and reproduction; and

(C) Riparian vegetation that provides shade cover contributing to cool and moist surface conditions for maintaining homeostasis, foraging opportunities, and physical structure for predator avoidance.

(iii) Corridors of aquatic habitat or riparian habitat that provide connectivity between patches of occupied habitat to allow for movement of individuals.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [EFFECTIVE DATE OF RULE].

(4) Data layers defining map units were created using the National Hydrography Dataset and California Natural Diversity Database occurrence records, and critical habitat units were then mapped using Universal Transverse Mercator Zone 11N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *https://www.regulations.gov* at Docket No. FWS–R8–ES–2022–0081, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

Figure 1 to Relictual Slender Salamander (*Batrachoseps relictus*) paragraph (5)

BILLING CODE 4333–15–C

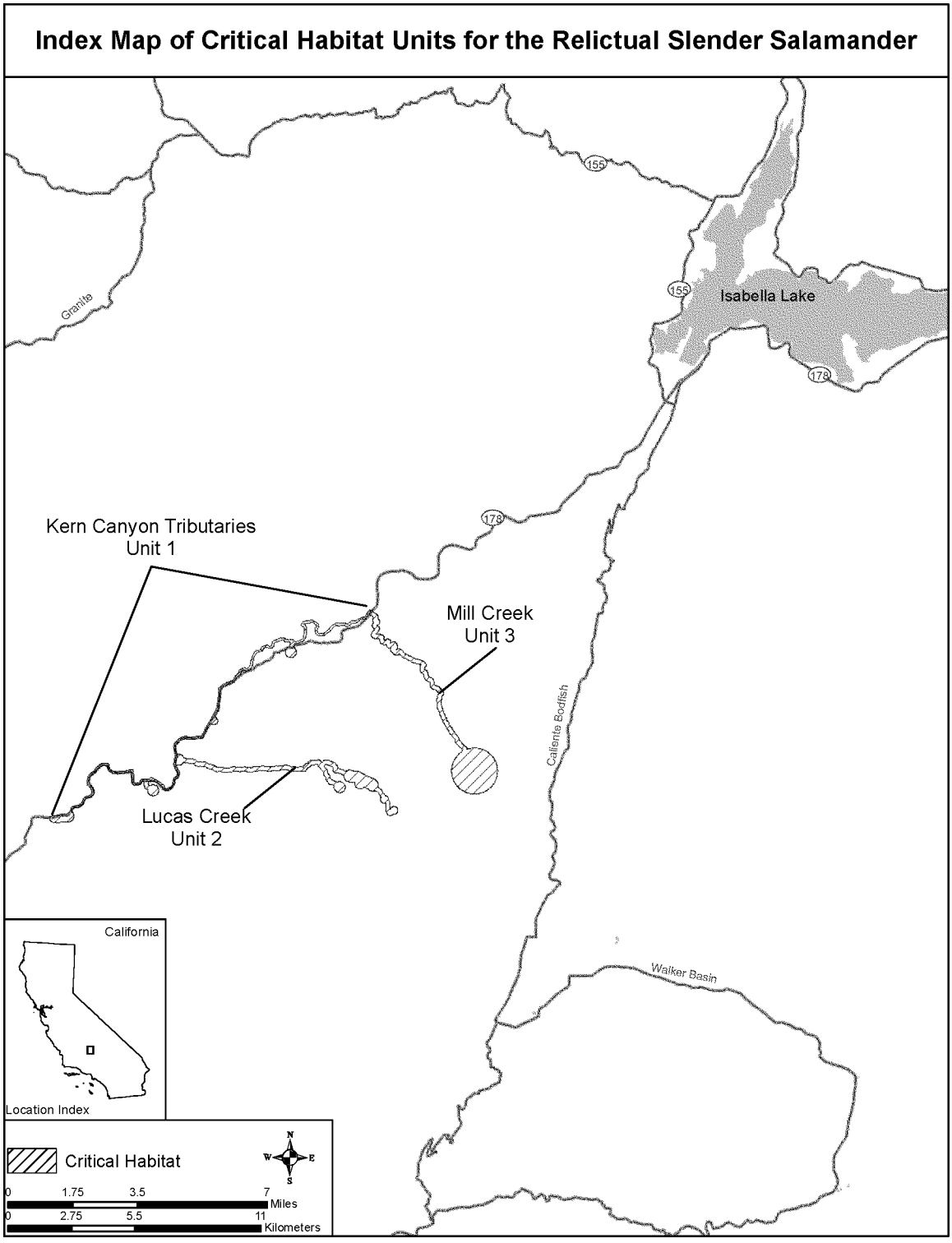


Figure 2 to Relictual Slender Salamander (*Batrachoseps relictus*) paragraph (6)(ii)

BILLING CODE 4333–15–P

(6) Unit 1: Kern Canyon Tributaries, Kern County, California.

(i) Unit 1 consists of 723 ac (293 ha) in Kern County, California. Nearly all of the land (713 ac (289 ha)) is within the boundaries of Sequoia National Forest, and a small area is privately owned.

(ii) Map of Unit 1 follows:

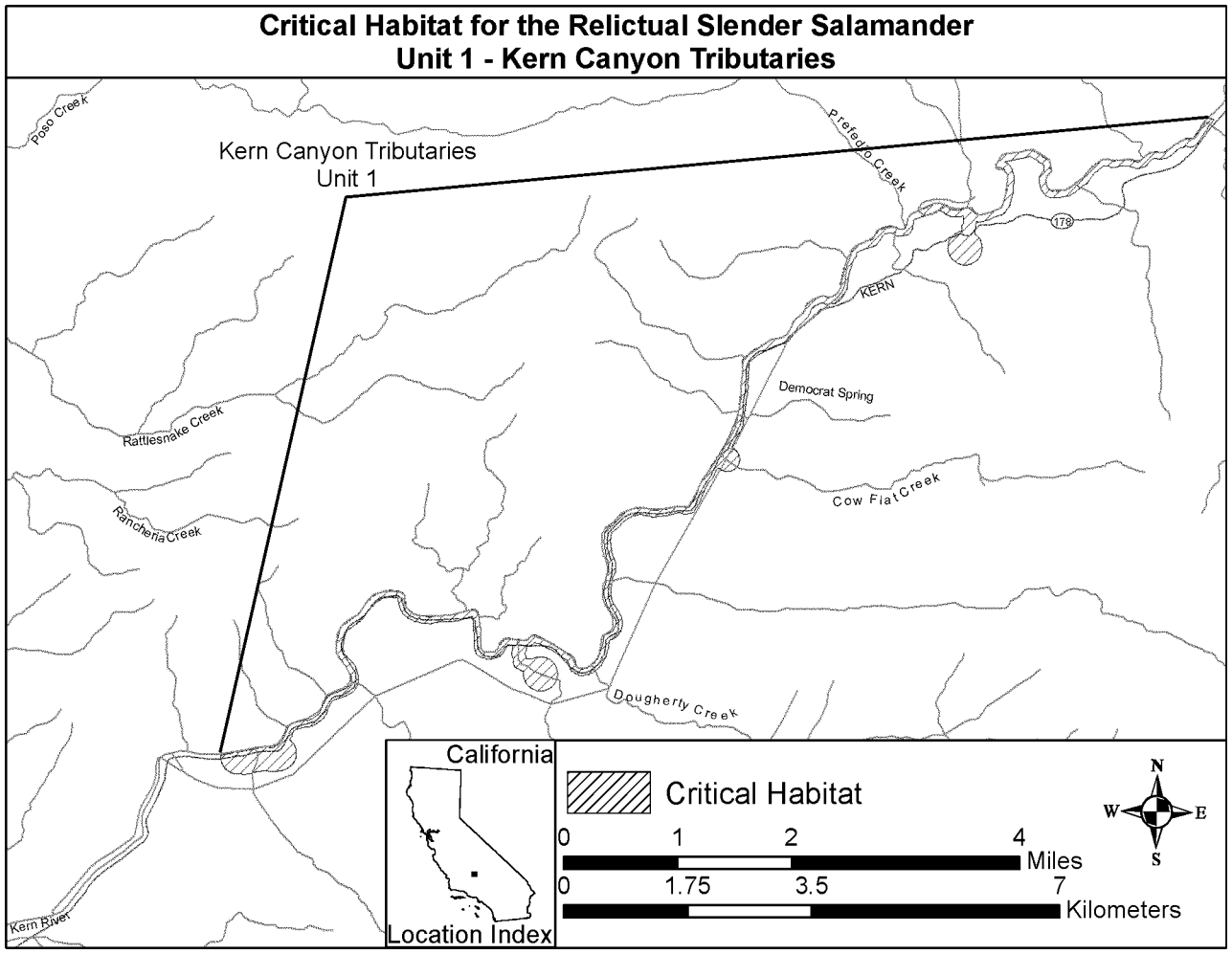
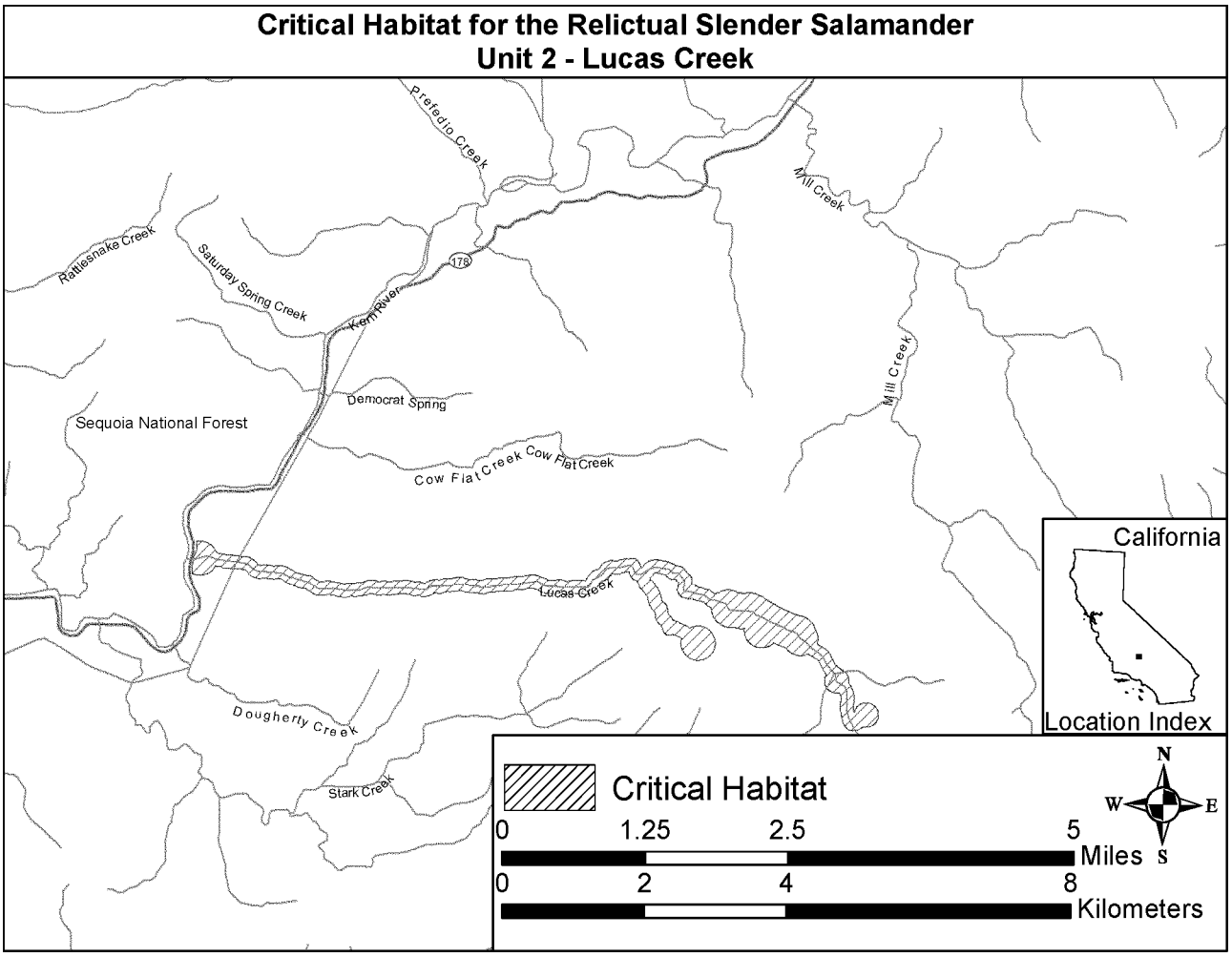


Figure 3 to Relictual Slender Salamander (*Batrachoseps relictus*) paragraph (7)(ii)

(7) Unit 2: Lucas Creek, Kern County, California.

(i) Unit 2 consists of 763 ac (309 ha) in Kern County, California. Nearly all of the land (761 ac (308 ha)) is within the boundaries of Sequoia National Forest, and a small area is privately owned. This unit extends south from the lower Kern River Canyon along Lucas Creek and two unnamed tributaries to Lucas Creek on Breckenridge Mountain.

(ii) Map of Unit 2 follows:

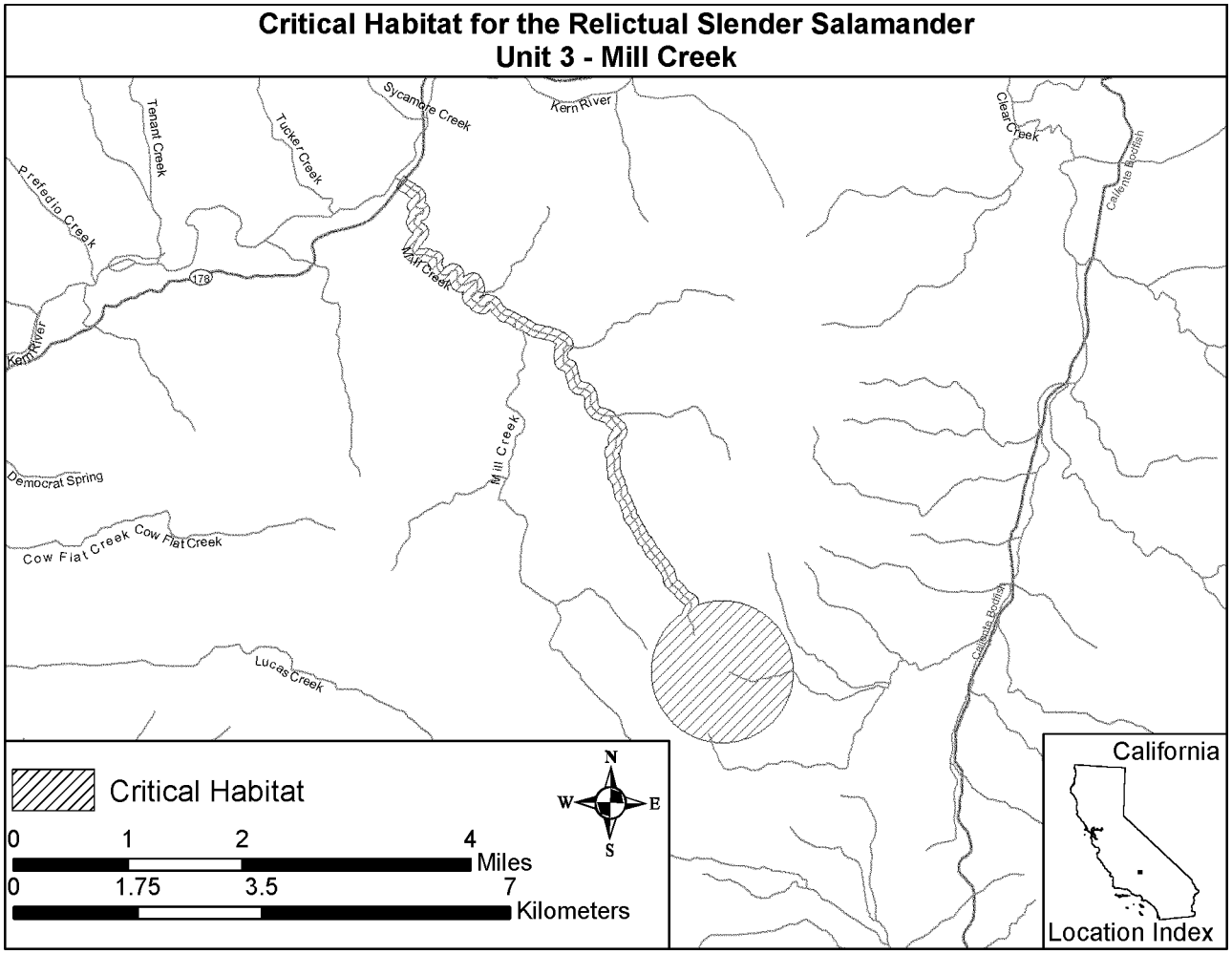


(8) Unit 3: Mill Creek, Kern County, California.

(i) Unit 3 consists of 1,199 ac (485 ha) in Kern County, California. The majority of land (1,190 ac (481 ha)) is within the boundaries of Sequoia National Forest, and a small area is privately owned. This unit extends south from the lower Kern River Canyon along Mill Creek and an unnamed tributary to Mill Creek on Breckenridge Mountain.

(ii) Map of Unit 3 follows:

Figure 4 to Relictual Slender Salamander (*Batrachoseps relictus*) paragraph (8)(ii)



* * * * *

Madonna Baucum,

Chief, Policy and Regulations Branch, U.S. Fish and Wildlife Service.

[FR Doc. 2022–21661 Filed 10–17–22; 8:45 am]

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Part III

Department of the Interior

43 CFR Part 10
Native American Graves Protection and Repatriation Act Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 10

[NPS–WASO–NAGPRA–33190; PPWOCRADN0–PCU00RP14.550000]

RIN 1024–AE19

Native American Graves Protection and Repatriation Act Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony

AGENCY: Office of the Secretary, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior proposes to revise regulations to improve implementation of the Native American Graves Protection and Repatriation Act of 1990. These proposed regulations would clarify and improve upon the systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The proposed changes would provide a step-by-step roadmap for museums and Federal agencies to comply with requirements within specific timelines to facilitate the required disposition and repatriation. The proposed changes would describe the processes in accessible language with clear timelines and terms, reduce ambiguity, and improve efficiency in meeting the requirements. In addition, the proposed changes emphasize consultation in every step and defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

DATES: Comments on the proposed rule must be received by 11:59 p.m. EDT on January 17, 2023.

Federal Advisory Committee Act Meetings: The Native American Graves Protection and Repatriation Review Committee (Review Committee) will meet virtually during the comment period. The National Park Service will announce the exact dates and times of the Review Committee meetings in the **Federal Register**, once scheduled. These meetings will be open to the public and there will be time for public comment.

Tribal Consultation Sessions: The Department of the Interior will conduct consultation sessions with Indian Tribes virtually during the comment period. The Department of the Interior will announce the exact meeting dates and times of the consultation sessions, once scheduled, on *https://www.doi.gov/priorities/tribal-consultation/upcoming-tribal-consultations* and by letter to Tribal leaders.

Native Hawaiian Consultation Sessions: The Department of the Interior will conduct consultation sessions with the Native Hawaiian Community virtually during the comment period. The Department of the Interior's Office of Native Hawaiian Relations will invite the Native Hawaiian Community to participate and provide the exact meeting dates and times of the consultation sessions, once scheduled.

Public Listening Sessions: The Department of the Interior will host virtual listening sessions during the comment period. The National Park Service will announce the exact dates and times of the listening sessions, once scheduled, on *https://www.nps.gov/orgs/1335/events.htm.* These meetings will be open to the public.

Information Collection Requirements: If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to decide concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the **Federal Register**. Therefore, comments should be submitted to OMB by December 19, 2022.

ADDRESSES: You may submit written comments, identified by the Regulation Identifier Number (RIN) 1024–AE19, by any one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail to:* National NAGPRA Program, National Park Service, 1849 C Street NW, Mail Stop 7360, Washington DC 20240. Attn: Melanie O'Brien, Manager NAGPRA Rule Comments.

Instructions: All submissions received must include the words ''National Park Service'' or ''NPS'' and the RIN (1024–AE19) for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided. Written comments will not be accepted by fax, email, or in any way other than those specified above. The NPS will not accept bulk comments in any format (hard copy or electronic) submitted on behalf of others.

Oral Comments: Register for opportunities to make oral comments at: *https://www.nps.gov/orgs/1335/events.htm.* The consultation sessions listed above are for federally recognized Indian Tribes and for representatives of the Native Hawaiian Community. All oral comments by other members of the public must be made during specified sessions of the Review Committee meetings or public listening sessions. Oral comments will be recorded and submitted for the record and oral commenters should include a written copy of their statement prior to the public meeting. Time for oral comments may be limited.

Information Collection Requirements: Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, Reston, VA 20191. Please include ''1024–AE19'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: Melanie O'Brien, National NAGPRA Program, National Park Service, (202) 354–2201, *melanie_o'brien@nps.gov.* Questions regarding the NPS's information collection request may be submitted to Phadrea Ponds, NPS Information Collection Clearance Officer, *phadrea_ponds@nps.gov.* Please include ''1024–AE19'' in the subject line of your email request.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA or Act) (25 U.S.C. 3001 *et seq.*) requires the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants, Indian Tribes, and Native Hawaiian organizations (NHOs). The Act governs the disposition of human remains or cultural items removed from Federal or Tribal lands (25 U.S.C. 3002); requires the inventory of human remains and associated funerary objects in holdings or collections (25 U.S.C. 3003); requires a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony in holdings or collections (25 U.S.C. 3004); governs the repatriation of human remains or cultural items in holdings or collections (25 U.S.C. 3005); creates a Federal advisory committee to monitor and review the inventory and identification process and repatriation activities (25 U.S.C. 3006); and authorizes civil penalties for museums that fail to comply with the Act (25 U.S.C. 3007).

II. Previous Federal Actions

The Secretary of the Interior (Secretary) is responsible for implementation of the Act, including the issuance of regulations implementing and interpreting its provisions (25 U.S.C. 3011). The regulations are codified at 43 CFR part 10. The Department of the Interior (Department) published the initial rule to implement NAGPRA in 1995 at 60 FR 62134 (December 4, 1995). Subsequently, the Department published additional rules concerning:

- Civil penalties, at 68 FR 16354 (April 3, 2003);
- Future applicability, at 72 FR 13184 (March 21, 2007);
- Culturally unidentifiable human remains, at 75 FR 12378 (March 15, 2010);
- Technical amendments, at 78 FR 27078 (May 9, 2013);
- The definition of ''Indian tribe,'' at 79 FR 33482 (June 11, 2014); and
- Disposition of unclaimed cultural items, at 80 FR 68465 (November 5, 2015).

The Department also publishes annual adjustments to civil penalties for inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

III. Development of the Proposed Rule

As part of the Department's regulatory review in accordance with the Regulatory Flexibility Act and E.O. 13563, the Department regularly seeks public input on how we may best achieve regulatory ends. Over the past 12 years, parties affected by the definitions and procedures established in 43 CFR part 10 have commented, in various forums, that some of the regulatory provisions should be amended to improve implementation of the Act.

The following paragraphs detail the degree of consultation, coordination, and collaboration in this review, and the nature of public comments that the Department received from lineal descendants, Indian Tribes, NHOs, Federal agencies, museums, national museum and scientific organizations, Indian Tribal historic preservation organizations, the Review Committee, and interested members of the public.

From March to July of 2011, the Department consulted with Indian Tribes, NHOs, the Review Committee, Federal agencies, and the public on full revisions to the regulations implementing the Act. This effort resulted from the Department's publication of a final rule for the disposition of culturally unidentifiable human remains in March of 2010 (75 FR 12378) which solicited comments on the final rule. Many of those comments requested broader changes to the entire regulatory process. In April 2012 (77 FR 12378), the Department published a proposed rule to revise the regulations for accuracy and consistency based on some of those comments. Additional comments on that proposed rule requested changes that went beyond the scope of accuracy and consistency.

Since 2012, the Department has heard repeatedly from Indian Tribes, NHOs, museums, and Federal agencies on the implementation of the Act through the regulations. From 2012 to 2019 at 21 meetings of the Review Committee, public commenters have highlighted concerns with the regulations or challenges in implementing its procedures. The Review Committee has heard frequently that the regulations themselves pose barriers to successful and expedient repatriation.

As a result of previous consultation, public comment, and input from the Review Committee, the Department developed a draft text of regulatory revisions and on July 8, 2021, provided Indian Tribes and NHOs with an invitation to consult on the draft text. Along with the draft text, the Department provided a summary of the 2011 consultation with Indian Tribes and NHOs and how the draft text was responsive to that input. The Department hosted consultation sessions with Indian Tribes on August 9, 13, and 16, 2021, and with NHOs on August 17, 2021. In addition, the Department accepted written input until September 30, 2021. In total, we received 71 individual comment letters, which when combined with oral comments from consultation sessions, yielded over 700 specific comments on sections of the draft text.

The Department reviewed each comment provided during consultation and in writing and, wherever possible, adjusted the proposed regulations to address them. In a separate document, the Department has provided a summary of each comment and specific detailed responses. An overview of the major comments received is provided here, and specific adjustments made to the proposed regulations in response to comments are noted throughout Part V. Section-by-Section Summary of Proposed Changes.

A. Cultural Affiliation

We received a total of 179 comments on the definitions in the draft text of ''cultural affiliation'' and ''geographical affiliation'' and on the section for establishing cultural affiliation. Some of these comments requested an alternative process be developed utilizing the Secretary and the Review Committee to facilitate repatriation of human remains currently labeled as ''culturally unidentifiable.'' These same comments requested we strike most of the section on cultural affiliation, citing to the language in the Act (25 U.S.C. 3003(d)(2)(C) and 3005(a)(4)). Most comments focused on clarifying that one type of information was sufficient for finding cultural affiliation, especially geographic information. Some comments requested prioritizing the list of information or giving more weight to certain lines of information. Several comments suggested adopting language from the California statute on deference to traditional Native American knowledge as expert opinion. We received many supportive comments on the addition of multiple cultural affiliations and closest cultural affiliation.

In response, the Department proposes to define a new term, ''affiliation,'' in the proposed regulations and to combine the process for identifying

cultural and geographical affiliation into a single section. The Department also proposes to define Native American traditional knowledge which is referred to throughout the proposed revision in identifying affiliation and cultural items and in conducting consultation. In response to several comments, the Department considered how an alternative process might work, considering the legal limitations on the Secretary and the Review Committee under the Act. The roles of the Secretary and the Review Committee are advisory only in this part of the repatriation process, and an alternative process limited by that role seems overly complicated and intrusive rather than helpful or expeditious.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part and D. Section 10.3 Cultural and Geographical affiliation.

B. Consultation

We received a total of 115 comments on the term ''consultation'' and the related regulatory provisions. Nearly all comments appreciated the definition, but some comments suggested aligning it with definitions found in 36 CFR part 800, Executive Order 13175, or the U.N. Declaration on the Rights of Indigenous Peoples. Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process. Several comments questioned the requirement for Indian Tribes and NHOs to make written requests to consult.

In response, the Department proposes to define ''consultation'' to seek consensus and to require a record of consultation that explains, if applicable, why consensus or agreement could not be achieved. The requirement for a written request to consult (which can include email) is necessary to establish a required timeline for responding to a request.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part, Plan of Action in E. Section 10.4 General, and Require that Consultation Seek Consensus, in J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony and K. Section 10.10 Repatriation of human remains and associated funerary objects.

C. Discovery on Federal or Tribal Lands

We received more than 100 comments on the draft text for discoveries on Federal or Tribal lands. Most of the comments were directed at two issues—(1) notification or consultation with Indian Tribes or NHOs when a discovery occurs, and (2) the timelines for action by the appropriate official after a discovery. The comments recommended that the requirements of the existing regulations at § 10.4 be reinstated, specifically, immediate telephone notification and written confirmation by the person who makes the discovery. Many comments expressed concern over the draft text paragraph on evaluating the potential for an excavation.

In response, the Department proposes to require written documentation (which can include email but not text messages) of a discovery within 24 hours. The Department proposes additional timelines in this section to ensure adequate time for consultation, a plan of action, and securing, protecting, monitoring, or, if required, excavation of the discovery.

See Part V. Section-by-Section Summary of Proposed Changes, F. Section 10.5 Discovery.

D. Comprehensive Agreements

We received 66 comments on the draft text on comprehensive agreements. The majority of comments requested plans of action be reinstated, and many comments remarked on the utility of a plan of action in responding to discoveries or excavations and promoting consultation and coordination between land managers and Indian Tribes. A few comments requested changes to provide for immediate reburial of human remains or cultural items without any procedural requirements that might delay a reburial. A few comments requested tribal preference be incorporated into both the plan of action and comprehensive agreements.

In response, the Department proposes to move the requirement for a plan of action in the existing regulations at § 10.5 to the beginning of the subpart, and provide the requirements, in three separate steps, for a required plan of action before a planned activity, including an excavation, or after a discovery.

See Part V. Section-by-Section Summary of Proposed Changes, E. Section 10.4 General and references in F. Section 10.5 Discovery and G. Section 10.6 Excavation.

E. Control

We received a total of 68 comments on the term ''control'' as defined in the draft text. Many comments requested it be replaced with the statutory term ''possession or control.'' Other comments requested removing the use of ''legal interest'' from the definition, as the Act does not recognize a museum or Federal agency has a lawful interest in human remains or cultural items other than the ''right of possession.'' A few comments suggested museums and Federal agencies should be jointly and severally liable for compliance with NAGPRA's inventory, summary, and repatriation obligations. The same comments requested the removal of the new term ''custody.''

In response, the Department proposes to define the term as ''possession or control'' as used in the Act. Further, the Department has added clarifications to address how the Act did not intend for this term to confer any legal rights upon a Federal agency or museum, but instead act as an element of applicability of the Act's repatriation provisions. The Department also proposes other regulatory revisions to require Federal agencies and museums to share information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items under loan or repository agreements to other entities.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part, and I. Section 10.8 General.

F. Funerary Object

We received 64 comments on the definitions of ''funerary object,'' ''associated funerary object,'' and ''unassociated funerary object.'' Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition.

In response, the Department proposes to clarify long-standing confusion over the distinction between associated and unassociated funerary objects. For both associated and unassociated funerary objects, broad categorical identifications, including everything from a burial site or specific area, may meet these definitions depending on the information available and the results of consultation.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part.

G. Stay of Repatriation for a Scientific Study

We received 55 comments on the draft text carrying out the provision of the Act if human remains or cultural items are indispensable for completion of a specific scientific study the outcome of which would be of major benefit to the United States (25 U.S.C. 3005(b)). Half of the comments recommended the provisions should only apply to human

remains and associated funerary objects, and not to unassociated funerary objects, sacred objects, and objects of cultural patrimony. Other comments suggested the provisions of the Act were intended to be limited to studies ongoing when the Act was passed in 1990. Other comments suggested clarifying changes.

In response, the Department has clarified some of the provisions, but has retained the provisions applying to both human remains and cultural items as in the Act (25 U.S.C. 3005(b)). The recommendation that this provision apply retroactively runs counter to the prospective applicability of the Act and would conflict with the Act.

See Part V. Section-by-Section Summary of Proposed Changes, J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony, and K. Section 10.10 Repatriation of human remains and associated funerary objects.

H. Summaries

We received 54 comments on the provision in the draft text requiring that museums and Federal agencies prepare and submit a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony in its holding or collection. Comments pointed out that the summary is prepared before consultation and that Indian Tribes and NHOs are the best parties to determine whether any item in a holding or collection fits a NAGPRA category. Museums and Federal agencies could potentially use the draft text requirement to evade preparing a summary, claiming that they do not have such objects when they might.

In response, the Department proposes to retain language from the existing regulations in both the opening paragraph to the section and in the paragraph on completing a summary.

See Part V. Section-by-Section Summary of Proposed Changes, J. Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

I. Acknowledged and Adjudicated Aboriginal Land

We received 51 comments on the new terms to replace ''aboriginal land'' and ''aboriginal occupation.'' Several comments appreciated the new definition of ''acknowledged aboriginal land'' and some comments recommended that ''acknowledged aboriginal land'' be used not just in Subpart C of the regulations, but also in Subpart B, either combined with the definition of ''adjudicated aboriginal land,'' or instead of that definition. Some comments suggested further clarifying language, including addition of other sources or changes to the listed sources. For ''acknowledged aboriginal land,'' many comments suggested changing the first source, ''treaty sent by the President to the United States Senate for ratification,'' to an earlier stage in the treaty-making process, while another comment suggested that it be deleted, since only a ratified treaty is final and authoritative.

In response, the Department proposes to add definitions of ''adjudicated aboriginal land'' and ''acknowledged aboriginal land'' to distinguish the criteria for a determination of ''aboriginal land'' under Subpart B and the Act (25 U.S.C. 3002(a)), on the one hand, and under Subpart C on the other. The Department proposes to include intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes. In the Act, Congress defined ''the aboriginal land of some Indian tribe'' as ''Federal land that is recognized by a final judgement of the Indian Claims Commission or the United States Court of Claims,'' and we have used that to define ''adjudicated aboriginal land.'' The Department can neither add to this definition nor ignore it, so the comments requesting a change to the application or definition of adjudicated aboriginal land cannot be adopted.

See Part V. Section-by-Section Summary of Proposed Changes, C. Section 10.2 Definitions for this part.

J. Federal Lands and Boarding Schools

We received 39 comments on the definition for ''Federal lands.'' Several comments requested the addition of specific language to provide for protection and disposition of Native American children buried at Indian boarding schools, especially in circumstances where the land is not or was not owned or controlled by the U.S. Government, but the Indian boarding school was operated by or for the U.S. Government. Some comments asserted that the intentional excavation provisions of NAGPRA (25 U.S.C. 3002(c)) could be used to authorize the disinterment of Native children from these cemeteries on Federal or Tribal lands, and suggested that, for this purpose, the Department expand the statutory definition of ''Federal lands'' in the regulations to include any former Indian boarding school where any amount of Federal funding, government certifications, or permissions were granted, regardless of the current ownership of land.

In response, as discussed in the Secretarial Memorandum establishing the Federal Indian Boarding School Initiative, the Department is committed to ''address[ing] the intergenerational impact of Indian Boarding Schools to shed light on the traumas of the past.'' The Memorandum identifies the NAGPRA process as a possible method for repatriation of some Native American children. While NAGPRA does not require a Federal agency to engage in an intentional excavation of possible burial sites, (*Geronimo* v. *Obama,* 725 F. Supp. 2d 182, 187, n. 4 (D.D.C. 2010)), we agree with the comments that the intentional excavation provisions of NAGPRA apply to the human remains and cultural items disinterred from cemeteries on Federal or Tribal lands. Congress did not make any distinction in the Act between excavations from cemeteries and excavations from other burial sites on Federal or Tribal lands. In fact, the definition of ''burial site'' in the Act (25 U.S.C. 3001(1)) explicitly refers to both a ''natural or prepared physical location.'' Furthermore, we agree with some comments that the excavation provisions of NAGPRA do not conflict with the opinion of the United States Court of Appeals for the Third Circuit in *Thorpe* v. *Borough of Thorpe,* 770 F.3d 255 (3d Cir. 2014), where the Court ruled that the repatriation provisions of NAGPRA (25 U.S.C. 3005) did not apply to a proposed disinterment and repatriation of human remains. The human remains at issue in that case, while Native American, were not located on Federal or Tribal lands, so the excavation provisions were not at issue, and were therefore not addressed by the Court of Appeals. Thus, on Federal or Tribal lands, any excavation must comply with the Act, including the requirements for consultation with (or consent from) the appropriate Indian Tribe or NHO (25 U.S.C. 3002(c)) and the order of priority for disposition of human remains (25 U.S.C. 3002(a)).

Unfortunately, the Department cannot, however, amend the regulatory definition of ''Federal lands'' as the comments requested. Congress specifically and explicitly defined Federal lands based on ownership or control, not on receipt of Federal funds (as it did in the definition of a ''museum''). Thus, ''[w]e have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals . . . . In such case, neither [a] court nor the agency is

free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.'' *Alabama Power Co.* v. *United States EPA,* 40 F.3d 450, 456 (D.C. Cir. 1994). See also, *United Keetoowah Band of Cherokee Indians of Okla.* v. *United States HUD,* 567 F.3d 1235, 1243 (10th Cir. 2009) (same); *Chevron U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837, 842–43 (1984) (''If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress''). The Department does, however, encourage the custodians of records from boarding schools, whether on Federal or Tribal lands or not, and the current owners of those boarding schools and cemeteries, to fully consult with Indian Tribes and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist Indian Tribes and NHOs in that process to the fullest extent of its authority.

Beginning in July 2021, the Department requested direct input from the Review Committee on the draft regulatory text prepared for consultation. The Review Committee held 14 meetings with over 50 hours of meeting time devoted to discussion of and development of written recommendations on the draft regulatory text. The Review Committee submitted a written recommendations to the Secretary of the Interior on March 14, 2022, and June 7, 2022. The Department reviewed these written recommendations, along with the minutes and transcripts from the related public meetings, in preparing the proposed regulations. The major comments received related to the Introductory section (see proposed 10.1) and the inventory update requirements in Subpart C—Repatriation of human remains or cultural items by museums or Federal agencies (see proposed 10.10(d) and (e)). Additional recommendations by individual members of the Review Committee were also submitted. The Department, wherever possible, adjusted the proposed regulations to address the Review Committee recommendations.

IV. Overview of Major Proposed Changes

The proposed revisions to these regulations would streamline requirements, clarify timelines and terms, reduce ambiguity, and improve efficiency in the systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony under the Act. The revisions being proposed today are intended to make the regulations more user-friendly and would:

- Reduce the number of sections and remove duplicative language. Existing requirements are condensed into a clear, easy to follow, step-by-step process.
- Correct inaccuracies and ambiguities in the existing regulations by using consistent language and clearly defined terms.
- Create a consistent writing style with clear, concise headings that describe each specific regulatory step.
- Clarify when actions are required by lineal descendants, Indian Tribes, Native Hawaiian organizations, museums, and Federal agencies by using specific timelines and deadlines.
- Provide clear instructions to Indian Tribes, NHOs, museums, and Federal agencies for establishing cultural and geographical affiliation and resolving competing claims or requests.

The proposed changes in Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands would:

- Replace the requirement for Federal agencies to publish two notices in a newspaper of general circulation for human remains or cultural items removed from Federal lands with a requirement for Federal agencies to submit one notice to the Manager, National NAGPRA Program, for publication in the **Federal Register**.
- Require certain actions be taken by Indian Tribes, NHOs, and the State of Hawai'i Department of Hawaiian Home Lands (DHHL) for discoveries or excavations on Tribal lands, including responding to a discovery, certifying that an activity may resume, authorizing an excavation, and documenting in writing the disposition of human remains or cultural items.
- Require Federal agencies and DHHL on Federal lands in the United States and Tribal lands in Hawai'i to develop a plan of action or comprehensive agreement, in consultation with lineal descendants, Indian Tribes, and NHOs, that includes instructions for protecting, stabilizing, or covering human remains or cultural items in situ, if appropriate.
- Clarify that the jurisdiction of a Federal agency to issue a permit under Section 4 of the Archaeological Resources Protection Act (ARPA) for an excavation is no broader than it is under ARPA.

The proposed changes in Subpart C—Museum or Federal Agency Holdings or Collections would:

- Remove the term ''culturally unidentifiable'' (*i.e.,* when cultural affiliation cannot be determined for human remains) and integrate the concept of repatriation through geographic origin into the overall affiliation and inventory process.
- Require repatriation of associated funerary objects together with human remains to an Indian Tribe or NHO with cultural or geographical affiliation.
- Require updated inventories for human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion. For the updated inventory, the proposed regulations would require a museum or Federal agency to initiate consultation, consult with requesting parties, and determine if there is a known lineal descendant or a connection between the human remains and associated funerary objects and Indian Tribes or NHOs with cultural or geographical affiliation.
- Require museums and Federal agencies to submit a notice of inventory completion within 6 months of completing or updating an inventory of human remains and associated funerary objects with a known lineal descendant or a connection to an Indian Tribe or NHO with cultural or geographical affiliation.
- Require museums and Federal agencies to send repatriation statements to the National NAGPRA Program. In the existing regulations, museums and Federal agencies are not required to report on any actions that occur after the publication of a notice. The proposed regulations would require both Federal agencies and museums to provide the Manager, National NAGPRA Program, with a copy of the written statement completing the repatriation, as recommended by the Government Accountability Office in a 2010 report on the implementation of the Act.
- Require museums to submit a statement describing holdings or collections in its custody to the responsible Federal agency, if known, and to the Manager, National NAGPRA Program. If a museum cannot identify a person, institution, state or local agency, or Federal agency that likely has possession or control of the holding or collection, it must submit a statement to the Manager, National NAGPRA Program. In the existing regulations, museums have no requirement to report on Federal holdings or collections. The proposed changes would align with the Department's response to the Government Accountability Office's 2010 report on the implementation of the Act.

V. Section-by-Section Summary of Proposed Changes

Table 1 shows how the Department proposes to reorganize the existing regulatory requirements and summarizes the proposed changes.

TABLE 1—SUMMARY OF PROPOSED CHANGES

Existing 43 CFR section	Proposed 43 CFR section	Summary of proposed changes
10.1 ..... 10.15	10.1	• Adds paragraphs on Accountability, Duty of care, Delivery of written documents, and Deadlines and timelines. • Informs parties of the result in failing to claim or request human remains or cultural items prior to disposition or repatriation. • Clarifies final agency action in a specific paragraph.
10.2	10.2	• Revises definitions for consistency and to reduce ambiguities. • Adds new terms to clarify requirements. • Removes obsolete terms.
10.14	10.3	• Implements Congressional intent by defining ''affiliation'' as a connection between human remains or cultural items and an Indian Tribe or NHO. Affiliation is established by identifying cultural or geographical affiliation. • Adds new paragraphs to assist when there are multiple Indian Tribes or NHOs with affiliation.
10.2 ..... 10.3 ..... 10.4 ..... 10.5	10.4	• Provides a general overview to the responsibilities of Indian Tribes, NHOs, Federal agencies, and DHHL under the Act. • Outlines the requirements in three steps for a plan of action, developed in consultation with Indian Tribes and NHOs. • Consolidates compliance options for land management activities that might result in a discovery or excavation of human remains or cultural items.
10.4	10.5	• Reduces and streamlines requirements for discoveries. • Provides a clear, documented process and timeline for resuming activities after a discovery.
10.3 ..... 10.5	10.6	• Removes duplicative language and simplifies the excavation requirements. • Clarifies and limits when a permit under Section 4 of ARPA is required.
10.6 ..... 10.7	10.7	• Adds process for disposition to a lineal descendant and clarifies requirements for disposition on Tribal lands. • Requires publication of notices in the **Federal Register** (rather than in newspapers) to improve the effectiveness of the notification and reduce burden on Indian Tribes and NHOs.
N/A	10.8	• Provides a general overview to the responsibilities of museums and Federal agencies for holdings and collections subject to the Act. • Requires museums to submit statements on holdings or collections in their custody but not in their possession or control one year after the effective date of the final rule.
10.8 ..... 10.9 ..... 10.10 ..... 10.11 ..... 10.13	10.9 10.10	• Clarifies when and what actions are required for repatriation of human remains or cultural items in a simple step-by-step process. • Updates the deadlines for completing summaries and inventories to the effective date of the final rule. • Integrates the timelines into the step-by-step process for any new holdings or collections, newly recognized Indian Tribes, new museums, or amendments to previous decisions. • Establishes timelines, deadlines, and instructions for responding to requests for human remains or cultural items and completing repatriations.
10.11	10.10	• Requires updated inventories two years after the effective date of the final rule and notices of inventory completion six months after updating or completing an inventory. • Eliminates ''culturally unidentifiable'' when cultural affiliation cannot be determined. • Requires repatriation of associated funerary objects with human remains that have a cultural or geographical affiliation.
10.12	10.11	• Removes the limited definition of a failure to comply. • Replaces the dual hearing process with a single hearing process to contest the failure to comply or the penalty assessment.
10.16 ..... 10.17	10.12	• Consolidates and clarifies the responsibilities of and procedures for the Review Committee. • Clarifies requirements and the process for informal dispute resolution through informal negotiations and request before the Review Committee.

A. Authority

NAGPRA, 25 U.S.C. 3001 *et seq.,* is the primary authority for the issuance of regulations implementing and interpreting the Act's provisions. The authority section continues to cite 25 U.S.C. 9 which authorizes the Secretary to make such regulations as he or she may think fit for carrying into effect the various provisions of any act relating to Indian affairs. Because the Act is Indian law (*Yankton Sioux Tribe* v. *United States Army Corps of Engineers,* 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate any regulations needed to implement it under the broad authority to supervise and manage Indian affairs given by Congress (*United States* v. *Eberhardt,* 789 F.2d 1354, 1360 (9th Cir. 1986)). Although 43 CFR part 10 previously cited one provision of the Archaeological Resources Protection Act (ARPA, 16 U.S.C. 470dd(2)) as an authority, the Department has determined that reliance on ARPA as authority for these regulations is unnecessary.

B. Section 10.1 Introduction

This section of the proposed rule would reorganize for readability and restate in plain language the purpose and general requirements found in the existing regulations. In response to

consultation with Indian Tribes and NHOs, the Department proposes the purpose paragraph (see proposed § 10.1(a)) recognize and ensure deference to the rights of lineal descendants, Indian Tribes, and NHOs, as provided under the Act. The Department is specifically seeking input during public comment on the proposed purpose paragraph.

In the applicability paragraph (see proposed § 10.1(b)), the Department proposes a revision to clarify that these regulations pertain to Native American human remains or cultural items and require certain actions for their protection in the event of a discovery or excavation on Federal or Tribal lands after November 16, 1990, and for their repatriation if in the possession or control of a museum or Federal agency. The Act does not provide express authority for applying the discovery and excavation provisions to land that does not meet the definition of Federal or Tribal lands (25 U.S.C. 3002). However, depending on other relevant state or local laws, human remains or cultural items discovered or excavated from private or state lands may be subject to the repatriation provisions under Subpart C.

To further clarify the applicability of these regulations, the Department proposes to remove the existing paragraph § 10.1(b)(2) to correct the misconception that human remains or cultural items must, themselves, be indigenous to Alaska, Hawai'i, and the continental United States. Under the Act, ''indigenous'' relates to the definition of ''Native American.'' Human remains or cultural items are ''Native American'' based on a relationship to a tribe, people, or culture that is indigenous to the United States.

In response to consultation with Indian Tribes and NHOs, the Department proposes new regulatory provisions to address accountability by museums and Federal agencies and to require a duty of care for human remains and cultural items (see proposed § 10.1(c) and (d), respectively). The paragraph on duty of care was drawn from language in the existing regulations at § 10.7(2) and (3) which includes a requirement for Federal agencies to consider and respect the traditions of potential claimants (*i.e.,* Indian Tribes and NHOs) including, but not limited to, traditions regarding housing, maintenance, and preservation, *to the maximum extent feasible* (emphasis added). During consultation, many Indian Tribes and NHOs requested that ''to the maximum extent feasible'' be incorporated into the duty of care requirement. The Department proposes to use the phrase ''to the maximum extent possible'' in the duty of care requirement for both museums and Federal agencies. In addition, this phrase is used to describe implementation of a plan of action under Subpart B and in the definition of consultation and the related regulatory steps in both Subpart B and C. The Department intends this phrase, ''to the maximum extent possible,'' to mean museums and Federal agencies will make a reasonable effort to:

- seek consensus during consultation,
- provide appropriate treatment, care, or handling of human remains or cultural items, and
- incorporate identifications, recommendations, and Native American traditional knowledge (see definition below) in making determinations.

Proposed § 10.1(e) would: (1) consolidate and clarify those requirements governing the delivery of written documents that are currently dispersed throughout the existing regulations; and (2) provide for delivery of written documents by email with proof of receipt, and explicitly exclude delivery of written documents by text message or social media message.

Proposed § 10.1(f) would describe how deadlines and timelines for written documents are calculated based on business days, *i.e.,* Monday through Friday, and that documents are deeded timely based on the sent date.

The Department also proposes to relocate to this Introduction section existing regulatory provisions regarding (1) failure to make a claim or a request (see proposed § 10.1(g)), (2) judicial jurisdiction (see proposed § 10.1(h)), and (3) final agency action (see proposed § 10.1(i)). Regarding final agency action, ''a final determination making the Act or this part inapplicable'' is intended to be construed broadly across the regulatory process, including some circumstances where a Federal agency's failure to comply with a regulatory requirement or deadline may demonstrate its determination that either the Act or this part is inapplicable. Regarding judicial jurisdiction (25 U.S.C. 3009(3)) nothing in the Act or these regulations is intended to abrogate any concurrent Tribal jurisdiction that may exist with respect to alleged violations of similar Tribal laws on Tribal lands.

Table 2 shows how the Department proposes to reorganize the existing regulatory requirements.

TABLE 2—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.1

Existing 43 CFR section		Proposed 43 CFR section	
10.1(a)	Purpose	10.1(a)	Purpose.
10.1(b)	Applicability	10.1(b)	Applicability.
	New	10.1(c)	Accountability.
10.7(b)	(2) Care for and manage . . .	10.1(d)	Duty of care.
	New	10.1(e)	Delivery of written documents.
		10.1(f)	Deadlines and timelines.
10.15(a)	Failure to claim prior to repatriation. (1) Any person who fails to make a timely claim . . .	10.1(g)	Failure to make a claim or a request.
10.11(e)	Disputes	10.1(h)	Judicial jurisdiction.
10.17(a)	Formal and informal resolutions		
10.15(c)	Exhaustion of remedies	10.1(i)	Final agency action.
10.1(c)	The information collection requirements . . .	10.1(j)	Information collection.
10.15(a)	Failure to claim prior to repatriation (2) If there is more than one (1) claimant. . . .		Removed.
10.15(d)	Savings provisions		Removed in part.

C. Section 10.2 Definitions for This Part

This section of the proposed rule defines terms used throughout this part. The Department proposes to reorganize defined terms in alphabetical order and remove the paragraph designations in the existing regulations at § 10.2 in conformance with the **Federal Register** Document Drafting Handbook.

The Department does not propose any substantive changes to the following 10 definitions: Act, discovery (replaces ''inadvertent discovery''), excavation (replaces ''intentional excavation''), Federal agency, Manager, National NAGPRA Program, museum, person, Review Committee, Secretary, and summary. The Department proposes to remove the following seven definitions that are no longer used in the proposed regulations: burial site, cultural affiliation (see affiliation), culturally unidentifiable, Federal agency official, Indian Tribe official, museum official, and Native Hawaiian (see Native Hawaiian organization).

Table 3 shows how the Department proposes to add, replace, or revise terms for consistency, to reduce ambiguities, and to clarify requirements throughout this part. Except as noted in the table, all terms are explained in the immediate section below.

TABLE 3—CHANGES TO EXISTING TERMS IN PROPOSED § 10.2

Change	Defined term
New terms	acknowledged aboriginal land.
	adjudicated aboriginal land.
	affiliation.
	ahupua'a.
	appropriate official*.
	ARPA*.
	ARPA Indian lands*.
	ARPA Public lands*.
	consultation.
	cultural item.
	custody.
	holding or collection.
	Indian Tribe (previously reserved).
	Native American traditional knowledge.
	'ohana.
	right of possession.
	Tribal lands of an NHO.
	United States.
Replace terms	''disposition'' and ''repatriation'' replace ''disposition''.
	''possession or control'' replaces ''possession'' and ''control''.
Revise existing terms	Federal lands.
	funerary object.
	human remains.
	inventory.
	lineal descendant.
	Native American.
	Native Hawaiian organization.
	object of cultural patrimony.
	receives Federal funds.
	sacred object.
	traditional religious leader.
	Tribal lands.
	unclaimed cultural item.

*See proposed § 10.4 and § 10.6 and related preamble section.

1. ''Acknowledged Aboriginal Land'' and ''Adjudicated Aboriginal Land''

The Department proposes to add two new terms to replace ''aboriginal lands'' and ''aboriginal occupation,'' which are not defined but are used in the existing regulations §§ 10.6 and 10.11. The new terms, ''acknowledged aboriginal land'' and ''adjudicated aboriginal land,'' would contain the same requirements for ''aboriginal lands'' and ''aboriginal occupation,'' found in the existing regulations at §§ 10.6(a)(2)(iii)(A) and 10.11(b)(2)(ii) and (c)(1)(ii), but the new definitions would distinguish and clarify how to apply the terms.

For ''acknowledged aboriginal land,'' the definition would elaborate on which treaties may be used to identify aboriginal land and would add other Federal, foreign, or intertribal government documents to the list of acceptable sources. Some examples of other Federal documents that provide information on aboriginal occupation by an Indian Tribe are ''Report to the President by the Indian Peace Commission, 1868,'' ''Annual Reports of the Commissioner on Indian Affairs,'' and ''Alaska Natives and the Land'' (by the Federal Field Committee for Development Planning in Alaska, October 1968). A source for identifying intertribal treaties, diplomatic agreements, and bilateral accords is David H. DeJong's book ''American Indian Treaties,'' which identifies 63 intertribal treaties, dating between 1666 and 1903. The Department has intentionally declined to require that intertribal treaties, diplomatic agreements, or bilateral accords be in writing in recognition of traditional forms of documentation, such as two-row wampum belts.

For ''adjudicated aboriginal land,'' the definition is drawn from the Act (25 U.S.C. 3002(a)(2)(C)) and clarified, based on Sections 15 and 22 of the Indian Claims Commission Act of 1946 (Pub. L. 79–726, 60 Stat. 1049), that a final judgment also includes a judgment concerning a settlement (compromise of claim) if that judgment or settlement either explicitly recognizes certain land

as the aboriginal land of an Indian Tribe or adopts findings of fact that do so.

2. ''Affiliation''

The Department proposes a new term, ''affiliation,'' and to remove the existing definitions of ''cultural affiliation'' and ''culturally unidentifiable.'' This change reflects Congressional intent and focus on affiliation for the sole purpose of disposition or repatriation. In defining affiliation, Congress ''intended to ensure that the claimant has a reasonable connection with the materials'' (H. Rep. 101–877, at 14, and S. Rep. 101–473, at 6). Identifying ''cultural affiliation'' has been a significant barrier to disposition and repatriation under the Act, despite the clear intent of Congress that it be used for no other purpose than to ensure a reasonable connection between the human remains and cultural items and an Indian Tribe or NHO. Defining ''affiliation'' in these regulations without the qualifier of ''cultural'' better aligns with Congressional intent, and addresses concerns raised during consultation with Indian Tribes and NHOs about implementing the term ''geographical affiliation'' separately from cultural affiliation. In response to consultation with Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this definition and the section on affiliation. The definition of ''cultural affiliation'' from the Act and the existing regulations, the lines of information, and the use of geographic relationships consistent with the existing regulation are all incorporated into the regulatory process by which ''affiliation'' is established in the proposed text at § 10.3.

3. ''Ahupua'a''

The Department proposes to add a new term, ''ahupua'a,'' to use when determining the Native Hawaiian organization with the closest affiliation to human remains or cultural items. While the term serves a geographic purpose, identifying a traditional land division, an ahupua'a may also be associated with various traditional and customary practices in addition to habitation and provides important cultural connections between its earlier occupants or traditional users and Native Hawaiian organizations. Traditionally, the occupants of an ahupua'a are its primary stewards.

4. ''Consultation''

The Department proposes to add a new term, ''consultation,'' using language provided by Congress (H. Rep. 101–877, at 16). In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus and incorporate identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.

5. ''Cultural Item''

In response to consultation with Indian Tribes and NHOs, the Department proposes to add a new term, ''cultural item,'' and specifically exclude human remains from that definition. Although Congress included human remains in defining cultural items (25 U.S.C. 3001(3)), the Department proposes throughout these regulations to use the phrase ''human remains or cultural items'' rather than ''cultural items.'' This edit is responsive to requests from some Indian Tribes and NHOs who oppose any language that identifies people as items since this can be seen as objectifying and dehumanizing. This edit does not have any impact on the applicability or scope of these regulations.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition of cultural items (and to subsequent specific definitions of cultural items) that identification of cultural items is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of cultural items is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of cultural items, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a cultural item.

The Act was enacted for the benefit of Indians, therefore the canons of construction for Indian law applies. The Act and these regulations ''are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'' (*Yankton Sioux Tribe* v. *United States Army Corps of Engineers,* 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). Consistent with this principle, the Department proposes to require deference to lineal descendants, Indian Tribes, and NHOs throughout the regulations, but specifically for identification of cultural items. Legislative intent on the definition of cultural item, generally, and to each definition specifically, is clear. ''The Committee has made every effort to incorporate the comments and address the concerns of members of the scientific and museum communities with regard to the substantive definitions set forth in the Act, while at the same time recognizing that there are over 200 tribes and 200 Alaska Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community. Accordingly, the definitions of sacred objects, funerary objects, and items of cultural patrimony will vary according to the tribe, village, or Native Hawaiian community.'' (Senate Rpt. 101–473, page 4).

6. ''Custody''

The Department proposes to add a new term, ''custody,'' that would indicate an obligation for human remains or cultural items that is less than ''possession or control.'' See discussion of ''possession or control'' below. This newly defined term does not have the same meaning as the general meaning given to the same word used throughout the existing regulations, especially at § 10.6.

7. ''Disposition''

The Department proposes to replace the term ''disposition'' in the existing regulations at § 10.2(g)(5) with two separate terms: ''disposition'' and ''repatriation.'' In the proposed revision, ''disposition'' applies only to Subpart B. The proposed revision to ''disposition'' would denote that an Indian Tribe, NHO, Federal agency, or DHHL acknowledges and recognizes that a lineal descendant, Indian Tribe, or NHO has control or ownership of human remains or cultural items removed from Federal or Tribal lands. Although the phrase, control or ownership, is not defined in the Act or the proposed regulations, it is used to refer to the rights of lineal descendants, Indian Tribes, and NHOs in Native American human remains or cultural items as acknowledged and recognized by the Act. The phrase, control or ownership, is used to differentiate ''disposition'' and ''repatriation'' from terms used in other sections of the Act, such as the ''right of possession,'' which a museum or Federal agency may use to assert its lawful control or ownership, or ''possession or control,'' which is an element of applicability under the Act that itself does not determine control or ownership or a right of possession. In describing disposition, the Act uses the terms ''ownership,'' ''control,'' ''right of control,'' and ''title to'' (25 U.S.C. 3002). Of these terms, the phrase, control or ownership, is the most appropriate to apply to human remains as well as cultural items that may be subject to

disposition and describes the existing rights of lineal descendants, Indian Tribes, and NHOs more accurately. The phrase, control or ownership, is intended to indicate that, as in the Act, human remains or cultural items removed from Federal or Tribal lands belong, in the first instance, to lineal descendants, Indian Tribes, and NHOs and not to the Federal agency.

8. ''Federal Land''

The Department proposes to revise the term ''Federal land'' to clarify the lands on which Federal programs or activities may be subject to the Act. As in the existing regulations, ''Federal land'' includes lands not just owned by the United States Government, but also lands under its control. (Note that the general term ''control'' as used in this discussion of Federal land is not the same as the defined term ''possession or control'' as used in the Act). Whether Federal control of the lands on which it conducts its programs or activities is sufficient to apply these regulations depends on the circumstances and scope of the Federal agency's authority, and on the nature of State and local jurisdiction. Because of the wide array of agency-specific authorities that can establish federally controlled lands, the Federal agency officials must make such determinations on a case-by-case basis and, in doing so, should consult with their legal counsel.

While Federal agency officials must ultimately make their own determinations as to the lands under the control of their agency, the drafters note that, in general, a Federal agency will only have sufficient legal interest to ''control'' lands it does not own when it has sufficient statutory jurisdiction with respect to those lands or other form of property interest in the land, such as a lease, easement, or other agreement with terms that have indicia of control. *See Yankton Sioux Tribe* v. *United States Army Corps of Eng'rs,* 396 F. Supp 2d 1087 (D.S.D. 2005); *Crow Creek Sioux Tribe* v. *Brownlee,* 331 F.3d 912 (D.C. Cir. 2003) (the Act still applied to lands transferred by the U.S. Army Corps of Engineers to South Dakota pursuant to the Water Resources Development Act due to a specific statutory provision applicable to those transferred lands). Where two or more Federal agencies share regulatory or management jurisdiction over federally owned or controlled lands, the Federal agency with primary management authority will generally have ''control'' for purposes of implementing these regulations.

On the other hand, the drafters note that Federal agency participation in a regulatory or supervisory capacity does not necessarily rise to the level of Federal ''control.'' *See, e.g., Castro Romero* v. *Becken,* 256 F.3d 349 (5th Cir. 2001) (claims for violations of the Act with regard to human remains found on municipal land could not be upheld, even though a Federal agency was involved in the project in a supervisory role); *Western Mohegan Tribe and Nation of New York* v. *New York,* 100 F. Supp. 2d 122, (N.D.N.Y. 2000), *aff'd in part, vacated in part on other grounds* 246 F.3d 230 (2nd Cir. 2001) (''Plaintiffs' broad reading of the statute is inconsistent with the Act's plain meaning and its legislative history where the language 'Federal lands' denotes a level of dominion commonly associated with ownership, not funding pursuant to statutory obligations or regulatory permits.''). For example, the fact that a Federal permit is required to undertake an activity on non-Federal land generally is not sufficient legal interest in and of itself to ''control'' the land within the meaning of the Act and this proposed rule.

Indian lands outside reservation boundaries that are held in trust by the United States Government or are held by an Indian landowner subject to restrictions on alienation imposed by the United States Government, such as allotments, are subject to Federal control and are treated as Federal lands under these regulations. The control of the United States Government over Indian land is the same whether it is in trust or restricted status and whether it is within the exterior boundaries of a reservation or not. *United States* v. *Ramsey,* 271 U.S. 467, 471–72 (1926). See also *Cohen's Handbook of Federal Indian Law* § 16.03[1], at 1071 (Nell Jessup Newton ed., 2012). Since Congress's control is virtually the same for trust allotments and off-reservation allotted lands with Federal restraints on encumbrance and alienation (restricted fee allotments), then Federal control of such lands as a matter of law meets the *Western Mohegan* standard noted above. The treatment of off-reservation Indian land as ''Federal land'' for purposes of the Act is consistent with the current practice of the Bureau of Indian Affairs.

9. ''Funerary Object''

The Department proposes to revise the term ''funerary object'' and align it with the definitions in the Act for ''associated funerary object'' and ''unassociated funerary object.'' The portion of the statutory definition that is the same between the two terms has been used to define ''funerary object.'' As defined in the Act, the only difference between the definition for associated and unassociated funerary objects is the location of the related human remains. A single object may be a funerary object if the object is identified as having been placed with or near human remains. Therefore, determining if the funerary object is associated or unassociated does not require identifying the specific individual with which the object was placed, but rather, only requires identifying the location of the related human remains.

For example, an authorized excavation in 1940 removed a Native American object from what was thought to be a village site dating between 2000 BCE to 500 CE. The object dates to the late pre-contact period, likely between 1500–1580 CE, based on materials and form. Fragmentary human remains were identified during the excavation and noted in field notes, but no human remains were removed. Based on information available including the results of consultation, it is reasonable to believe the object was placed intentionally in this location because of the human remains, but it is also reasonable to believe the object was placed there many centuries after the human remains. Nevertheless, the object meets the definition of a funerary object since it was intentionally placed near human remains.

The funerary object does not, however, meet the definition of an associated funerary object. Human remains were identified, but no human remains were removed during the excavation. In the information available, there is no record of human remains being removed from the site at any other time. Through consultation with Indian Tribes, the funerary object was not identified as being the kind of object made exclusively for burial purposes or to contain human remains.

When a funerary object is not an associated funerary object, it may be an unassociated funerary object if it meets one or more of the criteria in the definition (see proposed § 10.2 Funerary object (2)). The funerary object is not related to specific individuals or families (see proposed § 10.2 Funerary object (2)(ii)). The funerary object was not removed from a specific burial site or an area known to be a burial site (see proposed § 10.2 Funerary object (2)(iii) and (iv)). However, the funerary object is related to known human remains (identified in the field notes), but those human remains were not removed from the site (see proposed § 10.2 Funerary object (2)(i)). Therefore, the funerary object meets the definition of an unassociated funerary object.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition of funerary object (and to all specific definitions of cultural items) that identification of a funerary object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of a funerary object is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of a funerary object, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a funerary object.

10. ''Holding or Collection''

The Department proposes to add a new term ''holding or collection'' which is not defined in the Act. The proposed definition is drawn from dictionary definitions as well as the International Council of Museums' 2007 definition. Merriam-Webster Dictionary defines ''collection'' as ''something collected; especially: an accumulation of objects gathered for study, comparison, or exhibition . . .'' and defines ''holding'' as ''any property that is owned or possessed . . .'' The International Council of Museums' 2007 definition of a museum is an institution ''which acquires, conserves, researches, communicates and exhibits . . . for the purposes of education, study, and enjoyment.'' Additional purposes in this definition are taken from Unit 34 of ''Museum Basics'' (1993) by Timothy Ambrose, which lists different types of museum collections. In response to consultation with Indian Tribes and NHOs, we have refrained from using offensive purposes listed in some of these sources such as ''enjoyment'' or ''personal benefit.'' While the proposed definition includes a wide variety of purposes, a holding or collection under this proposed rule would not be limited to only these purposes.

11. ''Human Remains''

The Department proposes to revise the term ''human remains'' to clarify what is and what is not considered human remains for purposes of disposition and repatriation. The proposed revision is based on the explanation provided in the preamble to the 1995 final rule (60 FR 62137, December 4, 1995). The explanation noted that the Act makes no distinction between fully articulated burials and isolated bones and teeth. The preamble then stated that the final rule added language excluding ''naturally shed'' human remains from consideration under the Act. The preamble clarified that this exclusion does not include human remains for which there is evidence of purposeful disposal or deposition. The preamble then addressed a question asked by a commenter who sought clarification on the status of human remains that were not freely given but had been incorporated into objects that are not cultural items as defined in the regulations. The preamble explained that the legislative history does not address this question and therefore the proper disposition of such human remains must be determined on a case-by-case basis.

Consistent with the advice in 1995, identification of human remains must be made on a case-by-case basis. The Act requires identification of all human remains in a holding or collection, including human remains reasonably believed to be comingled with other material (such as soil or faunal remains). During consultation with lineal descendants, Indian Tribes, and NHOs, museums and Federal agencies should evaluate if an entire admixture can be treated as human remains. If such a request is made during consultation, but it is not possible to treat the admixture as human remains, the record of consultation should include the effort to identify a mutually agreeable alternative. The proposed definition provides two ways human remains may be incorporated into an object or item. For example, depending on the results of consultation, a scalp shirt with human remains or a flute made with human remains that is not a funerary object, a sacred object, or an object of cultural patrimony would be considered human remains and subject to disposition or repatriation under the Act and the proposed regulations. Human remains that are incorporated into a funerary object, sacred object, or object of cultural patrimony would not be treated as human remains, but as a cultural item and subject to disposition or repatriation under the Act and the proposed regulations.

12. ''Indian Tribe''

The Department proposes to add a definition for the term ''Indian Tribe,'' currently reserved in the existing regulations at § 10.2(b)(2). The list of federally recognized Indian Tribes is the list of Indian Tribes for the purposes of NAGPRA. Throughout the proposed rule, the term is used in the singular form, but it is expected that multiple Indian Tribes may meet the criteria under this part for disposition or repatriation of the same human remains or cultural items. Any Indian Tribe with cultural or geographical affiliation may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

13. ''Inventory''

The Department proposes to revise the term ''inventory'' to accurately reflect the content as required by the Act. In response to consultation with Indian Tribes and NHOs, the Department is aware that the existing regulatory definition has been a barrier to expeditious repatriation as it requires an ''item-by-item description.'' In the Act, an inventory is defined as a ''simple itemized list.'' The proposed revision to the definition uses the exact language from the Act and includes the information required to be included in an inventory.

14. ''Lineal Descendant''

The Department proposes to revise the definition and remove the criteria for determining lineal descent in the existing regulations at §§ 10.2(b)(2) and 10.14(b). The term ''lineal descendant'' is not defined in the Act. The revised definition would allow for disposition or repatriation of human remains and associated funerary objects to a ''lineal descendant'' in the following cases:

- The identity of a particular deceased individual is known, and a specific living person is known to be the direct descendant of the deceased individual. For example, the human remains are of the great-great-grandfather of the living great-great-granddaughter.
- The identity of each deceased individual in a group of human remains is not known, but a specific living person is known to be the direct descendant of all the deceased individuals in the group. For example, all that is known is that the human remains of multiple individuals are the great-great-grandfather, great-grandfather, father, and maternal uncle of a specific living person, who is the direct descendant of them all under a traditional system of descent.

Throughout the proposed rule, the term is used in the singular form, but it is expected that multiple lineal descendants may meet the criteria under this part for disposition or repatriation of the same human remains, funerary

objects, or sacred objects. Any lineal descendant may submit a claim for disposition or a request for repatriation for human remains, funerary objects, or sacred objects. Two or more lineal descendants may agree to joint disposition or joint repatriation of human remains, funerary objects, or sacred objects. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

15. ''Museum''

The Department proposes a slight addition to the term ''museum'' to clarify that, consistent with the Act, the term does not include the Smithsonian Institution. Also consistent with the Act, the term ''museum'' includes State or local government agencies, including subdivisions of State or local government agencies. Consequently, any of the following examples may be a museum under the Act and the proposed regulations if they meet all the criteria of the definition: a county coroner's office, a city medical examiner's office, a State police department or local post, a city library, or a city water authority.

16. ''Native American''

The Department proposes to revise and clarify the existing definition of ''Native American.'' The Act applies to human remains or cultural items that meet the definition of ''Native American.'' ''Native American'' human remains or cultural items are not only items of a tribe, people, or culture that is indigenous to the United States, but are also items that are related to such tribe, people, or culture. Because Congress did not define ''tribe,'' ''people,'' or ''culture,'' the proposed definition of the term ''Native American'' incorporates statutory and dictionary definitions to better clarify these terms.

17. ''Native American Traditional Knowledge''

The Department proposes to add a new term, ''Native American traditional knowledge,'' for use in the definition of ''consultation'' and ''cultural item'' as well as definitions of specific kinds of cultural items. In response to consultation with Indian Tribes and NHOs, this definition is a variation on what was suggested by a specific Indian Tribe, but this term is rooted in the larger concept of indigenous ways of knowing. The proposed definition attempts to cover the wide variety of terminology related to this concept while remaining consistent with the disposition and repatriation process under the Act. The Department recognizes that there is different terminology used by and among Native American people that incorporates this concept. Additionally, the concept of traditional knowledge is recognized by a number of Federal agencies in the context of land management activities and the use of natural or cultural resources. In these contexts, it is often referred to as traditional ecological knowledge or TEK. It may also be referred to as indigenous knowledge or traditional cultural knowledge. For the limited purposes of these regulations, the term ''Native American traditional knowledge'' is inclusive of all these terms and may provide information needed to identify affiliation (either cultural or geographical), funerary objects, lineal descendants, objects of cultural patrimony, and sacred objects. We welcome additional input on the specifics in this definition as well as its use in the regulatory text.

18. ''Native Hawaiian Organization''

The Department proposes to revise the term ''Native Hawaiian organization'' (NHO) by incorporating the definition of ''Native Hawaiian'' from the Act. While the Act uses the phrase ''aboriginal people'' to define Native Hawaiian, the proposed regulations use the phrase ''indigenous people'' to better relate to the definition of Native American and distinguish from the use of aboriginal elsewhere in the Act and regulations referring to land. The proposed definition would include those entities that the Secretary, through the Office of Native Hawaiian Relations, has identified on the most current Native Hawaiian Organization Notification List. The Department also proposes to include in the definition of NHO the Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations. Although the Act names Hui Malama I Na Kupuna O Hawai'i Nei as a Native Hawaiian organization, that group ceased to exist in 2015, so the proposed definition does not include it.

Throughout the proposed rule, ''Native Hawaiian organization'' is used in the singular form, but it is expected that multiple NHOs may meet the criteria under this part for disposition or repatriation of the same human remains or cultural items. Any NHO with affiliation may submit a claim for disposition or a request for repatriation under the proposed rule. Two or more NHOs may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation would be considered a single request and not competing claims or requests.

19. ''Object of Cultural Patrimony''

The Department proposes to revise the definition of ''object of cultural patrimony'' to clarify what a Native American group or culture is for purposes of the definition. In response to consultation with Indian Tribes and NHOs and a specific suggestion from an Indian Tribe, the Department also proposes to add a sentence to recognize that a caretaker may have been entrusted with responsibility for an object and may have even conferred that responsibility on another caretaker, but the object can still be an object of cultural patrimony. In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition (and to all specific definitions of cultural items) that identification of an object of cultural patrimony is according to an Indian Tribe or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of an object of cultural patrimony is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of an object of cultural patrimony, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how an Indian Tribe or NHO shares the information needed to identify an object of cultural patrimony.

20. '' 'Ohana''

To emphasize the importance of the familial or kinship relationship in Hawai'i, the Department proposes to add a new term '' 'ohana,'' used in the definition of ''Native Hawaiian organization'' and in determining the NHO with the closest affiliation.

21. ''Possession or Control''

In response to consultation with Indian Tribes and NHOs, the Department proposes to replace the two separate terms in the existing regulations ''possession'' and ''control'' into one term, as used in the Act, ''possession or control.'' Congress used these two words as a single term throughout the Act except for ''right of possession'' (discussed later). The phrase ''possession or control'' as used in the Act connotes a singular interest in human remains or cultural items and utilizes the two elements of the phrase only to address the physical location of the human remains or cultural items. In the Act, having possession or control means a museum or Federal agency may

make decisions about human remains or cultural items without having to request permission from some other entity or person (an interest). This interest is present regardless of the physical location of the human remains or cultural items. For a similar example, a person has the same interest in property that is in the person's home as in property that same person keeps in an offsite storage unit. The person can make decisions about the property in the storage unit without having to request permission from the storage facility. Regardless of the physical location of the property, the person's interest in the property is the same whether it is in their home or in the custody of the storage facility.

The Department also proposes to define a separate term, ''custody,'' that would indicate an obligation that is less than ''possession or control.'' Whether a Federal agency or museum has a sufficient interest in human remains or cultural items to establish possession or control is a legal determination that must be made on a case-by-case basis. However, when a museum with custody of human remains or cultural items cannot identify any person, institution, State or local government agency, or Federal agency with possession or control, the museum should presume it has possession or control for purposes of repatriation under the Act. When a Federal agency cannot determine if human remains or cultural items came into its possession or control before or after November 16, 1990, or cannot identify the type of land the human remains or cultural items were removed from, the Federal agency should presume it has possession or control for purposes of repatriation under the Act. This determination alone does not create any legal rights or indicate that a museum or Federal agency has a ''right of possession'' to human remains or cultural items; it is merely a jurisdictional requirement for application of the Act to human remains or cultural items subject to repatriation by the appropriate museum or Federal agency.

The Department received several comments through consultation with Indian Tribes and NHOs requesting that it expand the scope of the term ''possession or control'' to include both those entities that have possession or control as defined in the existing regulations and those entities that merely have custody as defined in this proposed rule. In some cases, this request would make multiple entities concurrently responsible for fulfilling the Act's inventory, summary, and repatriation processes. The Department has declined to make this change as such an interpretation is inconsistent with the framework and legislative history of the Act. Congress provided no indication in the Act or its legislative history that such an expansive interpretation was its intent, and various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency would be responsible for compliance with the Act. However, the Department acknowledges the underlying intent of this request to ensure repatriation of all holdings or collections subject to the Act and has proposed other revisions that seek to address this issue by directing museums and Federal agencies to share greater information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items in the custody of other entities.

22. ''Receives Federal Funds''

The Department proposes to revise the term ''receives Federal funds'' to clarify that any recipient of Federal financial assistance would be deemed to receive Federal funds under this part. The definition is drawn from the interpretation of comparable terms from the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, as amended, implementing regulations, and OMB's Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200). The ''Receives Federal funds'' requirement may be satisfied by direct or indirect receipt of funds from the Federal government. Satisfaction of the requirement through indirect funding is permissible and consistent with the Supreme Court's decision in *Grove City College* v. *Bell,* 465 U.S. 555 (1982).

For example, an educational institution that accepts no direct Federal financial assistance is deemed to receive Federal financial assistance when it enrolls students who receive Federal grants that must be used for educational purposes (34 CFR part 106). A Tribal museum receives Federal funds for purposes of repatriation if the Indian Tribe of which the museum is a part receives Federal financial assistance. A county library receives Federal funds for purposes of repatriation if its State government or other agency provides a subaward to the library as part of a Federal grant or award. The term also underscores that the U.S. Government's payments that are compensatory, such as payments in lieu of taxes paid under the Payments in Lieu of Taxes Act, as amended (31 U.S.C. 6901 *et seq.*) are not considered Federal financial assistance (and *see McMullen* v. *Wakulla County Board of County Commissioners,* 650 Fed. Appx. 703 (11th Cir. 2016)).

23. ''Repatriation''

The Department proposes to replace the term ''disposition'' in the existing regulations at § 10.2(g)(5) with two separate terms: ''disposition'' and ''repatriation'' used consistently throughout the regulations. In the proposed revision, ''repatriation'' applies only to Subpart C and has been incorporated into the title of that subpart. The proposed revision would denote that a museum or Federal agency acknowledges and recognizes that a lineal descendant, Indian Tribe, or NHO has control or ownership of human remains or cultural items in a holding or collection. Although the phrase, control or ownership, is not defined in the Act or the regulations, it is used to refer to the rights of lineal descendants, Indian Tribes, and NHOs in Native American human remains or cultural items acknowledged and recognized by the Act. The phrase, control or ownership, is used to differentiate ''disposition'' and ''repatriation'' from terms used in other sections of the Act, such as the ''right of possession,'' which a museum or Federal agency may use to assert its lawful control or ownership, or ''possession or control,'' which is an element of applicability under the Act that itself does not determine control or ownership or a right of possession. In describing repatriation, the Act uses the terms ''return,'' ''owned,'' and ''owned or controlled'' (25 U.S.C. 3005). Of these terms, the phrase, control or ownership, is the most appropriate to apply to human remains as well as cultural items that may be subject to repatriation and describes the existing rights of lineal descendants, Indian Tribes, and NHOs more accurately. The phrase, control or ownership, is intended to indicate that, as in the Act, human remains and cultural items in holdings or collections belong, in the first instance, to lineal descendants, Indian Tribes, and NHOs and not to the museum or Federal agency unless the museum or Federal agency is able to prove a ''right of possession.'' By using ''right of possession'' as a standard of repatriation, the Act establishes that museums and Federal agencies do not have a rightful legal interest in human remains or cultural items unless the museum or Federal agency can prove an authoritative transfer of that ''right of possession.''

24. ''Right of Possession''

The Department proposes a new defined term ''right of possession'' by

moving the text from the existing regulations at § 10.10(a)(2). The Act recognizes a ''right of possession'' to cultural items; however, Congress acknowledged that this right is qualified with respect to human remains and associated funerary objects. The Act utilizes the concept of right of possession first as a defense against criminal sanctions for the sale, purchase, use, or transport for profit of human remains (18 U.S.C. 1170); and again, where museums and Federal agencies are permitted to assert a right of possession to unassociated funerary objects, sacred objects, and objects of cultural patrimony with evidence (25 U.S.C. 3005).

Congress did not provide a process for a museum or Federal agency to assert a right of possession to human remains and associated funerary objects. This approach is consistent with Congress' intent to distinguish human remains and associated funerary objects from cultural items as quasi-property. Applicable common law in the United States generally accepts that human remains and associated burial items cannot be ''owned'' in the same manner as conventional property. The Act (25 U.S.C. 3001 (13)) follows the common law by distinguishing between the property attributes of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony, and the quasi-property attributes of Native American human remains and associated funerary objects.

Congress acknowledged that the right of possession to unassociated funerary objects, sacred objects, or object of cultural patrimony, as defined in the Act, may be subject to a Fifth Amendment takings analysis, and that these objects may potentially be considered property. A right of possession for prehistoric cultural items fitting these categories might be shown through a written authorization from a competent authority to excavate, remove, and curate such items from a particular area or site. Although Congress also determined that the original acquisition of Native American human remains and associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate Indian Tribe or NHO is deemed to give right of possession to those human remains and associated funerary objects, Congress chose not to make that right of possession to human remains and associated funerary objects subject to a Fifth amendment takings analysis. Congress was clear that it did not intend to categorize human remains and associated funerary objects as property under the Act, as had been its approach for unassociated funerary objects, sacred objects, or object of cultural patrimony. Thus, a Fifth Amendment taking does not result from the repatriation of human remains and associated funerary objects.

In the proposed revision, the Department interprets ''voluntary consent'' and ''full knowledge and consent'' considering the history of Indian country and recognizes that ''voluntary consent'' and ''full knowledge and consent'' does not include ''consent'' given under duress or as a result of bribery, blackmail, fraud, misrepresentation, or duplicity on the part of the recipient. As such, consent in this definition must be shown to have been fully free, prior, and informed consent.

25. ''Sacred Object''

In response to consultation with Indian Tribes and NHOs, the Department proposes to revise that a sacred object is, in the words of the Act, ''needed'' for a traditional Native American religious practice. Such practice could include the need to ritually inter the object. The Department proposes to add to the definition of sacred object (and to all specific definitions of cultural items) that identification of a sacred object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of a sacred object is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of a sacred object, the Department seeks to emphasize that consultation, which is required throughout the proposed regulation, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a sacred object.

26. ''Traditional Religious Leader''

The Department proposes to revise the term ''traditional religious leader'' in response to consultation with Indian Tribes and NHOs. The term is not defined in the Act and the proposed revisions are intended to clarify and simplify the definition. The proposed revisions intend to place the authority for identifying a traditional religious leader in the hands of an Indian Tribe or NHO. There is no requirement for an Indian Tribe or NHO to disclose information about the cultural, ceremonial, or religious practices or cultural duties or leadership role used to identify a traditional religious leader.

27. ''Tribal Lands''

The Department proposes to revise the term ''Tribal lands'' by removing the provision in the existing regulations related to a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution (25 U.S.C. 3001(13)). Comments to the 1995 final rule sought clarification regarding the application of NAGPRA to privately owned lands within the exterior boundaries of an Indian reservation. To address any potential conflict, the final rule codified language stating that the regulations will not apply to Tribal lands to the extent that any particular action authorized or required will result in such a taking of property. A review of the legislative history for the Act shows this concept does not apply to the statute as enacted and therefore is removed from the definition of Tribal lands.

28. ''Tribal Lands of an NHO''

The Department proposes to add a new term ''Tribal lands of an NHO'' to more accurately describe a subset of Tribal lands in Hawai'i so it can be applied in the regulatory process in Subpart B. In the Act, priority for disposition of human remains or cultural items from Tribal lands is in the Indian Tribe or NHO on whose Tribal lands the human remains or cultural items were removed. While the Tribal lands of an Indian Tribe is clearly identified by the definition of Tribal lands, the application of this priority on Tribal lands in Hawai'i is not clear from the definition of Tribal lands alone. This definition provides for an NHO to take on responsibility for the provisions of the Act from the State of Hawai'i DHHL. When an NHO has a lease or license from DHHL pursuant to the Hawaiian Homes Commission Act (HHCA), that NHO can elect to take on any of the responsibilities under Subpart B of the proposed regulations on its Tribal lands (see proposed §§ 10.5(c), 10.6(a), and 10.7(c)).

29. ''Unclaimed Cultural Items''

The Department proposes to revise the term ''unclaimed cultural items'' for clarity. The proposed revision retains the same central requirement of the existing definition but removes the more regulatory process part of the existing regulation to the regulatory text (see proposed § 10.7(e)).

30. ''United States''

The Department proposes to add a new term ''United States'' to provide a geographical descriptor throughout this part.

D. Section 10.3 Cultural and Geographical Affiliation

This section of the proposed rule would improve the organizational structure of the existing regulations and better align the requirements with Congressional intent. The Department proposes to relocate existing regulatory provisions at § 10.14 to Subpart A-General.

The proposed revisions would remove the criteria for determining lineal descent in the existing regulations at § 10.14(b), as it is repetitive of the definition for lineal descendant and not necessary. In conjunction with the defined term ''affiliation,'' the proposed revisions reflect the intent of Congress that for purposes of disposition or repatriation, all that is required is a reasonable connection between human remains or cultural items and an Indian Tribe or NHO (H. Rep. 101–877, at 14, and S. Rep. 101–473, at 6). The proposed revisions identify two kinds of affiliation for purposes of disposition or repatriation: cultural or geographical.

1. Cultural Affiliation

For cultural affiliation, the proposed revisions clarify the existing requirements by moving ''cultural affiliation'' to this section to include not only what it is, but also how it is established and what it does not require. The proposed revisions simplify the information and criteria needed to identify cultural affiliation by removing extraneous or duplicative language that has often been a barrier to repatriation. The proposed revisions also clearly explain that more than one Indian Tribe or NHO may have a cultural affiliation to human remains or cultural items.

For example, assume that the only information available for individual human remains shows that the human remains were removed from a particular site and that the human remains have a date range spanning 1,000 years. Indian Tribe A has a relationship of shared group identity to an earlier group who occupied the site at some point during that 1,000-year span. Similarly, Indian Tribe B has a shared group identity with a different earlier group that also occupied the site at different point during that 1,000-year span. Even though Indian Tribe A and Indian Tribe B do not themselves have a relationship of shared group identity, both Indian Tribe A and Indian Tribe B have a cultural affiliation with the human remains from that site.

In response to consultation with Indian Tribes and NHOs, the Department emphasizes that ''a preponderance of the evidence'' is a similar standard to a ''reasonableness'' requirement, both of which are common legal concepts. In both standards, a ''more likely than not'' assessment is required, such that the reasonableness requirement for tracing cultural affiliation is satisfied by a preponderance of the evidence establishing cultural affiliation. Congressional report language states cultural affiliation ''shall be established by a simple preponderance of the evidence,'' and that phrase is used in the proposed revisions.

2. Geographical Affiliation

For geographical affiliation, the proposed revisions draw on language in the Act requiring the identification of ''the geographical and cultural affiliation'' (25 U.S.C. 3003(a)) and include the information and criteria needed to establish geographical affiliation. The proposed revisions clarify, as under the existing regulations at § 10.11, ''geographical affiliation'' is identified by tracing a relationship between an Indian Tribe or NHO and a geographic area connected to the human remains or cultural items. While cultural affiliation requires a simple preponderance of the evidence given the information available, geographical affiliation only requires that the information be available. The proposed revisions also clearly explain that more than one Indian Tribe or NHO may have a geographical affiliation to human remains or cultural items.

For example, assume that the geographic area connected to human remains and associated funerary objects is the Tribal lands of Indian Tribe L, the adjudicated aboriginal land of Indian Tribe N, and the acknowledged aboriginal land of Indian Tribes M, N, O, and P. All the Indian Tribes (L, M, N, O, and P) have a geographical affiliation with the human remains. Any information beyond the geographic area, for example when the human remains or cultural items were removed or types of associated funerary objects, may provide information sufficient to identify a more specific cultural affiliation to one or more of the Indian Tribes but must not be used to limit the geographical affiliation to all the Indian Tribes.

The proposed revision states (in response to consultation with Indian Tribes and NHOs) that the information used to identify geographical affiliation may provide information sufficient to also establish cultural affiliation. Because geographical information is one line of information that may be used for cultural affiliation, that information alone may be sufficient to establish cultural affiliation as well as geographical affiliation.

3. Multiple Affiliations and Closest Affiliations

The proposed revisions provide clear instructions to Indian Tribes, NHOs, museums, and Federal agencies for making and considering single claims or requests and for resolving competing claims or requests by identifying the Indian Tribe or NHO with the closest affiliation (see proposed § 10.3(c) and (d)). The proposed revisions clearly explain that two or more Indian Tribes or Native Hawaiian organization may submit a claim for disposition or a request for repatriation and may claim joint disposition or request joint repatriation of human remains or cultural items. Joint claims or requests are considered a single claim or request and not competing claims or requests.

In rare cases when there are competing claims or requests, museums and Federal agencies must identify the ''closest cultural affiliation'' (25 U.S.C. 3002(a)(2)(B)) and the ''most appropriate claimant'' (25 U.S.C. 3005 (e)). The Act provides no process for making these identifications, but in the inventory and notification provisions of the Act (25 U.S.C. 3003(d)(2)(B) and (C)), there is a distinction made between two types of cultural affiliation: clearly identifiable as to tribal origin and not clearly identifiable as being culturally affiliated but determined by a reasonable belief. The Department proposes to use this language to inform how a museum or Federal agency might resolve competing claims for disposition or requests for repatriation. The standard for establishing cultural affiliation in the first instance is always a preponderance of the evidence, but when multiple Indian Tribes or NHOs meet that standard and have submitted competing claims or requests, these paragraphs provide a priority order to differentiate between culturally affiliated Indian Tribes. In resolving competing claims or requests, a museum or Federal agency may identify one or more Indian Tribes or NHOs with the closest affiliation.

Table 4 shows how the Department proposes to reorganize the existing regulatory requirements regarding cultural or geographical affiliation.

TABLE 4—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.3

Existing 43 CFR section		Proposed 43 CFR section	
10.14(c)	Criteria for determining cultural affiliation		Cultural affiliation. (1) Information. (2) Criteria. (3) Multiple cultural affiliations.
10.14(f)	Standard of proof	10.3(a).	
10.14(d)	A finding of cultural affiliation . . .		
10.14(e)	Evidence.		
10.11(c)	Disposition of culturally unidentifiable human remains and associated funerary objects.	10.3(b)	Geographical affiliation. (1) Information. (2) Criteria. (3) Multiple geographical affiliations.
	New	10.3(c)	Multiple affiliations.
	New	10.3(d)	Closest affiliation.
10.14(a)	General		Removed.
10.14(b)	Criteria for determining lineal descent	10.2	Lineal descendant means.

E. Section 10.4 General

This section of the proposed rule would provide a general overview to Subpart B and clarify the responsibilities of Indian Tribes, NHOs, Federal agencies, and the State of Hawai'i Department of Hawaiian Home Lands (DHHL) for human remains or cultural items on Federal or Tribal lands. This section would consolidate general information in the existing regulations at §§ 10.3, 10.4, and 10.5. The Department proposes to revise the title of Subpart B (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for this section of the Act (25 U.S.C. 3002).

1. Appropriate Official

The Department proposes to employ a new term, ''appropriate official,'' to denote the person or persons responsible for completing the regulatory requirements related to a discovery, excavation, and disposition of human remains or cultural items on Federal or Tribal lands. The revision would improve consistency with the Act by requiring certain actions be taken by the appropriate official for an Indian Tribe, NHO, Federal agency, and DHHL concerning discoveries, excavations, and disposition on Federal or Tribal lands.

2. Plan of Action

On all Federal lands in the United States or on some Tribal lands in Hawai'i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to move the existing regulatory requirement for a plan of action to the beginning of the subpart. In the existing regulations, § 10.5(e) requires Federal agency officials to prepare, approve, and sign a written plan of action after consultation and before a planned activity that may result in the excavation of human remains or cultural items. The proposed revisions would require a plan of action before for any planned activity that may result in the discovery or excavation of human remains or cultural items as well as after a discovery of human remains or cultural items and before authorizing an excavation that may result in the discovery or excavation of human remains or cultural items. The Department proposes to simplify the plan of action in three separate steps (see proposed § 10.4(b)): (1) Step 1—Initiate consultation; (2) Step 2—Consult with requesting parties; and (3) Step 3—Approve and sign the plan of action. Consulting parties listed in § 10.4(b)(1) would not be considered the same as consulting parties under other applicable law, specifically under 36 CFR part 800. The Department proposes to use specific terms to clarify the distinction between a consulting party (as defined in § 10.4(b)(1)(i)) and a requesting party (any consulting party that submits a written request to consult).

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible, on the content of the plan of action. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. The consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties to the plan of action. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required. The Department proposes to remove some of the existing requirements for a plan of action that are not necessary and overly intrusive. Depending on the results of consultation, any of these elements may be included in a plan of action but are no longer the minimum requirement for a plan of action. Specifically, the Department proposes to remove the following items from a plan of action in the existing regulations at § 10.5(e):

(1) The kinds of objects considered as cultural items;

(2) The specific information used to determine disposition;

(4) The planned archaeological recording;

(5) The kinds of analysis planned for each kind of object; and

(8) The nature of reports to be prepared.

The Department proposes to include in a plan of action the preference of requesting parties for stabilizing and covering human remains or cultural items in situ, protecting and relocating human remains or cultural items, if removed, or providing appropriate treatment, care, or handling of human remains or cultural items. For example, under the proposed regulations, a plan of action might indicate that requesting parties prefer protection of human remains or cultural items in situ, but when that is not possible, the plan of action may require that the appropriate official protect and relocate the human remains or cultural items by burying them in a nearby location. Once disposition under § 10.7 is complete (including any required notice publication and claim), the claimants may determine the care, custody, or physical transfer of the human remains or cultural items, including deciding to leave the human remains or cultural items buried in the nearby location.

In response to consultation with Indian Tribes and NHOs and based the experience of Federal agencies with these requirements since 1990, the Department is aware of a preference by some Indian Tribes for allowing natural exposure or erosion of human remains or cultural items to continue, without covering or removing human remains or cultural items. In those cases, a plan of action may indicate that requesting parties prefer the appropriate official take no action upon the discovery of human remains or cultural items that

are naturally exposed. The plan of action should also indicate what the appropriate official will do if the human remains or cultural items cannot be left in place. If disposition under § 10.7 is required because the human remains or cultural items could not be left in place, the claimants (after notice publication and claim, if required) may determine the care, custody, or physical transfer of the human remains or cultural items, including returning them to a safe location to continue a natural process.

3. Comprehensive Agreement

The Department proposes to retain the option for Federal agencies or DHHL to enter into a comprehensive agreement for all land managing activities on Federal or Tribal lands under its responsibility. The proposed regulations would require a comprehensive agreement be consented to by a majority of requesting parties and include, at minimum, the information required in a plan of action.

Table 5 shows how the Department proposes to reorganize the existing regulatory requirements on Federal or Tribal lands after November 16, 1990.

TABLE 5—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.4

Existing 43 CFR section		Proposed 43 CFR section	
10.3(c)	Procedures (1) . . . determine whether a planned activity may result . . .	10.4	To ensure compliance with the Act, any permit, license, lease . . .
10.4(g)	Notification requirement in authorizations.		
	New	10.4(a)	Appropriate official.
10.5(b)	Initiation of consultation	10.4(b)	Plan of action.
10.5(a)	Consulting parties		(1) Step 1: Initiate consultation
10.5(c)	Provision of information		
10.5(d)	Requests for information		(2) Step 2: Consult with requesting parties.
10.5(e)	Written plan of action		(3) Step 3: Approve and sign the plan of action.
10.5(f)	Comprehensive agreements	10.4(c)	Comprehensive agreement.
10.3(c)	Procedures (3) planned activity subject to NHPA	10.4(d)	Federal agency coordination with other laws.
10.4(f)	Federal agency officials.		
10.5(g)	Traditional religious leaders		Removed. See §§ 10.2 and 10.4(b)(2).

F. Section 10.5 Discovery

This section of the proposed rule would implement the requirements of the Act regarding a discovery of human remains or cultural items on Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(d)). This section would include and clarify the requirements in the existing regulations at § 10.4(b) through (e) regarding discoveries.

1. Reporting and Documentation Requirements Upon Discovery

The proposed language in § 10.5(a) and (b) would prescribe specific reporting and documentation procedures that any person who knows or has reason to know of a discovery must take upon discovery of human remains or cultural items. Specifically, the proposed language would:

- Establish reporting timeframes (immediately with written documentation in 24 hours), requirements to secure and protect the discovery, and documentation requirements to include the location and contents of the discovery.
- Provide clear instructions for reporting the discovery in Table 1 to § 10.5, which identifies the appropriate official and the additional point of contact who must be informed of a discovery, based on the location of the discovery.

2. Timeframes To Respond to Discovery

The Department also proposes to require the appropriate official respond to any discovery on Federal or Tribal lands and keep the existing regulations' timeline of three days. On Tribal lands, the existing regulations only recommend actions by an appropriate official by using the verb ''may'' in the existing regulation at § 10.4(e). The Department proposes to change this to ''require,'' on Tribal lands in Alaska and the continental United States, that the appropriate official for an Indian Tribe respond to a discovery and certify that an activity may resume (see proposed § 10.5(c) and (e)), with an option to delegate this responsibility to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for discoveries on its Tribal lands; otherwise DHHL is responsible for discoveries on Tribal lands in Hawai'i. Table 6 shows the name of each requirement and a shortened version of the deadline in the proposed revisions.

TABLE 6—DISCOVERY

Requirement	Deadline (no later than)
Report a discovery	24 hours after a discovery.
Cease any nearby activity	Immediately.
Respond to a discovery	3 days after a report of a discovery.
Approve and sign a plan of action	30 days after a report of a discovery.
Certify an activity may resume	35 days after a report of a discovery.
Resume an activity	30 days after certification.

3. Plan of Action

On all Federal lands in the United States or on Tribal lands in Hawai'i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to revise the existing notification and consultation requirements for discoveries under § 10.4(d)(iii) and (iv) by requiring a plan of action. Although

the Act does not require consultation on a discovery, the Department proposes to require the appropriate official, in consultation with Indian Tribes or NHOs, prepare, approve, and sign a plan of action within 30 days of a discovery. The Department hopes that by requiring a plan of action after a discovery, Federal agencies and DHHL will be encouraged to engage in consultation earlier and develop a plan of action prior to a discovery. The requirement for a plan of action is waived if, prior to the discovery, the appropriate official approved and signed a comprehensive agreement or plan of action, or if an NHO agreed to be responsible for discoveries on its Tribal lands.

4. Certification and Resumption of Activity

The Department proposes to provide additional time for the appropriate official to certify an activity related to a discovery may resume. In the existing regulations at § 10.4(d) and (e), the appropriate official on Federal or Tribal lands must certify receipt of a notification of a discovery within three days and the activity related to the discovery may resume 30 days later. The existing regulations do not allow for any additional time and do not provide a mechanism for the appropriate official to prevent an activity from resuming 33 days after a discovery.

The Department proposes to build in an additional 35 days, if needed, for consultation with Indian Tribes and NHOs, evaluation of the discovery, and to carry out a plan of action (see proposed § 10.5(e)). The Department is specifically seeking input during public comment on this timeline. The Act requires that an activity may resume 30 days after the appropriate official certifies that notification of a discovery was received (25 U.S.C. 3002(d)(1), last sentence). The legislative history clearly indicates that reporting a discovery is not meant to be an impediment to resuming a lawful activity on Federal or Tribal lands. However, the Department proposes to allow an additional 35 days in the timeline by separating the requirements for responding to a discovery within 3 days from the requirements for certifying that an activity may resume within 30 days. This would allow a maximum of 65 business days (35 business days to certify and 30 business days later resume the activity) after a discovery on Federal or Tribal lands before an activity could resume. If the appropriate official determines an earlier date for resuming the activity is acceptable, there is no restriction against certifying the activity may resume within less than 65 days. The proposed change would allow the appropriate official more time, if needed, to consult with Indian Tribes and NHOs, evaluate the potential need for an excavation, and carry out the steps in a plan of action.

Table 7 shows how the Department proposes to reorganize the existing regulatory requirements regarding a discovery.

TABLE 7—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.5

(1) Existing 43 CFR section		(1) Proposed 43 CFR section	
10.4(b)	Discovery	10.5(a)	Report any discovery.
10.4(c)	Ceasing activity	10.5(b)	Cease any nearby activity.
10.4(d)	(1) As soon as possible, but no later than three (3)	10.5(c)	Respond to a discovery.
10.4(e)	working days . . .		
10.4(d)	(1) (iv) Initiate consultation	10.5(d)	Approve and sign a plan of action.
10.4(d)	(2) Resumption of activity	10.5(e)	Certify that an activity may resume.
10.4(e)			
10.4(a)	General		Removed.

G. Section 10.6 Excavation

This section of the proposed rule would implement the requirements of the Act regarding excavation of human remains or cultural items on Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(c)). This section would include and clarify the requirements in the existing regulations at § 10.3(b) and (c) regarding excavations.

1. Jurisdiction to Issue ARPA Permit

The Department proposes to revise the existing regulations to clarify the jurisdiction of a Federal agency to issue a permit under Section 4 of the Archaeological Resources Protection Act (ARPA) for an excavation. This proposed change, based on the legislative history of NAGPRA, would address requests from Federal agencies and DHHL to correct the scope of jurisdiction in the existing regulations at § 10.3(b)(1), which requires the Bureau of Indian Affairs to take certain actions on private lands for which they do not have jurisdictional authority. The Department proposes that an excavation on Federal or Tribal lands would only require a permit under the ARPA (16 U.S.C. 470cc) if the excavation would occur on ''Indian lands'' or ''public lands'' under ARPA (referred to and defined as ''ARPA Indian lands'' and ''ARPA public lands''), subject to the exemptions in the ARPA Uniform Regulations. ARPA's definition of ''Indian lands'' and ''public lands'' is narrower than ''Tribal lands'' and ''Federal lands'' under NAGPRA, which is why the Department proposes to include the ARPA definitions in these proposed regulations. The legislative history of NAGPRA makes clear that Congress intended to protect human remains and cultural items by requiring ARPA permits be issued for NAGPRA excavations when a permit is also required under ARPA.

2. Requirement for Consent to Excavation

Consistent with the Act, the proposed language in § 10.6(a) would require, on Tribal lands, an Indian Tribe or NHO to consent in writing to an excavation. On Tribal lands in Alaska and the continental United States, an Indian Tribe may delegate this responsibility to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for excavations on its Tribal lands; otherwise DHHL is responsible for excavations on Tribal lands in Hawai'i.

3. Requirement for Plan of Action Prior To Authorizing Excavation

On all Federal lands in the United States or on Tribal lands in Hawai'i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to revise the notification and consultation requirements for excavations under existing § 10.3(c)(1)

by requiring a plan of action prior to authorizing an excavation of human remains or cultural items. The Act requires consultation with the appropriate Indian Tribe or NHO prior to permitting an excavation, and the Department proposes to require the appropriate official, in consultation with Indian Tribes and NHOs, prepare, approve, and sign a plan of action prior to authorizing an excavation of human remains or cultural items as proof of consultation. The Department hopes that by requiring a plan of action before authorizing an excavation, Federal agencies and DHHL will be encouraged to engage in consultation earlier and develop a plan of action prior to any need for an excavation. The requirement for a plan of action is waived if, prior to authorizing the excavation of human remains or cultural items, the appropriate official approved and signed a comprehensive agreement or plan of action, or if an NHO agreed to be responsible for excavations on its Tribal lands.

Table 8 shows how the Department proposes to reorganize the existing regulatory requirements regarding excavation and consultation.

TABLE 8—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.6

(1) Existing 43 CFR section		(1) Proposed 43 CFR section	
10.3(b)	Specific Requirements. (1) . . . following the requirements of ARPA . . .	10.6	A permit under Section 4 of ARPA is required when . . .
10.3(b)	(2) . . . in the case of tribal lands, consent of, the appropriate . . .	10.6(a)	On Tribal lands.
	(4) Proof of the consultation or consent is shown . . .		
10.3(c)	Procedures.		
	(4) . . . on tribal lands, the Indian tribe or NHO may . . .		
10.3(c)	Procedures	10.6(b)	On Federal lands in the United States or on Tribal lands in Hawai‘i.
	(1) . . . the Federal agency official must notify in writing . . .		
	(2) . . . must complete a written plan of action . . .		
10.3(a)	General		Removed.
10.3(b)	(3) The disposition of the objects . . .		Removed.

H. Section 10.7 Disposition

This section of the proposed rule would implement the requirements of the Act regarding the disposition of human remains or cultural items removed from Federal or Tribal lands after November 16, 1990 (25 U.S.C. 3002(a) and (b)). This section would include and clarify the requirements in the existing regulations at §§ 10.6 and 10.7 regarding dispositions.

1. Consistent Use of the Term ''Disposition''

The Department proposes to replace the term ''disposition'' in the existing regulations with two separate terms: ''disposition'' and ''repatriation.'' In the proposed revision, ''disposition'' applies consistently throughout but only to Subpart B. In the existing regulations, ''disposition'' and the undefined word custody are used interchangeably at times while ''disposition'' is also used as a catch-all term for any transfer of human remains or cultural items under the regulations. The Act uses the terms ''ownership,'' ''right of control of the disposition,'' and ''disposition of and control over'' in describing this process (25 U.S.C. 3002). In the proposed revision, ''disposition'' is the title of this section and means the appropriate official acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items removed from Federal or Tribal lands.

2. Timeline for Disposition

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that disposition occur as soon as possible, but no later than one year, after the discovery or excavation of human remains or cultural items on Federal or Tribal lands. In the existing regulations, there is no deadline for disposition, and the Department is aware of many instances where human remains or cultural items have not completed the regulatory process for years or even decades after discovery or excavation. This timeline will ensure that, on all Federal lands in the United States or on Tribal lands in Hawai‘i, when disposition cannot be completed within one year, the Federal agency or DHHL reports the human remains or cultural items to the Manager, National NAGPRA Program.

The Department proposes to clarify the requisite steps for disposition by establishing a step-by-step process with corresponding deadlines. Table 9 shows the name of each step and a shortened version of the deadline in the proposed revisions.

TABLE 9—STEP-BY-STEP PROCESS FOR DISPOSITION

Step number and name	Deadline (no later than)
Step 1—Inform consulting parties	6 months after a discovery or excavation.
Step 2—Submit a notice of intended disposition	6 months after Step 1.
Step 3—Receive and consider a claim for disposition	Any time after notice publication.
Step 4—Respond to a claim for disposition	30 days after Step 3.
Step 5—Disposition of the human remains or cultural items	90 days after Step 4.

3. Priority for Disposition

The Department proposes to simplify and clarify information contained in the existing regulations at § 10.6(a). The proposed revisions are consistent with the Act and the existing regulations in establishing the priority for disposition (see proposed § 10.7(a)), which can be simplified to be:

(1) Lineal descendants,

(2) Tribal lands Indian Tribe or NHO,

(3) Indian Tribe or NHO with clear cultural affiliation,

(4) Indian Tribe or NHO with reasonably identified cultural affiliation,

(5)(i) Adjudicated aboriginal land Indian Tribe, and

(5)(ii) Indian Tribe with a stronger cultural relationship than (5)(i).

4. Align Disposition to a Lineal Descendant or on Tribal Lands to the Act

The Department proposes to remove the requirement in the existing regulations at § 10.6(c) for publishing notices or requiring claims for disposition to a lineal descendant. The existing regulations do not provide any requirements for disposition of human remains or cultural items from Tribal lands. The Department proposes to require written documentation for disposition to a lineal descendant or on Tribal lands to better align with the Act (25 U.S.C. 3002(a)(1) and (2)(A); note the lack of a requirement for a notice or claim). On Tribal lands in Alaska and the continental United States, an Indian Tribe may delegate its responsibilities for disposition to the Bureau of Indian Affairs or another Federal agency. On Tribal lands of an NHO, the NHO may accept responsibility for dispositions on its Tribal lands; otherwise DHHL is responsible for dispositions on Tribal lands in Hawai'i.

5. Revise Requirements for Notices and Claims for Disposition

The Department proposes to revise language in the existing regulations at § 10.6(c) describing the requirements for Federal agencies to publish notices, receive claims, and complete dispositions in one paragraph with long, complex sentences. On all Federal lands in the United States and on Tribal lands in Hawai'i, the proposed revisions would provide five clearly written steps to complete the disposition of human remains or cultural items and establish deadlines and timelines.

The Department proposes to change the notice publication requirement in the existing regulations at § 10.6(c) that requires two publications of a notice in local area newspapers at least one week apart. This requirement has become increasingly burdensome given the general changes in newspaper publications since 1995. The Department proposes to require only one publication in the **Federal Register** by the Manager, National NAGPRA Program.

The Department proposes a new requirement for completing dispositions by sending claimants and the Manager, National NAGPRA Program, a written disposition statement. In the case of joint claims for disposition, the disposition statement would identify and be sent to all claimants. In the case of competing claims for disposition, the proposed revisions give guidance and timelines for identifying the most appropriate claimant and completing the disposition. The Act requires that the Federal agency apply the priority order and determine the ''closest cultural affiliation'' based on the evidence before it (25 U.S.C. 3002(a)(2)(B)) and does not provide for a stay of disposition to acquire further evidence or information.

6. Unclaimed Human Remains or Cultural Items

The Department proposes to move the existing section at § 10.7 to be a paragraph under the larger disposition section and modify the existing timeline. On all Federal lands in the United States or on Tribal lands in Hawai'i, when disposition cannot be completed within one year of a discovery, excavation, or notice of intended disposition, the proposed revisions require that the Federal agency or DHHL must report the human remains or cultural items to the Manager, National NAGPRA Program. These provisions would apply to any human remains or cultural items that were discovered or excavated on Federal lands in the United States or on Tribal lands in Hawai'i after November 16, 1990, even if it has been more than one year since the discovery, excavation, or notice of intended disposition. Federal agencies and DHHL should submit a list of all unclaimed human remains or cultural items removed from Federal or Tribal lands. As in the existing regulations at § 10.7(c) through (e), the proposed revisions would provide a process whereby a Federal agency or DHHL may transfer or reinter unclaimed human remains or cultural items, after it publishes a notice of proposed transfer or reinterment.

The Department proposes to clarify the requisite steps for unclaimed human remains or cultural items by establishing a step-by-step process with corresponding deadlines. Table 10 shows the name of each step and a shortened version of the deadline in the proposed revisions.

TABLE 10—STEP-BY-STEP PROCESS FOR UNCLAIMED HUMAN REMAINS OR CULTURAL ITEMS

Step number and name	Deadline (no later than)
Step 1—Submit a list of unclaimed cultural items	1 year after effective date, update by Dec 31 each year.
Step 2—Agree to transfer or decide to reinter human remains or cultural items.	Any time after Step 1.
Step 3—Submit a notice of proposed transfer or reinterment	30 days after Step 2.
Step 4—Transfer or reinter the human remains or cultural items	90 days after Step 3.

Table 11 shows how the Department proposes to reorganize and revise the existing regulatory requirements regarding disposition.

TABLE 11—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.7

(1) Existing 43 CFR section		Proposed 43 CFR section	
10.6(a)	Priority of custody	10.7(a)	Priority for disposition.
	New	10.7(b)	To a lineal descendant.
10.15(d)	Savings provisions		(3) After the disposition statement is sent . . .

TABLE 11—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.7—Continued

(1) Existing 43 CFR section			
	New	10.7(c)	On Tribal lands.
10.15(d)	Savings provisions		(4) After the disposition statement
10.10(c)	(3) . . . from expressly relinquishing title to . .		
10.6(c)	Final notice, claims and disposition with respect to Federal lands.	10.7(d)	On Federal lands in the United States or on Tribal lands in Hawai'i. (1) Step 1: Inform consulting parties. (2) Step 2: Submit a notice of intended disposition. (3) Step 3: Receive and consider a claim for disposition. (4) Step 4: Respond to a claim for disposition. (5) Step 5: Disposition of the human remains or cultural items.
10.15(d)	Savings provisions		(5)(iii) After the disposition statement . . .
10.10(c)	(3) . . .from expressly relinquishing title to . . .		
10.7	Disposition of unclaimed . . .	10.7(e)	Unclaimed human remains or cultural items . . .
10.7(b)	(1) Submit a list of items . . .		(1) Step 1: Submit a list of unclaimed human remains or cultural items.
10.7(c)	. . . upon request, transfer . . .		(2) Step 2: Agree to transfer or decide to reinter human remains or cultural items. (3) Step 3: Submit a notice of proposed transfer or reinterment. (4) Step 4: Transfer or reinter the human remains or cultural items.
10.7(d)	. . . reinter . . .		(4)(ii) After transfer or reinterment occurs . . .
10.7(e)	(2) Publish a notice of the proposed transfer or reinterment . . .		
	New		
10.15(d)	Savings provisions.		
10.10(c)	(3) . . . from expressly relinquishing title to . . .		
10.6(b)	Custody of human remains . . .		Removed.
10.7(b)	(2) Care for and manage . . .	10.1(d)	Duty of care.
	(3) To the maximum extent feasible . . .		
10.7(a)	This section carries out . . .		Removed.
10.7(e)	(1) Submit the list required . . .		
	(3) Send to the Manager, National NAGPRA Program . . .		

I. Section 10.8 General

This section of the proposed rule would provide a general overview to Subpart C and clarify the requirements for museums and Federal agency with possession or control of holdings or collections. The section would consolidate general information in the existing regulations at §§ 10.8(a), 10.9(a), 10.11(e), and 10.17(a). The Department proposes to revise the title of Subpart C (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for these sections of the Act (25 U.S.C. 3003–3005).

1. Clarify Who Has Responsibility for Holdings or Collections

The Department proposes to clarify, regardless of the physical location of a holding or collection, who is responsible for carrying out the requirements of the Act. The proposed revisions would provide both museums and Federal agencies with instructions on determining possession or control of holdings or collections. As discussed in the definition section, whether a museum or Federal agency has possession or control is a legal determination that must be made on a case-by-case basis. However, when a museum with custody of human remains or cultural items cannot identify any person, institution, State or local government agency, or Federal agency with possession or control, the museum should presume it has possession or control for purposes of Subpart C. When a Federal agency cannot determine if human remains or cultural items came into its possession or control before or after November 16, 1990, or cannot identify the type of land the human remains or cultural items were removed from, the Federal agency should presume it has possession or control for purposes of Subpart C.

2. Museums With Custody of a Federal Agency Holding or Collection

The Department proposes two new requirements aimed at locating Federal collections in non-Federal museums (see proposed § 10.8(c)). Specifically, the proposed language would require that:

- A museum must submit a statement describing Federal holdings or collections in its custody to the responsible Federal agency and to the Manager, National NAGPRA Program, no later than one year after the effective date of the final rule; and
- Within 120 days of receiving such a statement, the Federal agency must acknowledge its possession or control of a holding or collection, acknowledge that it does not have possession or control of a holding or collection, or acknowledge it has joint possession or control with the museum.

These new requirements are a direct response to requests from Federal agencies and Indian Tribes who struggle to locate Federal collections in non-Federal museums. In 2010, the Government Accountability Office commented on this issue in its report on Federal agency compliance with the Act. Addressing this issue, the Department's detailed response to the Government Accountability Office's

report stated, ''These instances illustrate the importance of repositories notifying agencies upon discovery of Federal collections in their possession.'' This requirement is consistent with the conditions for repositories holding Federal collections under 36 CFR part 79, its referenced Federal property management authorities, and the Secretary's authority to prescribe regulations relating to Indian affairs under 25 U.S.C 9 (*United States* v. *Eberhardt,* 780 F.2d 1354, 1360 (9th Cir.1986)).

If a museum has custody of a holding or collection from multiple agencies or is unsure which Federal agency has possession or control of the holding or collection, the museum must send information on the holding or collection to any Federal agency that might have an interest and to the Manager, National NAGPRA Program. If a museum is unsure of who the appropriate point of contact is for a Federal agency, the Department recommends contacting the Federal Preservation Officer to assist in identifying the appropriate agency contact. The Advisory Council on Historic Preservation keeps an updated list at *https://www.achp.gov/protecting-historic-properties/fpo-list.* In responding to such statement, a Federal agency need not perform exhaustive research to determine whether it has possession or control of the collection, but it must merely assess the museum's statement on possession or control based on the information available to the Federal agency.

3. Museums With Custody of Other Holdings or Collections

The Department proposes a new requirement for museums with custody of holdings or collections for which the museum cannot identify who has possession or control. The museum would be required to submit a statement describing holdings or collections in its custody for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control. The statement would be sent to the Manager, National NAGPRA Program, no later than one year after the effective date of the final rule. This new requirement is a direct response to requests from Indian Tribes who struggle to determine their rights to holdings or collections in the custody, but not in the possession or control, of a museum. The Manager, National NAGPRA Program, would share this information with appropriate parties to determine possession and control and proceed with the inventory, summary, and repatriation processes.

Table 12 shows how the Department proposes to reorganize and add to the existing regulatory requirements for museum or Federal agency holdings or collections.

TABLE 12—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.8

(1) Existing 43 CFR section	(1) Proposed 43 CFR section		
10.8(a)	General	10.8(a)	Museum holding or collection.
10.9(a)		10.8(b)	Federal agency holding or collection
	New	10.8(c)	Museums with custody of a Federal agency holding or collection.
		10.8(d)	Museums with custody of other holdings or collections.
10.11(e)	Disputes	10.8(e)	Contesting actions on repatriation.
10.17(a)	Formal and informal resolutions.		

J. Section 10.9 Repatriation of Unassociated Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony

This section of the proposed rule would implement the requirements of the Act regarding summaries of holdings or collections to facilitate the repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony (25 U.S.C. 3004 and 3005). In response to consultation with Indian Tribes and NHOs, the Department proposes to retain the existing requirement that a museum or Federal agency prepare a summary for any holding or collection that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony. NAGPRA requires ''Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum'' (25 U.S.C. 3004(a)). The statutory language is unclear whether summaries should include only the unassociated funerary objects, sacred objects, or objects of cultural patrimony, or the entire collection which may include these cultural items. The Act was enacted for the benefit of Indians and therefore the canon of construction applies that statutes ''are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'' (*Yankton Sioux Tribe* v. *United States Army Corps of Engineers,* 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). The legislative history and statutory language are clear that the summary is intended as an initial step in bringing an Indian Tribe and Native Hawaiian organization into consultation with a museum or Federal agency. As Indian Tribes and NHOs noted during consultation, identification of specific sacred objects or objects of cultural patrimony must be done in consultation with Indian Tribe or NHO representatives and traditional religious leaders since few, if any, museums or Federal agencies have the necessary personnel to make such identifications. Further, identification of specific unassociated funerary objects, sacred objects, and objects of cultural patrimony would require a museum or Federal agency to complete an item-by item listing first. That would be directly contrary to Congress's admonition that a summary should not be an object-by-object listing (25 U.S.C. 3004(b)(1)(A)).

The Department proposes to consolidate the requirements for repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony into a seven-step process in a single section. These same requirements are currently spread out among the existing regulations at §§ 10.8, 10.10, and 10.13. In addition, the Department proposes to add more detailed instructions for evaluating multiple requests for repatriation and resolving stays of repatriation than currently in the existing regulations at § 10.10(c).

1. Establish a Step-by-Step Process for Repatriation

The Department proposes to clarify the requisite steps for repatriation by establishing a step-by-step process with corresponding deadlines. Table 13 shows the name of each step and a shortened version of the deadline in the proposed revisions.

TABLE 13—STEP-BY-STEP PROCESS FOR REPATRIATION

Step number and name	Deadline (no later than)
Step 1—Complete a summary . . .	6 months for a new collection.
Step 2—Initiate consultation	30 days after Step 1.
Step 3—Consult with requesting parties	10 days after a request, propose a timeline for consultation.
Step 4—Receive and consider a request for repatriation	Any time after a summary is complete.
Step 5—Respond to a request for repatriation	60 days after Step 4.
Step 6—Submit a notice of intended repatriation	30 days after Step 5.
Step 7—Repatriation of the unassociated funerary object, sacred object, or objects of cultural patrimony.	90 days after notice publication.

The intent of these proposed revisions is to correct inaccuracies and ambiguities in the existing regulations by using a clear, easy to follow, step-by-step process, and ensure a timely resolution of any requests for repatriation. For example, the proposed revisions would clarify, consistent with the Act, that invitations to consult follow the completion of a summary. In the existing regulations at § 10.8(d)(2), consultation is initiated ''no later than the completion of the summary process.''

The proposed revisions would also directly address a required step that lacks explanation or deadlines in the existing regulations. The Department proposes in Step 5 to require a museum or Federal agency to respond no later than 60 days after receiving a request for repatriation. The Department also proposes four specific options for the response, summarized as follows:

(1) Accept the request and agree to the repatriation.

(2) Reject the request, explain why, and ask for more information.

(3) Assert and prove a right of possession and refuse repatriation.

(4) Determine the most appropriate requestor among competing requests.

2. Update Deadlines, Establish New Timelines, and Clarify Procedures

To update deadlines for completing a summary, the proposed revisions integrate all the deadlines for completing a summary in the first paragraph (see proposed § 10.9(a), Table 1 to § 10.9). The proposed revisions would identify the past required deadlines for completing a summary (*i.e.,* November 16, 1993). The Act does not clearly indicate when museums or Federal agencies must complete a summary after the statutory deadline for reporting had passed. The existing regulations at § 10.13 provide these requirements for newly acquired or newly regulated holdings or collections beginning in 2007. The proposed revisions use the same deadlines as the existing regulations.

To establish new timelines, the proposed revisions would require in Step 2 a written request to consult. This new requirement for a written request to consult (which can include email) is necessary to then require a museum or Federal agency to respond to the request within 10 days. In this same subparagraph, the proposed revisions require requests to consult be submitted prior to a notice publication. This requirement ensures the repatriation process moves forward by certain deadlines in later steps. After publication of a notice, any party, even if they have not requested to consult, can make a request for repatriation as a competing claim (see proposed § 10.9(f)(4)).

To clarify procedures, the proposed revisions would require in Step 4 that any party wishing to make a request for repatriation must do so in writing. In the existing regulations at §§ 10.8 and 10.10, there are references to making requests for repatriation, but not until the very end of the process under notification in the existing regulations at § 10.10(a)(3) is it clear that such a request must be in writing. The Department is specifically seeking input during public comment on the deadlines for responding to a request for repatriation and sending a repatriation statement.

3. Require That Consultation Seek Consensus

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required.

4. Protect Sensitive Information and Disclose Hazardous Substances

The Department proposes to remove the existing regulations at § 10.8(d)(4)(iii) because it requires Indian Tribes and NHOs to provide information about funerary objects, sacred objects, or objects of cultural patrimony. This kind of information is often very sensitive and providing it in writing or in the absence of qualified persons within the Indian Tribe or NHO might be inappropriate. The proposed language would still provide for an exchange of information about the types of objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony, but would do so in a way to allow for sensitive information to be protected.

In the existing regulations at § 10.10(e), museums and Federal agencies must inform Indian Tribes and NHOs about any potentially hazardous substances used to treat any of the objects only after repatriation has occurred. The proposed revisions would require a museum or Federal agency to disclose information about the presence of any potentially hazardous substances first in the summary (see proposed § 10.9(a)(1)(v)) and second in the notice of intended repatriation (see proposed § 10.9(f)(1)(vi)).

5. Clarify Requirements for Notices

The proposed revisions clearly outline informational requirements for a **Federal Register** notice and do so with greater detail than the existing

regulations at § 10.8(f). To protect potentially sensitive information, the only location information that would be required is the county and State where the unassociated funerary object, sacred object, or object of cultural patrimony were removed, if known. Other informational requirements of a **Federal Register** notice would include: (1) the identification of the cultural item specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony; (2) the requestor, with no requirement that other lineal descendants or Indian Tribes or NHOs with cultural affiliation be listed in the notice; and (3) a brief abstract of the information showing the requestor is a lineal descendant or an Indian Tribe or NHO with cultural affiliation.

In enumerating the unassociated funerary objects, sacred objects, or objects of cultural patrimony in a notice, museums and Federal agencies would be encouraged to count in a way that reduces the chances of having to issue a correction notice. For example, identifying 3 lots of shell beads means that no matter the exact number of beads present, the count would stand, whereas identifying exactly 1,960 shell beads in a notice would mean that if additional (or fewer) beads were located before repatriation occurs, a correction notice would be required because the number of objects would have changed.

6. Written Repatriation Statement

The Department proposes to require a new document to complete the repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor. A written repatriation statement would be sent to and would identify all requestors in the case of joint requests. In accordance with the recommendation by the Government Accountability Office in a 2010 report on the implementation of the Act, a copy of the repatriation statement would also be sent to the Manager, National NAGPRA Program. Table 14 shows how the Department proposes to reorganize the existing regulatory requirements for repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

TABLE 14—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.9

Existing 43 CFR section		Proposed 43 CFR section	
10.8(b)	Contents of summaries	10.9(a)	Step 1: Complete a summary of . . .
10.8(e)	Using summaries to determine affiliation		(1) A summary must include . . .
10.10(e)	. . . inform recipients of repatriation . . . treatment with potentially hazardous substances.		(1)(v) The presence of any potentially hazardous substances . . .
10.13(b)	New holdings or collections		(2) After [effective date of final rule], . . . must submit a summary . . .
10.13(d)	New Federal funds.		
10.8(c)	Completion		(3) Prior to [effective date of final rule], . . . must have submitted a summary . . .
10.13(b)	(3) Previously prepared summary or inventory.		(4) After [effective date of final rule], . . . acquires possession or control of a holding or collection that contains . . .
10.8(d)	Consultation	10.9(b)	Step 2: Initiate consultation.
	(1) Consulting parties		(1) Consulting parties are . . .
	(2) Initiation of consultation		(2) An invitation to consult must . . .
	New		(3) Any consulting party . . . must . . .
			(4) . . . identifies a new consulting party . . .
10.13(c)	New Indian Tribes		(4)(ii) . . . after the addition of a Tribal entity to the list of federally recognized Indian Tribes . . .
10.8(d)	(4) Requests for information	10.9(c)	Step 3: Consult with requesting parties
			(1) . . . a museum or Federal agency must ask for the following information . . .
	New		(2) The consultation process must . . .
			(3) The museum or Federal agency must prepare a record of consultation . . .
10.8(d)	(3) Provision of information		(4) . . . A museum or Federal agency must provide access to the additional information . . .
	New	10.9(d)	Step 4: Receive and consider a request for repatriation.
			(1) A request for repatriation . . . must be received . . .
			(2) Requests from two or more . . .
10.10(a)	(1) Criteria		(3) A request for repatriation must satisfy . . .
	New	10.9(e)	Step 5: Respond to a request for repatriation.
10.8(f)	Notification	10.9(f)	Step 6: Submit a notice of intended repatriation
10.10(e)	. . . treatment with potentially hazardous substances.		(1)(vi) . . . the presence of any potentially hazardous
10.13(b)	(2) Additional pieces or fragments.		(3) If the number or identity . . . changes . . .
10.13(e)	Amendment of previous decision.		
10.10(a)	(3) Notification	10.9(g)	Step 7: Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.
10.10(d)	Place and manner of repatriation.		
10.10(f)	Record of repatriation.		
10.15(d)	Savings provisions.		
10.10(c)	(2) Circumstances where there are multiple requests for repatriation.	10.9(h)	Evaluating competing requests for repatriation.
10.10(c)	Exceptions	10.9(i)	Stay of repatriation.

TABLE 14—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.9—Continued

Existing 43 CFR section			
10.8(d)	(4)(iii) Kinds of cultural items		Removed.

K. Section 10.10 Repatriation of Human Remains and Associated Funerary Objects

This section of the proposed rule would implement the requirements of the Act regarding inventories of holdings or collections to facilitate the repatriation of human remains and associated funerary objects (25 U.S.C. 3003 and 3005). The Department proposes to consolidate the requirements for repatriation of human remains and associated funerary objects into an eight-step process in a single section. These same requirements are currently spread out among the existing regulations at §§ 10.9, 10.10, 10.11, and 10.13. In addition, the Department proposes to add more detailed instructions for evaluating multiple requests for repatriation and resolving stays of repatriation than currently in the existing provisions at § 10.10(c).

1. Eliminate ''Culturally Unidentifiable''

On March 15, 2010, the Department issued a final rule with request for comment that codified procedures for the disposition of culturally unidentifiable Native American human remains in the possession or control of museums or Federal agencies (75 FR 12378, March 15, 2010). These procedures require museums and Federal agencies to consult with, and transfer control of, culturally unidentifiable human remains to the Indian Tribes and NHOs from whose Tribal lands or from whose aboriginal lands the human remains were removed.

Comments on the March 15, 2010, final rule raised concerns that the financial burden on museums of consultation and disposition of culturally unidentifiable human remains would be ''tremendous,'' ''onerous,'' ''overwhelming,'' ''ruinous,'' or ''significant.'' However, since the Act became law in 1990, museums and Federal agencies have accounted for over 84,000 Native American human remains in notices, including over 21,000 culturally unidentifiable human remains, with no indication that a single museum has suffered overwhelming or ruinous consequences from compliance with the Act. Every year since 1994, Congress has provided approximately $2 million dollars in grant funds for consultation and repatriation activities to assist in compliance with the Act.

Comments for the March 15, 2010, final rule also raised questions about what types of relationships were required for disposition of culturally unidentifiable human remains. Using a geographic relationship between an Indian Tribe or NHO and human remains and associated funerary objects for the purpose of repatriation aligns with the Act's requirements for museums and Federal agencies to ''identify the geographical and cultural affiliation of such items'' and with the general intent of repatriation under the Act. As noted in the response to comments for the March 15, 2010, final rule, the disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian Tribes and NHOs based on criteria other than cultural affiliation was clearly anticipated by Congress.

Section 3002(a)(2) of the Act which was used as the model for the March 15, 2010, final rule specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony removed from Federal or Tribal lands after November 16, 1990 to the Indian Tribe or NHO on whose Tribal lands the human remains or cultural items were removed, to the Indian Tribe or NHO with cultural affiliation to the human remains or cultural items, or to the Indian Tribe having aboriginally occupied the Federal land where the human remains or cultural items were removed. Significantly, under the Act, ownership or control of human remains or cultural items based on Tribal lands origin is given a higher priority than cultural affiliation. Consistent with the terms of the Act, the 2010 rule codified a process for disposition of culturally unidentifiable human remains to the Indian Tribe or NHO from whose Tribal lands, at the time of excavation or removal, or from whose aboriginal land the human remains were removed. In addition to the Act, the implementing regulations rely on the specific recommendations from the Review Committee for disposition of culturally unidentifiable human remains and additional information gleaned from culturally unidentifiable inventories. The existing regulations are consistent with the Department's determination that it was reasonable and appropriate for the disposition of culturally unidentifiable human remains to be based on geographical information given that the designation of ''culturally unidentifiable'' is often due to a lack of information occasioned by some collection practices rather than a lack of geographical information.

To streamline the existing regulations at § 10.11 regarding disposition of human remains and associated funerary objects currently referred to as culturally unidentifiable, the Department proposes to incorporate the concepts underlying the existing regulations more logically into the overall inventory and repatriation process. As a result, the Department also proposes to generally remove the term ''culturally unidentifiable'' as the streamlining of these concepts would make this term no longer serve a useful regulatory purpose. Further, this proposed change is intended to more accurately reflect the geographically focused analysis required for an inventory of human remains and associated funerary objects. As discussed above, the proposed revisions identify two kinds of affiliation for purposes of repatriation: cultural or geographical. As discussed in more detail below, the proposed revisions would require that an inventory of human remains and associated funerary objects include determinations of both cultural and geographical affiliation or an explanation why no affiliation could be identified.

2. Require Repatriation of Associated Funerary Objects

While the existing regulations at § 10.11 mandate the disposition of certain categories of culturally unidentifiable human remains by museums and Federal agencies upon receipt of a claim, the transfer of culturally unidentifiable associated funerary objects under the existing regulations is at the discretion of the museum or Federal agency. Following publication of the 2007 proposed rule (72 FR 58582, October 16, 2007), the Department received numerous comments on the voluntary transfer of culturally unidentifiable associated funerary objects. Most of the comments stated that transfer of such objects should also be mandatory. These comments were carefully considered,

but the Department determined that this area of law was not clearly resolved at that time and needed further consideration. The March 15, 2010, final rule retained the voluntary transfer provision. After the publication of the final rule, the Department received additional comments on this issue, which have been reviewed in the development of the proposed revisions.

The Department proposes to require repatriation of associated funerary objects whenever repatriation of the related human remains occurs. In the Act, Congress differentiated human remains and associated funerary objects from unassociated funerary objects, sacred objects, and objects of cultural patrimony. Congress did this both in its treatment of these items throughout the Act and in its assessment of the potential legal interests at stake for those items, for example, by differentiating the use and analysis of right of possession for human remains and associated funerary objects from a right of possession for cultural items. With respect to the Act, Congress acknowledged that no general property interest exists either in human remains or in the funerary objects associated with them in a burial. This follows common law principles indicating that the next-of-kin of a deceased individual have a quasi-property right of control over the lawful disposition of the decedent's remains. For these reasons, the proposed revision would require repatriation of associated funerary objects whenever the repatriation of human remains is required. Such an action, based on this guidance from Congress, would not result in a taking of property within the meaning of the Fifth Amendment of the United States Constitution.

3. Establish a Step-By-Step Process for Repatriation

The Department proposes to clarify the requisite steps for repatriation of human remains and associated funerary objects by establishing a step-by-step process with corresponding deadlines. Table 15 shows the name of each step and a shortened version of the deadline in the proposed revisions.

TABLE 15: STEP-BY-STEP PROCESS FOR REPATRIATION

Step number and name	Deadline (no later than)
Step 1—Compile an itemized list of human remains and associated funerary objects.	Before deadline in Step 4.
Step 2—Initiate consultation	Before deadline in Step 4.
Step 3—Consult with requesting parties	10 days after a request, propose a timeline for consultation.
Step 4—Complete/update an inventory	2 years for a new collection/2 years after effective date for update.
Step 5—Submit a notice of inventory completion	6 months after Step 4.
Step 6—Receive and consider a request for repatriation	Any time after notice publication.
Step 7—Respond to a request for repatriation	30 days after Step 6.
Step 8—Repatriation of the human remains and associated funerary objects.	90 days after Step 7.

The intent of these proposed revisions is to correct inaccuracies and ambiguities in the existing regulations by using a clear, easy to follow, step-by-step process, and ensures a timely resolution of any requests for repatriation. For example, the proposed revisions would clarify, consistent with the Act, that invitations to consult are required before completing an inventory. In the existing regulations at § 10.9(b)(2), consultation is initiated ''as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation . . . is being conducted.''

The proposed revision would also directly address a required step that lacks explanation or deadlines in the existing regulations. The Department proposes in Step 7 to require a museum or Federal agency to respond no later than 30 days after receiving a request for repatriation. The Department also proposes three specific options for the response, summarized as follows:

(1) Accept the request and agree to the repatriation.

(2) Reject the request, explain why, and ask for more information.

(3) Determine the most appropriate requestor among competing requests.

4. Update Deadlines, Establish New Timelines, and Clarify Procedures

To update deadlines for completing an inventory, the proposed revisions integrate all the deadlines in Step 4 (see proposed § 10.10(d), Table 1 to § 10.10). The proposed revisions would identify the past required deadlines for completing an inventory (*i.e.,* November 16, 1995). The Act does not clearly indicate when museums or Federal agencies must complete an inventory after the statutory deadline for reporting. The existing regulations at § 10.13 provided these requirements for newly acquired or newly regulated holdings or collections beginning in 2007. The proposed revisions use the same deadlines as the existing regulations.

To establish new timelines, the proposed revisions would require in Step 2 a written request to consult. This new requirement for a written request to consult (which can include email) is necessary to then require a museum or Federal agency to respond to the request within 10 days. In this same subparagraph, the proposed revisions require requests to consult be submitted prior to a notice publication. This requirement ensures the repatriation process moves forward by certain deadlines in later steps. After publication of a notice, any party, even if they have not consulted, can make a request for repatriation as a competing request (see proposed § 10.10(g)(2)).

To clarify procedures, the proposed revisions would require in Step 6 that any party wishing to make a request for repatriation must do so in writing. In the existing regulations at §§ 10.9, 10.10, and 10.11, there are references to making requests for repatriation, but not until the very end of the process under notification in the existing regulations at § 10.10(b)(2) is it clear that such a request must be in writing. The Department is specifically seeking input during public comment on the deadlines for responding to a request for repatriation and sending a repatriation statement.

5. Require That Consultation Seek Consensus

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. For any determination considered during the

consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the requesting parties. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required.

6. Require Inventory Determinations and Updates

The proposed revisions would require that an inventory include specific determinations for human remains and associated funerary objects. In the existing regulations at § 10.9(d), two separate lists of human remains and associated funerary objects comprise the inventory: (1) those with cultural affiliation and (2) those with no cultural affiliation. The Department proposes to revise this requirement to require, for each entry in the itemized list of human remains and associated funerary objects, a determination of one or more of the following:

(1) There is a known lineal descendant;

(2) There is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through cultural affiliation;

(3) There is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through geographical affiliation; or

(4) There is no connection between the human remains and associated funerary objects and any Indian Tribe or NHO.

The Department proposes to require museums and Federal agencies update an inventory for any human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion by the effective date of the final rule. To update an inventory, a museum or Federal agency would be required to initiate consultation, consult with requesting parties, and determine if there is a connection between the human remains and associated funerary objects and an Indian Tribe or NHO through cultural or geographical affiliation. The updated inventory would be sent to all identified consulting parties and the Manager, National NAGPRA Program, no later than 2 years after the effective date of the final rule. Any museum may request an extension to update its inventory. Consistent with the Act (25 U.S.C. 3003(c)) and the existing regulations at § 10.9(f), only museums may request extension to update an inventory. Federal agencies may not request extensions.

7. Protect Sensitive Information and Disclose Hazardous Substances

The Department proposes to remove the existing regulations at § 10.9(b)(4)(iii) because it requires Indian Tribes and NHOs to provide information about the kinds of objects they consider to be funerary objects. This kind of information is often very sensitive and providing it in writing or in the absence of qualified persons within the Indian Tribe or NHO might be inappropriate. The proposed language would still provide for an exchange of information about the types of objects that might be funerary objects but would do so in a way to allow for sensitive information to be protected.

In the existing regulations at § 10.10(e), museums and Federal agencies must inform Indian Tribes and NHOs about any potentially hazardous substances used to treat human remains or funerary objects only after repatriation has occurred. The proposed revisions would require a museum or Federal agency to disclose information about the presence of any potentially hazardous substances first in the itemized list (see proposed § 10.10(a)(6)) and second in the notice of inventory completion (see proposed § 10.10(e)(2)(vii)).

8. Clarify Requirements for Notices

The proposed revisions clearly outline informational requirements for a **Federal Register** notice and reduce the information required in the existing regulations at § 10.9(e)(2). To protect potentially sensitive information, the only location information that would be required is the county and State where the human remains and associated funerary objects were removed, if known. To facilitate requests for repatriation, any lineal descendant or Indian Tribe or NHO with cultural or geographical affiliation would be identified in the notice. The notice would require only a brief abstract of the information used to identify the lineal descendant or Indian Tribe or NHO with cultural or geographical affiliation.

In enumerating the associated funerary objects in a notice, museums and Federal agencies would be encouraged to count in a way that reduces the chances of having to issue a correction notice. For example, identifying 3 lots of shell beads means that no matter the exact number of beads present, the count would stand, whereas identifying exactly 1,960 shell beads in a notice would mean that if additional (or fewer) beads were located before repatriation occurs, a correction notice would be required because the number of objects would have changed.

9. Written Repatriation Statement

The Department proposes to require a new document to complete the repatriation of human remains and associated funerary objects to a requestor. A written repatriation statement would be sent to and would identify all requestors in the case of joint requests. In accordance with the recommendation by the Government Accountability Office in a 2010 report on the implementation of the Act, a copy of the repatriation statement would also be sent to the Manager, National NAGPRA Program.

10. Transfer or Reinterment of Human Remains and Associated Funerary Objects

The Department proposes a new process for transfer or reinterment of human remains and associated funerary objects. This provision would apply in limited circumstances where there is no connection between the human remains and associated funerary objects and any Indian Tribe or NHO. Under such circumstances, a museum or Federal agency would have the discretion to agree to transfer the human remains and associated funerary objects to an Indian Tribe, NHO, or Indian group, or to reinter the human remains and associated funerary objects. In the existing regulations at § 10.10(g)(2)(ii), this same process is available to museums and Federal agencies but requires a recommendation from the Review Committee and the concurrence of the Secretary. The new provision would require publication of a notice and a repatriation statement but would eliminate the costly and burdensome process of making a request to the Review Committee.

Table 16 shows how the Department proposes to reorganize the existing regulatory requirements for an inventory of human remains and associated funerary object.

TABLE 16—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.10

Existing 43 CFR section		Proposed 43 CFR section	
10.9(c)	Required Information	10.10(a)	Step 1: Compile an itemized list of human remains . . .
10.10(e)	. . . inform recipients of repatriation . . . treatment with potentially hazardous substances.		(6) The presence of any potentially hazardous substances . . .
10.9(b)	Consultation	10.10(b)	Step 2: Initiate consultation.
	(1) Consulting parties.		(1) Consulting parties are . . .
	(2) Initiation of consultation.		(2) An invitation to consult must . . .
	(3) Provision of information.		
	New		(3) Any consulting party . . . must . . .
			(4) . . . identifies a new consulting party . . .
10.13(c)	New Indian Tribes		(ii) . . . after the addition of a Tribal entity to the list of federally recognized Indian Tribes . . .
10.9(b)	(4) Requests for information	10.10(c)	Step 3: Consult with requesting parties.
			(1) . . . a museum or Federal agency must ask for the following information . . .
	New		(2) The consultation process must . . .
			(3) The museum or Federal agency must prepare a record of consultation . . .
10.9(e)	(5) . . . upon request, additional documentation		(4) A museum or Federal agency must provide access to the additional information . . .
10.9(d)	Documents. Two separate documents comprise the inventory:	10.10(d)	Step 4: Complete an inventory of human remains . . .
			(1) An inventory must include:
	(1) a listing of culturally affiliated . . .		(iii) For each entry . . . a determination of one or more . . .
			(A) . . . a known lineal descendant,
			(B) . . . through cultural affiliation . . .
	(2) a listing of culturally unidentifiable . . .		(C) . . . through geographical affiliation . . .
			(D) There is no connection . . .
10.9(c)	(4) A summary of the evidence, including consultation		(iv) An abstract of the information supporting the determination . . .
10.13(b)	(1) New holdings or collections	10.10(d)	(2) After [effective date of final rule], . . . must submit an inventory . . .
10.13(d)	New Federal funds	.	
10.9(f)	Completion		(3) Prior to [effective date of final rule] . . . must have submitted an inventory . . .
10.11(b)	Consultation		
10.11(c)	Disposition of culturally unidentifiable human remains and associated funerary objects.		(4) No later than [2 years after the effective date of final rule], for any . . . listed in an inventory but not published in a notice of inventory completion prior to [effective date of final rule] . . . submit an updated inventory . . .
	(1) . . . must offer to transfer control . . .		
10.9(f)	Completion		(5) Any museum may request an extension to complete or update its inventory . . .
10.13(b)	(3) Previously prepared summary or inventory . . .		(6) After [effective date of final rule] . . . acquires possession or control of human remains . . .
10.9(e)	Notification	10.10(e)	Step 5: Submit a notice of inventory completion.
10.11(d)	Notification		
10.10(e)	. . . treatment with potentially hazardous substances.		(2) (vii) . . . the presence of any potentially hazardous
10.13(b)	(2) Additional pieces or fragments . . .		(4) If the number . . . changes . . .
10.13(e)	Amendment of previous decision.		
	New	10.10(f)	Step 6: Receive and consider a request for repatriation.
			(1) A request for repatriation . . . must be received . . .
			(2) Requests from two or more . . .
10.10(b)	(1) Criteria		(3) A request for repatriation must satisfy . . .
	New	10.10(g)	Step 7: Respond to a request for repatriation.
10.10(b)	(2) Notification	10.10(h)	Step 8: Repatriation of the human remains and associated funerary objects.
10.10(d)	Place and manner of repatriation.		
10.10(f)	Record of repatriation.		
10.15(d)	Savings provisions.		
10.10(c)	(2) Circumstances where there are multiple requests for repatriation	10.10(i)	Evaluating competing requests for repatriation.
10.10(c)	Exceptions	10.10(j)	Stay of repatriation.
10.11(c)	(5) The exceptions listed at § 10.10(c) apply . . .		
10.15(b)	Failure to claim where no repatriation has occurred. [Reserved].	10.10(k)	Transfer or reinter human remains and associated funerary objects.
10.10(g)	(2)(ii) Recommend to the Secretary specific actions . . .		
10.9(b)	(4) (iii) kinds of cultural items . . .		Removed.
10.9(c)	(1) Accession and catalogue entries . . .		

TABLE 16—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.10—Continued

Existing 43 CFR section			
	(3) A description . . . including dimensions, materials . . .		
10.9(e)	(6) This paragraph applies when a the [sic] museum . . .		
10.10(g)	Culturally unidentifiable human remains.		
10.11(a)	General.		
10.11(c)	(2) If none of the Indian Tribes or NHOs agree to accept . . .		
	(3) The Secretary may make a recommendation . . .		
	(4) . . . may also transfer control of funerary objects . . .		
	(6) Any disposition of human remains from Indian lands . . .		
10.11(d)	(2) Within 30 days . . . Manager, National NAGPRA . . .		

L. Section 10.11 Civil Penalties

This section of the proposed rule would implement the requirements of the Act regarding the process for the Secretary to assess civil penalties against any museum that fails to comply with the requirements of the Act (25 U.S.C. 3007). The Department proposes several revisions to the existing regulations at § 10.12 to clarify and streamline the process for assessing civil penalties. As noted in the proposed rule, Federal agencies are not subject to the assessment of civil penalties. Federal law does include, however, ways to allege that a Federal agency has failed to comply with the requirements of the Act or the regulations (or any other Federal law or regulation). The most broadly applicable way to allege that a Federal agency has failed to comply is to send an allegation to the head of the appropriate Federal agency or to the Federal agency's Office of the Inspector General. Assuming that the alleged failure to comply is a final agency action (see proposed § 10.1(i)), the failure to comply could also be the subject of a lawsuit under the Administrative Procedure Act (5 U.S.C. 704).

1. Broaden the Options for a Failure To Comply

The Department proposes to remove from the existing regulations at § 10.12(b) the definition of ''failure to comply.'' Consistent with the Act, the proposed revisions would provide that a museum that fails to comply with any provision of the Act or Subpart C of the regulations has failed to comply. As under the existing regulations, each instance of failure to comply would constitute a separate violation. The proposed revisions include what factors would be relevant for determining the number of separate violations.

For example, if a museum fails to include information regarding the known presence of a potentially hazardous substance used to treat the human remains or associated funerary objects in an itemized list, the number of separate violations committed by the museum may be calculated by determining the number of lineal descendants, Indian Tribes, or NHOs named in an allegation and determined to be aggrieved by this failure to comply. Alternatively, if a museum completes the repatriation of human remains and associated funerary objects without submitting a notice of inventory completion, the number of separate violations may be calculated by determining the number of human remains and associated funerary objects involved in this failure to comply.

2. Allowing for a Single Hearing To Contest

The Department proposes to consolidate the dual hearing process in the existing regulations—which involve an opportunity to contest both a substantiated failure to comply and a penalty assessment in separate hearings—into one single hearing. The bifurcated hearing process adopted in 2003 (68 FR 16354, April 3, 2003) is not legally required. The Act uses identical language (25 U.S.C. 3007(a)) to the Administrative Procedure Act (APA) (5 U.S.C. 554(a)). This reflects Congressional intent that civil penalties be adjudicated under similar procedural requirements to the APA and not a unique approach. Numerous government agencies have complied with Section 554(a) by conducting single hearing adjudications, which have withstood legal challenges for procedural due process. Not only does the single hearing process satisfy the Administrative Procedure Act's identical procedural requirements (5 U.S.C. 554(a)), but it would also provide greater efficiencies for all parties and quicker resolution of cases.

3. Calculation of Base Penalty Amount

The Department proposes to change the calculation of the base penalty amount for each instance of failure to comply. Under the existing regulations, the base penalty amount for each separate violation is calculated as the lesser of two amounts: 0.25 percent of the museum's annual budget or $7,475 (adjusted annually for inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74)). The proposed revision would require that the penalty amount be calculated using only $7,475 (adjusted annually for inflation) as the base penalty amount.

The Act, the existing regulations, and the proposed revisions permit the Secretary to increase the penalty amount after considering different factors, including an aggrieved party's economic and non-economic damages. For example, economic damages could be an Indian Tribe's expenditures for an attorney or other staff to prepare, review, and file documents to compel the museum to comply. For another example, non-economic damages could be a traditional religious leader's inability to conduct a certain ceremony because of the museum's failure to comply.

In response to consultation with Indian Tribes and NHOs, the Department proposes to include an additional factor for increasing the penalty amount based on ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or NHO. The Secretary also may reduce the penalty amount if the

museum agrees to mitigate the violation. For example, mitigation could be a museum's payment to an NHO for the cost of a ceremony associated with the repatriation of human remains or cultural items, or the value of land that a museum provides for the reinterment of human remains and associated funerary objects. Another appropriate factor that may justify reducing a penalty would include the museum, through its chief executive, self-reporting the museum's failure to comply, by sending a written report of the violation to the Manager, National NAGPRA Program.

4. Options Upon Receipt of Notice

The proposed revisions describe the actions a museum may take upon receipt of a notice of failure to comply and include the option for a museum to file a petition for relief in the existing regulations at § 10.12(i)(3). The proposed revisions also describe the actions a museum may take upon receipt of a notice of assessment and include the option for a museum to request a hearing to contest the failure to comply or the penalty assessment in the existing regulations at §§ 10.12(f)(2) and (i)(4).

5. Exhaustion of Administrative Remedies

The proposed revisions would require a museum to exhaust all administrative remedies under this section prior to seeking judicial review of the final administrative decision of the Secretary. This section would also make clear that no decision would be considered to constitute final agency action subject to judicial review during the time the decision is subject to review under this section of the regulations. The proposed revisions contain provisions that would allow for the assessment of an additional daily penalty amount of $1,496 per day, subject to annual adjustments based on inflation, and would include the Department's options of instituting legal action to recover penalties and pursuing other available legal or administrative remedies.

Table 17 shows how the Department proposes to reorganize the existing regulatory requirements for the assessment of civil penalties on any museum that fails to comply with the requirements of the Act.

TABLE 17—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.11

Existing 43 CFR section		Proposed 43 CFR section	
10.12(c)	How to notify the Secretary . . .	10.11(a)	File an allegation.
10.12(d)	Steps the Secretary may take . . .	10.11(b)	Respond to an allegation.
10.12(g)	How the Secretary determines the penalty amount.	10.11(c)	Calculate the penalty amount.
10.12(e)	How the Secretary notifies . . .	10.11(d)	Notify a museum of a failure to comply.
10.12(f)	Actions you may take upon receipt of a notice . . .	10.11(e)	Respond to a notice of failure to comply.
	(1) Seek informal discussions . . .		
10.12(i)	Actions that you may take upon receipt of a notice . . .		
	(1) Accept in writing . . .		
	(3) File a petition for relief..		
10.12(h)	How the Secretary assesses the penalty . . .	10.11(f)	Assess the civil penalty.
10.12(h)	(3) The Secretary notifies you in writing . . .	10.11(g)	Notify the museum of an assessment.
10.12(i)	Actions that you may take upon receipt of a notice . . .	10.11(h)	Respond to an assessment.
	(1) Accept in writing or by payment of the proposed penalty		
10.12(f)	(2) Request a hearing . . .		(2) File a written request for a hearing to contest
10.12(i)	(4) Request a hearing . . .		
10.12(j)	How you request a hearing	10.11(i)	Request a hearing.
		10.11(j)	Hearings.
10.12(k)	How you appeal a decision.	10.11(k)	Appealing the administrative law judge's decision.
10.12(l)	The final administrative decision	10.11(l)	Exhaustion of administrative remedies.
10.12(g)	(3) An additional penalty of up to	10.11(m)	Failure to pay penalty or continuing failure to comply . . .
10.12(m)	(2) If you fail to pay the penalty		
10.12(m)	(3) Assessing a penalty . . .	10.11(n)	Additional remedies.
10.12(a)	The Secretary's authority . . .		Removed.
10.12(b)	Definition of failure to comply		
10.12(f)	(3) Take no action and await . . .		
10.12(i)	(2) Seek informal discussion with the Secretary (on the assessment).		
10.12(m)	(1) If you are assessed a civil penalty, you have . . .		

M. Section 10.12 Review Committee

This section of the proposed rule would implement the requirements of the Act regarding the Federal Advisory Review Committee (25 U.S.C. 3006). The Department proposes to clarify the existing provisions at §§ 10.16 and 10.17 and add new provisions to clarify the responsibilities of the Review Committee.

1. Deadline for Publishing Findings or Recommendations

In response to consultation with Indian Tribes and NHOs, the Department proposes to add a requirement that recommendations made by the Review Committee will be published in the **Federal Register** within 90 days of the making the finding or recommendation. This is the same requirement under the Federal Advisory Committee Act (FACA) for completing minutes of the Review Committee meeting.

2. Add Requirements for Nominations to the Review Committee

The Department proposes to add new provisions to clarify which entities may make nominations to the Secretary.

Under the Act (25 U.S.C. 3006(b)(1)(A)), Congress explicitly identified who is eligible to nominate a person to three specified slots on the Review Committee and who is eligible to serve in two of those slots. Only Indian Tribes, NHOs, and ''traditional Native American religious leaders'' are eligible to be the nominators, and only ''traditional Indian religious leaders'' are eligible to serve in two of the three specified slots. When Congress expressly identified traditional Indian religious leaders as being eligible to serve in two of the three specified slots, it excluded traditional Native Hawaiian religious leaders.

Under the Act (25 U.S.C. 3006(b)(1)(B)), Congress did not provide any additional requirements for nominators beyond ''national museum organizations and scientific organizations. The proposed addition seeks to clarify these requirements by defining what national museum organizations and national scientific organizations are, as recommended by the Government Accountability Office in a 2010 report on the implementation of the Act. As many national organizations have an abundance of subsidiary organizations, the proposed addition requires nominations be submitted only through a parent organization.

3. Add Definitions and Provisions for Findings of Fact or Disputes

The proposed revisions describe the finding of fact or dispute function of the Review Committee and remove the references in the existing regulations to informal and formal dispute resolution. The proposed definition of ''an affected party'' was drawn from the Review Committee's Dispute Procedures. The proposed revisions seek to clarify the distinction between findings of fact and disputes as well as to provide the options for the Review Committee's recommendation.

Table 18 shows how the Department proposes to reorganize the existing regulatory requirements for the Review Committee.

TABLE 18—CROSS-REFERENCE OF EXISTING PROVISIONS TO PROPOSED § 10.12

Existing 43 CFR section		Proposed 43 CFR section	
10.16(b)	Recommendations	10.12(a)	Recommendations.
	New	10.12(b)	Nominations.
10.17	Dispute resolutions	10.12(c)	Findings of fact or disputes on repatriation.

VI. Public Engagement and Request for Comments

A. Public Engagement

The Department will conduct consultation sessions with Indian Tribes virtually during the comment period. The Department will announce the exact meeting dates and times of the consultation sessions, once scheduled, on *https://www.doi.gov/priorities/tribal-consultation/upcoming-tribal-consultations* and by letter to Tribal leaders. The Department will also conduct consultation sessions with the Native Hawaiian Community virtually during the comment period. The Department of the Interior's Office of Native Hawaiian Relations will invite the Native Hawaiian Community to participate and provide the exact meeting dates and times of the consultation sessions, once scheduled. Upon request, the Department will consider additional consultation sessions with Indian Tribes or the Native Hawaiian Community to ensure sufficient opportunity to engage and comment in advance of a final rule and to respond to the previous requests received for additional consultation sessions.

One goal of the proposed regulatory revisions is to provide specific timelines for museums and Federal agencies to facilitate the required repatriation. The Department does not intend to impose timeframes on lineal descendants, Indian Tribes, or NHOs to request disposition or repatriation. The Department requests feedback from Indian Tribes and NHOs on whether this goal has been achieved and how to further allow Indian Tribes and NHOs flexibility and discretion with regard to the proposed regulatory revisions and, in particular, the new responsibilities under Subpart B and the proposed deadlines under Subpart C.

The Department will also proactively contact and consult with a subset of smaller Indian Tribes and NHOs to ensure that they anticipate sufficient opportunity under the proposed regulatory changes in Subpart C to submit requests for repatriation of the human remains or cultural items anticipated to become available within three years of a final rule. Specifically, Indian Tribes and NHOs are currently responsible for submitting a request to consult, consulting, submitting a request for repatriation, and, in some cases, requesting transfer of human remains or cultural items. Under the proposed regulations, Indian Tribes and NHOs have the same responsibilities, but are likely to increase the number of annual responses for each responsibility, especially in submitting requests for repatriation. As stated in § 10.1(g), failure to make a claim for disposition or a request for repatriation of human remains or cultural items is deemed an irrevocable waiver of any right to make a claim or a request.

The Department will also proactively contact and consult with Indian Tribes and NHOs to ensure that they anticipate sufficient opportunity under the proposed regulatory changes to take on new responsibilities under Subpart B. Specifically, Indian Tribes and NHOs are currently responsible for responding to a discovery on their Tribal lands, consenting to an excavation on Tribal lands, and submitting a claim for disposition on Federal lands. Under the proposed regulations, Indian Tribes and NHOs will also be responsible for delegating or accepting responsibilities on Tribal lands, submitting a request to consult on Federal lands, sending or completing a disposition statement on Tribal lands, and requesting transfer of unclaimed human remains or cultural items on Federal lands.

Another goal of the proposed regulatory revisions is to improve efficiency in meeting the requirements of the systematic process for repatriation under Subpart C. The Department requests feedback from Indian Tribes, NHOs, museums, and Federal agencies on whether this goal has been achieved and how to ensure the step-by-step process for repatriation is streamlined and simplified by the proposed regulatory revisions under Subpart C.

The Department will proactively contact and engage with a subset of affected entities, which will include Indian Tribes, NHOs, museums, and Federal agencies, during the comment period to understand if the proposed regulatory revisions could impact these entities' capacity and resources. Under

the proposed regulatory revisions, museums and Federal agencies would be required to update inventories for any human remains and associated funerary objects previously included in an inventory but not published in a notice of inventory completion within two years of a final rule. Based on information available to it, a museum or Federal agency would be required to initiate consultation, consult with requesting parties, and determine if there is a known lineal descendant or a cultural or geographical affiliation. Museums would also be able to request extensions to update an inventory if it has made a good faith effort but will be unable to do so by the appropriate deadline. Indian Tribes and NHOs would be required to submit requests to consult and engage in consultation. Museums and Federal agencies would also be required to publish notices of inventory completion within six months of updating the inventory.

In particular, the Department anticipates that the human remains of 117,000 Native American individuals currently unable to be repatriated would become available for repatriation within two and a half years of the effective date of a final rule, a substantial increase from the 84,000 individuals repatriated in the almost 32 years since the passage of NAGPRA. At this time, the Department is not aware of any capacity and resource limitations that would prevent these entities from completing the new requirement to update inventories, submit requests to consult, engage in consultation, and publish notices following the effective date of a final rule.

B. Requests for Comments

In addition to the public engagement and outreach discussed above, the Department solicits comment from the public on the entirety of this proposed rule. The Department is interested in receiving comments from the public on the cost-benefit and regulatory flexibility analyses, including the conclusions about the expected costs of complying with the proposed rule. In particular, the Department is interested in responses to the following questions:

a. For each regulatory requirement, does the estimated time per response seem reasonable? If not, what range of time per response would be more reasonable for a specific regulatory requirement? For example, Federal agencies and museums are required to initiate and conduct consultation under both the existing regulations and the proposed regulations. We estimate the time per response ranges from ten hours to 300 hours, depending on the size and complexity of the consultation, for a median of 155 hours.

b. For Subpart B, is the estimated number of annual discoveries on Federal or Tribal lands reasonable? We used the average number of notices on Federal lands over the last three years, but we have no data on the number of discoveries on Tribal lands to inform this estimate.

c. For Subpart C, is the estimated number of museums and Federal agencies required to update inventory data under the proposed regulations reasonable? We estimate 414 museums and 19 Federal agencies will be required to update inventories within three years after promulgation of a final rule. We estimate that 33% of those museums and Federal agencies will submit inventory updates each year for three years. We assume fewer inventory records will require less time to update. We assume museums previously prepared and submitted inventories in accordance with the existing regulations and an update to that inventory requires less time than submission of a new inventory. We estimate the time per response will range from less than one hour to 100 hours, depending on the size and complexity of the update, for a median of 50.25 hours.

d. For Subpart C, many museums and Federal agencies update inventories at their own discretion, going beyond what is required by the Act and the existing regulations, which only requires use of ''information possessed by such museum or Federal agency'' (25 U.S.C. 3003(a)). Given the potential expense of more extensive studies not required by the Act or the revised regulations, how should the Department account for these costs in this rulemaking? We also request public data about the potential costs of updating inventories under the revised regulations.

e. For Subpart C, is the estimated number of museums required to report on Federal holdings or collections reasonable? We estimate the number of museums required to submit statements is 5% of all museums that previously submitted information under the existing regulations.

f. Is the estimated number of competing claims for disposition or competing requests for repatriation reasonable?

g. Using data on implementation since 2012, we estimate it will take an additional 26 years to complete the consultation and notification process for all 117,000 Native American human remains currently pending in the existing regulatory framework. Is this 26-year time horizon reasonable? Will the proposed regulatory requirements result in a change in consultation activities per year, and if so, how should the Department account for the change in costs to Indian Tribes or NHOs for engaging in consultation?

C. Use of Received Feedback

The Department will use all received feedback to inform a final rule and may make changes to a final rule based on received feedback that is within the scope of this proposed rule.

VII. Compliance With Other Laws, Executive Orders and Department Policy

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant regulatory actions. OIRA has determined that this rule is a significant regulatory action.

Executive Order 13563 reaffirms the principles of Executive 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Executive Order 13985)

This proposed rule is expected to advance racial equity in agency actions and programs, in accordance with the Executive Order 13985.

C. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on the cost-benefit and regulatory flexibility analyses found in the report entitled ''Benefit-Cost and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Regulations'' that may be viewed online at on *https://www.regulations.gov*.

D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

F. Takings (Executive Order 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

G. Federalism (Executive Order 13132)

Under the criteria in Section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

H. Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of § 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of § 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

I. Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified direct Tribal implications. Accordingly, we have developed this proposed rule after consulting with federally recognized Indian Tribes as detailed in this preamble. In addition, we developed this proposed rule in consultation with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by Indian Tribes.

J. Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.)

1. Overview

The Paperwork Reduction Act (PRA) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a ''collection of information,'' unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)).These proposed regulations contains existing and new information collection requirements that are subject to review by OMB under the PRA. OMB previously reviewed and approved information collection related to 43 CFR part 10 and assigned the following OMB control number 1024–0144 (expires 4/30/2025).

The information collection activities in this proposed rule are described below along with estimates of the annual burdens. These activities, along with annual burden estimates, do not include activities that are considered usual and customary industry practices. Included in the burden estimates are the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each component of the proposed information collection requirements.

The Department of the Interior requests comment on any aspect of this information collection, including:

a. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

b. The accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

2. Summary of Proposed Information Collection Requirements

Title of Collection: Native American Graves Protection and Repatriation Regulations.

OMB Control Number: 1024–0144.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Any person, any affected party, lineal descendants, Indian Tribes, Native Hawaiian organizations, and State and local governments, universities, and museums, that receive Federal funds and have possession or control of Native American human remains and cultural items.

Respondent's Obligation: Mandatory, voluntary, and required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Number of Annual Responses: 2,212

Estimated Completion Time per Response: Varies from 1 hour to 300 hours depending on respondent and/or activity.

Total Estimated Number of Annual Burden Hours: 35,878.

Total Estimated Annual Non Hour Burden Cost: None.

SUMMARY BY SUBPART OF THE PROPOSED REGULATIONS

Subpart	Information collections	Respondents
Subpart A—General	0	None.

SUMMARY BY SUBPART OF THE PROPOSED REGULATIONS—Continued

Subpart	Information collections	Respondents
Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands.	1	Any person.
	5	Indian Tribes or NHOs.
Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies.	1	Any person.
	1	Indian Tribes or NHOs.
	1	Lineal descendants.
	16	Museums.
Subpart D—Review Committee	1	Any affected party.

Subpart A—General does not contain any information collection requirements subject to the PRA. References to written documents in this Subpart refer to the specific information collection requirements in the three subparts below.

Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands contains six information collection requirements subject to the PRA. On Federal or Tribal lands, any person who knows or has reason to know of the discovery of human remains or cultural items must provide specified information to third parties. On Federal lands, an Indian Tribe or NHO may submit a claim for disposition by disclosing specified information to third parties. On Tribal lands, an Indian Tribe or NHO must maintain specified records and in one instance, disclose specified information to third parties.

Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies contains 19 information collection requirements subject to the PRA. State and local governments, universities, and museums that receive Federal funds and have possession or control of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony must submit information to the Federal government, maintain specified records, and disclose specified information to third parties. Lineal descendants, Indian Tribes, or NHOs may submit a request for repatriation by disclosing specified information to third parties. Any person alleging a failure to comply may voluntarily submit information to the Federal government. Museums may respond to a civil penalty action by submitting information to the Federal government.

In the proposed regulations, Subpart D—Review Committee contains one information collection requirements subject to the PRA. Any affected party may voluntarily submit information to the Federal government.

Information collection requirement	Proposed rule
Proposed New Information Collection Requirements in Subpart B	
Report a discovery on Federal or Tribal lands	§ 10.5(a)–(b)
Respond to a discovery	§ 10.5(c)(1) and § 10.5(e)
Consent to an excavation	§ 10.6(a)
Submit a claim for disposition	§ 10.7(d)(3)
Delegate or accept responsibility on Tribal land	§ 10.5(c)(2)–(3); § 10.6(a)(2)–(3) and § 10.7(c)(2)–(3)
Send or complete a disposition statement	§ 10.7(b) and § 10.7(c)
Currently Approved Information Collections Requirements in Subpart C	
New Summary/Inventory (private and state or local museums)	§ 10.9(a) and § 10.10(d)
Updated Summary/Inventory Data (private and state or local museums)	§ 10.9(a) and § 10.10(d)
Notices for publication in the **Federal Register** (private and state or local museums)	§ 10.9(f) and § 10.10(e)
Initiate Consultation and Request Information (private and state or local museums) (previously Notify Tribes).	§ 10.10(b)–(c)
Response to requests for information (state or local museums)	Removed
Proposed New Information Collection Requirements in Subpart C	
Conduct consultation	§ 10.9(c) and § 10.10(c)
Submit a request for repatriation	§ 10.9(d) and § 10.10(f)
Document physical transfer	§ 10.9(g)(2) and § 10.10(h)(2)
File an allegation of failure to comply	§ 10.11(a)
Respond to a civil penalty action	§ 10.11(e), (h), (i), and (k)
Submit statements describing holdings or collection	§ 10.8(c)–(d)
Make a record of consultation	§ 10.9(c)(3) and § 10.10(c)(3)
Respond to a request for repatriation	§ 10.9(e) and § 10.10(g)
Send a repatriation statement	§ 10.9(g) and § 10.10(h)
Evaluate competing requests and resolve stays of repatriation	§ 10.9(h)–(i) and § 10.10(i)–(j)
Transfer or reinter human remains and associated funerary objects	§ 10.10(k)
Proposed New Information Collection Requirements in Subpart D	
Request assistance of the Review Committee	§ 10.12(c)

3. Information That Is Not an Information Collection Subject to the PRA

Lineal descendants, Indian Tribes, and Native Hawaiian organizations may take certain actions that are not information collections subject to the PRA. Written documents requesting to consult are acknowledgements that entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the consultation.

Federal agencies and the Department of Hawaiian Home Lands (DHHL) must take certain actions that are not information collections subject to the PRA. The Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law (see 81 FR 29777 and 29787, May 13, 2016, 43 CFR 47 and 48, Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920). These written documents are required by employees of the Federal government or DHHL when acting within the scope of their employment.

Indian Tribes, Native Hawaiian organizations, and Indian groups that are not federally recognized may take certain actions to request transfer of human remains or cultural items that are not information collections subject to the PRA. These actions impact fewer than ten persons and occur less often than annually.

Indian Tribes, Native Hawaiian organizations, traditional religious leaders, national museum organizations, and national scientific organizations may take certain actions that are not information collections subject to the PRA. These actions are generally solicited through a notice in the **Federal Register**, impact fewer than ten persons, and occur less often than annually.

4. Burden Estimates

The Department has identified 26 information collections in the proposed regulations. In total, we estimate that we will receive, annually, 2,212 responses totaling 35,878 annual hour burden. We estimate the annual dollar value is $2,304,481 (rounded). We estimate the frequency of response for each of the information collections is once per year, but the number of respondents may not be the same as the number of responses, depending on the type of information collected. In our estimate, we have only used the number of responses to simplify our estimate and remain consistent across the types of information collected. For some information collections, the time per response varies widely because of differences in activity, size, and complexity.

5. Written Comments or Additional Information

Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to *https://www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 12201 Sunrise Valley Drive, (MS–242) Reston, VA 20191 (mail); or *phadrea_ponds@nps.gov* (email). Please include OMB Control Number 1024–0144 in the subject line of your comments.

To request additional information about this ICR, contact Melanie O'Brien, Manager, National NAGPRA Program by email at *melanie_o'brien@nps.gov,* or by telephone at (202) 354–2204. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *https://www.reginfo.gov/public/do/PRAMain*.

K. National Environmental Policy Act (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by a categorical exclusion under 43 CFR 46.210(i): ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

L. Effects on the Energy Supply (Executive Order 13211)

This rulemaking is not a significant energy action under the definition in Executive Order 13211; the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects in not required.

M. Clarity of This Rule

We are required by Executive Orders 12866 (§ 1(b)(12)) and 13563 (§ 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and enter RIN 1024–AE19 in the search box.

Drafting Information

This proposed rule was prepared by staff of the National NAGPRA Program, National Park Service; Office of Regulations and Special Park Uses, National Park Service; Office of Native Hawaiian Relations; Office of Regulatory Affairs & Collaborative Action, Office of the Assistant Secretary—Indian Affairs;

and Office of the Solicitor, Division of Parks and Wildlife and Division of Indian Affairs, Department of the Interior. This proposed rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee under the Act (25 U.S.C. 3006(c)(7)).

List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Alaska, Cemeteries, Citizenship and naturalization, Colleges and universities, Hawaiian Natives, Historic preservation, Human remains, Indians, Indians-claims, Indians-law, Indians-lands, Museums, Penalties, Public lands, Reporting and recordkeeping requirements, Treaties.

■ In consideration of the foregoing, the Department of the Interior proposes to revise 43 CFR Part 10 as follows:

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

Subpart A—GENERAL

Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands

Subpart C—REPATRIATION OF HUMAN REMAINS OR CULTURAL ITEMS BY MUSEUMS OR FEDERAL AGENCIES

Subpart D—REVIEW COMMITTEE

Authority: 25 U.S.C. 3001 *et seq.* and 25 U.S.C. 9.

Subpart A—General

§ 10.1 Introduction.

(a) *Purpose.* These regulations provide a systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony under the Native American Graves Protection and Repatriation Act (Act) of November 16, 1990. The Act recognized the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American human remains or cultural items subject to this part. Consistent with the Act's express language and Congress's intent in enacting the statute, these regulations require museums and Federal agencies to complete timely dispositions and repatriations through consultation and collaboration with lineal descendants, Indian Tribes, and Native Hawaiian organizations. In implementing this systematic process, museums and Federal agencies must defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

(b) *Applicability.* These regulations pertain to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony and require certain actions to:

(1) Protect Human Remains or Cultural Items on Federal or Tribal Lands in the event of a discovery or excavation after November 16, 1990; and

(2) Repatriate Human Remains or Cultural Items in the possession or control of:

(i) Any Federal agency, regardless of the physical location of the holding or collection; or

(ii) Any institution or State or local government agency (including any institution of higher learning) within the United States that receives Federal funds, regardless of the physical location of the holding or collection.

(c) *Accountability.* These regulations are applicable to and binding on all museums and Federal agencies for implementing the systematic process for the disposition and repatriation of human remains or cultural items under this part.

(d) *Duty of care.* Prior to disposition or repatriation, these regulations require a museum or Federal agency to care for, safeguard, and preserve all human remains or cultural items in its custody or in its possession or control. Upon request of a lineal descendant, Indian Tribe, or Native Hawaiian organization, a museum or Federal agency must, to the maximum extent possible:

(1) Consult, collaborate, and obtain consent on the appropriate treatment, care, or handling of human remains or cultural items;

(2) Incorporate and accommodate customs, traditions, and Native American traditional knowledge in practices or treatments of human remains or cultural items; and

(3) Limit access to and research on human remains or cultural items.

(e) *Delivery of written documents.* These regulations require written documents to be sent or delivered, such as requests for repatriation, claims for disposition, invitations or requests to consult, or notices for publication.

(1) The written documents must be sent by:

(i) Email, with proof of receipt,

(ii) Personal delivery with proof of delivery date,

(iii) Private delivery service with proof of date sent, or

(iv) Certified mail.

(2) Communication to the Manager, National NAGPRA Program, should be sent electronically to *nagpra_info@nps.gov*. If electronic submission is not possible, physical delivery may be sent to 1849 C Street NW, Mail Stop 7360, Washington, DC 20240. If either of these addresses change, a notice with the new address must be published in the **Federal Register** within 5 days of the change.

(f) *Deadlines and timelines.* These regulations require certain actions be taken by a specific date. Unless stated otherwise in these regulations:

(1) Days mean business days, *i.e.,* Monday through Friday. For any action by an Indian Tribe, Native Hawaiian organization, Federal agency, or the Manager, National NAGPRA Program, business days do not include days during which the Federal government is closed because of a Federal holiday, lapse in appropriations, or other reasons.

(2) Written documents are deemed timely based on the date sent, not the date received.

(3) Parties sending or receiving written documents under these regulations must document the date sent or date received, as appropriate, when these regulations require those parties to act based on the date sent or date received.

(g) *Failure to make a claim or a request.* Failure to make a claim for disposition or a request for repatriation before the disposition, repatriation, transfer, or reinterment of human remains or cultural items under this part is deemed an irrevocable waiver of any right to make a claim or a request for the human remains or cultural items once the disposition, repatriation, transfer, or reinterment of the human remains or cultural items has occurred.

(h) *Judicial jurisdiction.* The United States district courts have jurisdiction over any action by any person alleging a violation of the Act or this part.

(i) *Final agency action.* For purposes of the Administrative Procedure Act (5 U.S.C. 704), any of the following actions by a Federal agency constitutes a final agency action under this part:

(1) A final determination making the Act or this part inapplicable;

(2) A final denial of a claim for disposition or a request for repatriation; and

(3) A final disposition or repatriation determination.

(j) *Information collection.* The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1024–0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, the collection of information under this part unless the Federal agency provides a currently valid OMB control number.

§ 10.2 Definitions for this part.

Act means the Native American Graves Protection and Repatriation Act.

Acknowledged aboriginal land means land whose occupation by an Indian Tribe has been recognized in any of the following sources:

(1) A treaty sent by the President to the United States Senate for ratification;

(2) An Act passed by Congress;

(3) An Executive Order;

(4) A treaty between a foreign or colonial government and an Indian Tribe signed before the establishment of the United States Government or prior to the land becoming incorporated in the United States;

(5) Another Federal document or foreign government document providing information that reasonably shows aboriginal occupation; or

(6) Intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes.

Adjudicated aboriginal land means land whose occupation by an Indian Tribe has been recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims. A final judgment also includes a judgment concerning a settlement as long as that judgment or settlement either explicitly recognizes certain land as the aboriginal land of an Indian Tribe or adopts findings of fact that do so.

Affiliation means a connection between human remains or cultural items and an Indian Tribe or Native Hawaiian organization.

Ahupua‘a (singular and plural) means a land division in Hawai‘i usually extending from the uplands to the sea which traditionally was, and in some cases remains, self-sustaining or whose occupants were or are permitted access to or trade resources with the neighboring ahupua‘a.

Appropriate official means any representative authorized by a delegation of authority within an Indian Tribe, Native Hawaiian organization, Federal agency, or Department of Hawaiian Home Lands (DHHL) that has responsibility for human remains or cultural items on Federal or Tribal lands.

ARPA means the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa–mm) and the relevant Federal agency regulations implementing that statute.

ARPA Indian lands means lands of Indian Tribes, or individual Indians, which are either held in trust by the United States Government or subject to a restriction against alienation imposed by the United States Government, except for any subsurface interests in lands not owned or controlled by an Indian Tribe or an individual Indian.

ARPA Public lands means lands owned and administered by the United States Government as part of:

(1) The national park system,

(2) The national wildlife refuge system,

(3) The national forest system, and

(4) All other lands the fee title to which is held by the United States Government, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

Consultation means a process to seek consensus through the exchange of information, open discussion, and joint deliberations and by incorporating identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.

Cultural items means a funerary object, sacred object, or object of cultural patrimony according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge.

Custody means having an obligation to care for the object or item but not a sufficient interest in the object or item to constitute possession or control. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

Discovery means exposing, finding, or removing human remains or cultural items whether intentionally or inadvertently on Federal or Tribal lands without a written authorization for an excavation under § 10.6.

Disposition means an appropriate official acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items removed from Federal or Tribal lands.

Excavation means intentionally exposing, finding, or removing human remains or cultural items on Federal or Tribal lands with a written authorization under § 10.6.

Federal agency means any department, agency, or instrumentality of the United States Government. This term does not include the Smithsonian Institution.

Federal lands means any lands other than Tribal lands that is controlled or owned by the United States Government. For purposes of this definition, control refers to lands not owned by the United States Government, but in which the United States Government has a sufficient legal interest to permit it to apply these regulations without abrogating a person's existing legal rights. Whether the United States Government has a sufficient legal interest to control lands it does not own is a legal determination that a Federal agency must make on a case-by-case basis. Federal lands include:

(1) Any lands selected by, but not yet conveyed to, an Alaska Native Corporation or group organized under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*);

(2) Any lands other than Tribal lands that are held by the United States Government in trust for an individual Indian or lands owned by an individual Indian and subject to a restriction on alienation by the United States Government; and

(3) Any lands subject to a statutory restriction, lease, easement, agreement, or similar arrangement containing terms that grant to the United States Government indicia of control over those lands.

Funerary object means any object reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. This term does not include any object returned or distributed to living persons according to traditional custom after it has been displayed as part of a death rite or ceremony of a Native American culture. Funerary objects are either associated funerary objects or unassociated funerary objects.

(1) *Associated funerary object* means the human remains related to the funerary object are, or were after

November 16, 1990, in the possession or control of any museum or Federal agency or removed from Federal or Tribal lands. Any object made exclusively for burial purposes or to contain human remains is always an associated funerary object regardless of the location or existence of any related human remains.

(2) *Unassociated funerary object* means any funerary object that is not an associated funerary object and is identified by a preponderance of the evidence as one or more of the following:

(i) Related to human remains but the human remains were not removed or the location of the human remain is unknown,

(ii) Related to specific individuals or families,

(iii) Removed from a specific burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization, or

(iv) Removed from a specific area where a burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization is known to have existed, but the burial site is no longer extant.

Holding or collection means an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including:

(1) Academic interest;
(2) Accession;
(3) Catalog;
(4) Comparison;
(5) Conservation;
(6) Education;
(7) Examination;
(8) Exhibition;
(9) Forensic purposes;
(10) Interpretation;
(11) Preservation;
(12) Public benefit;
(13) Research;
(14) Scientific interest; or
(15) Study.

Human remains means the physical remains of the body of a Native American individual. This term does not include human remains or portions of human remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained. When human remains are reasonably believed to be comingled with other material (such as soil or faunal remains), the entire admixture may be treated as human remains.

(1) Human remains incorporated into a funerary object, sacred object, or object of cultural patrimony are considered part of the cultural item rather than human remains.

(2) Human remains incorporated into an object or item that is not a funerary object, sacred object, or object of cultural patrimony are considered human remains.

Indian Tribe means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary under the Act of November 2, 1994 (25 U.S.C. 5131).

Inventory means a simple itemized list of human remains and associated funerary objects in a holding or collection that includes the results of consultation and determinations about cultural and geographical affiliation.

Lineal descendant means:

(1) A living person tracing his or her ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to this part; or

(2) A living person tracing his or her ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to all the known individuals represented by comingled human remains (example: the human remains of two individuals have been comingled, and a living person may trace his or her ancestry directly to both of the deceased individuals).

Manager, National NAGPRA Program, means the official of the Department of the Interior designated by the Secretary as responsible for administration of the Act and this part.

Museum means any institution or State or local government agency (including any institution of higher learning) that has possession or control of human remains or cultural items and receives Federal funds. The term does not include the Smithsonian Institution.

Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States. To be considered Native American under this part, human remains or cultural items must bear some relationship to a tribe, people, or culture indigenous to the United States.

(1) A tribe is an Indian Tribe.

(2) A people comprise the entire body of persons who constitute a community, tribe, nation, or other group by virtue of a common culture, history, religion, language, race, ethnicity, or similar feature. The Native Hawaiian Community is a ''people.''

(3) A culture comprises the characteristic features of everyday existence shared by people in a place or time.

Native American traditional knowledge means knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by Native Americans. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed, sustained, and passed through time, often forming part of a cultural or spiritual identity.

Native Hawaiian organization means any organization that:

(1) Serves and represents the interests of Native Hawaiians, who are descendants of the indigenous people who, before 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i;

(2) Has as a primary and stated purpose the provision of services to Native Hawaiians; and

(3) Has expertise in Native Hawaiian affairs, and includes but is not limited to:

(i) The Office of Hawaiian Affairs established by the constitution of the State of Hawai‘i;

(ii) Native Hawaiian organizations (including ‘ohana) who are registered with the Secretary's Office of Native Hawaiian Relations; and

(iii) Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations as defined under 43 CFR 47.10.

Object of cultural patrimony means an object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group (such as a band, clan, lineage, ceremonial society, or other subdivision), according to an Indian Tribe or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. An object of cultural patrimony may have been entrusted to a caretaker, along with the authority to confer that responsibility to another caretaker. The object must be reasonably identified as

being of such importance central to the group that it:

(1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and

(2) Must have been considered inalienable by the group at the time the object was separated from the group.

*'Ohana (*family) means a group of people who are not lineal descendants but comprise a Native Hawaiian organization whose members have a familial or kinship relationship with each other.

Person means:

(1) An individual, partnership, corporation, trust, institution, association, or any other private entity; or

(2) Any representative, official, employee, agent, department, or instrumentality of the United States Government or of any Indian Tribe or Native Hawaiian organization, or of any State or subdivision of a State.

Possession or control means having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item. A museum or Federal agency may have possession or control regardless of whether the object or item is in its physical custody. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

Receives Federal funds means an institution or agency of a State or local government (including an institution of higher learning) directly or indirectly receives Federal financial assistance after November 16, 1990, including any grant; cooperative agreement; loan; contract; use of Federal facilities, property, or services; or other arrangement involving the transfer of anything of value for a public purpose authorized by a law of the United States Government. This term includes Federal financial assistance provided for any purpose that is received by a larger entity of which the institution or agency is a part. For example, if an institution or agency is a part of a State or local government or a private university, and the State or local government or private university receives Federal financial assistance for any purpose, then the institution or agency receives Federal funds for the purpose of these regulations. This term does not include procurement of property or services by and for the direct benefit or use of the United States Government or Federal payments that are compensatory.

Repatriation means a museum or Federal agency acknowledges and recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has control or ownership of human remains or cultural items in a holding or collection.

Review Committee means the advisory committee established under the Act.

Right of possession means possession or control obtained with the voluntary consent of a person or group that had authority of alienation. Right of possession is given through the original acquisition of:

(1) An unassociated funerary object, a sacred object, or an object of cultural patrimony from an Indian Tribe or Native Hawaiian organization with the voluntary consent of a person or group with authority to alienate the object; or

(2) Human remains and associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or, when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization.

Sacred object means an object that is a specific ceremonial object needed by a traditional religious leader for the practice of traditional Native American religion by present-day adherents, according to a lineal descendant, Indian Tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. While many items might be imbued with sacredness in a culture, this term is specifically limited to objects needed for the observance or renewal of Native American religious ceremonies.

Secretary means the Secretary of the Interior or a designee.

Summary means a written description of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony.

Traditional religious leader means a person who, based on cultural, ceremonial, or religious practices, is considered by an Indian Tribe or Native Hawaiian organization as being responsible for performing cultural ceremonies or exercising a leadership role.

Tribal lands means:

(1) All lands that are within the exterior boundaries of any Indian reservation;

(2) All lands that are dependent Indian communities; and

(3) All lands administered by the Department of Hawaiian Home Lands (DHHL) under the Hawaiian Homes Commission Act of 1920 (HHCA, 42 Stat. 108) and Section 4 of the Act to Provide for the Admission of the State of Hawai'i into the Union (73 Stat. 4), including ''available lands'' and ''Hawaiian home lands.''

Tribal lands of an NHO means Tribal lands in Hawai'i that are under the stewardship of a Native Hawaiian organization that has been issued a lease or license under HHCA section 204(a)(2), second paragraph, second proviso, or section 207(c)(1)(B).

Unclaimed human remains or cultural items means human remains or cultural items removed from Federal lands in the United States or from Tribal lands in Hawai'i whose disposition has not occurred under this part.

United States means the 50 States and the District of Columbia.

§ 10.3 Cultural and Geographical Affiliation.

Throughout this part, affiliation ensures that disposition or repatriation of human remains or cultural items is based on a reasonable connection to an Indian Tribe or Native Hawaiian organization. Affiliation is established by identifying the cultural and geographical affiliation of the human remains or cultural items using this section.

(a) *Cultural affiliation.* Cultural affiliation is identified by reasonably tracing a relationship of shared group identity between an Indian Tribe or Native Hawaiian organization and an identifiable earlier group connected to the human remains or cultural items. Cultural affiliation is established by a simple preponderance of the evidence given the information available, including the results of consultation. Cultural affiliation does not require exhaustive studies of the human remains or cultural items or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information.

(1) Information. One or more of the following equally relevant types of information may be used to identify cultural affiliation:

(i) Anthropological;

(ii) Archaeological;

(iii) Biological;

(iv) Folkloric;

(v) Geographical;

(vi) Historical;

(vii) Kinship;

(viii) Linguistic;

(ix) Oral Traditional; or

(x) Other relevant information or expert opinion, including Native American traditional knowledge which alone may be sufficient to identify cultural affiliation.

(2) Criteria. Using the information available, each of the following criteria for cultural affiliation must be identified:

(i) One or more earlier groups connected to the human remains or cultural items;

(ii) One or more Indian Tribes or Native Hawaiian organizations; and

(iii) A relationship of shared group identity between the earlier group and the Indian Tribe or Native Hawaiian organization reasonably traced through time.

(3) Multiple cultural affiliations. An identifiable earlier group may have a relationship to more than one Indian Tribe or Native Hawaiian organization. As two or more earlier groups may be connected to human remains or cultural items, a relationship may be reasonably traced to two or more Indian Tribes or Native Hawaiian organizations that do not themselves have a shared group identity.

(b) *Geographical affiliation.* Geographical affiliation is identified by reasonably tracing a relationship between an Indian Tribe or Native Hawaiian organization and a geographic area connected to the human remains or cultural items. Geographical affiliation is established by the information available, including the results of consultation.

(1) Information. Existing records, inventories, catalogues, relevant studies, or other pertinent data may be used to identify the:

(i) Geographic origin of the human remains or cultural items and

(ii) Basic facts surrounding the acquisition and accession of the human remains or cultural items.

(2) Criteria. Using the information available, each of the following criteria for geographical affiliation must be identified:

(i) A geographic area connected to the human remains or cultural items;

(ii) One or more Indian Tribes or Native Hawaiian organizations; and

(iii) A relationship between the geographic area and the Indian Tribe or Native Hawaiian organization, based on the identification of the geographic area as:

(A) The Tribal lands of the Indian Tribe or Native Hawaiian organization,

(B) The adjudicated aboriginal land of the Indian Tribe, or

(C) The acknowledged aboriginal land of the Indian Tribe.

(3) Multiple geographical affiliations. A geographic area may have a relationship to more than one Indian Tribe or Native Hawaiian organization. Information used for geographical affiliation may provide information sufficient to identify cultural affiliation under paragraph (a) of this section but must not be used to limit geographical affiliation.

(c) *Multiple affiliations.* When affiliation of human remains or cultural items is established with two or more Indian Tribes or Native Hawaiian organizations, any of the Indian Tribes or Native Hawaiian organizations may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes or Native Hawaiian organizations with affiliation may agree to joint disposition or joint repatriation of the human remains or cultural items.

(1) Single claims or requests. Claims or requests for joint disposition or joint repatriation of human remains or cultural items are considered a single claim or request and not competing claims or requests. Notices and statements for joint disposition or joint repatriation of human remains or cultural items required under this part must identify all joint requestors.

(2) Competing claims or requests. Under §§ 10.7, 10.9, and 10.10, when there are competing claims for disposition or competing requests for repatriation of human remains or cultural items, it may be necessary to determine the Indian Tribe or Native Hawaiian organization with the closest affiliation under paragraph (d) of this section.

(d) *Closest affiliation.* (1) The Indian Tribe with the closest affiliation, in the following order, is:

(i) The Indian Tribe whose cultural affiliation is clearly identified.

(ii) The Indian Tribe whose cultural affiliation is not clearly identified but is reasonably identified by the information available, including the circumstances surrounding the acquisition of the human remains or cultural items.

(iii) The Indian Tribe whose geographical affiliation is based on the Tribal lands of the Indian Tribe.

(iv) The Indian Tribe whose geographical affiliation is based on the adjudicated aboriginal land of the Indian Tribe.

(v) The Indian Tribe whose geographical affiliation is based on the acknowledged aboriginal land of the Indian Tribe.

(2) The Native Hawaiian organization with the closest cultural affiliation, in the following order, is:

(i) An ʻohana that can trace an unbroken connection of named individuals to one or more of the human remains or cultural items, but not necessarily to all of the human remains or cultural items from a specific site.

(ii) An ʻohana that can trace a relationship to the ahupuaʻa where the human remains or cultural items were removed and a direct kinship to one or more of the human remains or cultural items, but not necessarily an unbroken connection of named individuals.

(iii) An organization with affiliation only to the earlier occupants of the ahupuaʻa where the human remains or cultural items were removed, and not to the earlier occupants of any other ahupuaʻa.

(iv) An organization with affiliation to either:

(A) The earlier occupants of the ahupuaʻa where the human remains or cultural items were removed, as well as to the earlier occupants of other ahupuaʻa on the same island, but not to the earlier occupants of all ahupuaʻa on that island, or to the earlier occupants of any other island of the Hawaiian archipelago, or

(B) The earlier occupants of another island who accessed the ahupuaʻa where the human remains or cultural items were removed for traditional or customary practices and were buried there.

(v) An organization with affiliation to the earlier occupants of all ahupuaʻa on the island where the human remains or cultural items were removed, but not to the earlier occupants of any other island of the Hawaiian archipelago.

(vi) An organization with affiliation to the earlier occupants of more than one island in the Hawaiian archipelago that has been in continuous existence from a date prior to 1893.

(vii) Any other Native Hawaiian organization with affiliation.

Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands

§ 10.4 General.

Whenever an Indian Tribe, Native Hawaiian organization, Federal agency, or the State of Hawai'i Department of Hawaiian Home Lands (DHHL) has responsibility for human remains or cultural items on Federal or Tribal lands, it must comply with the requirements of this subpart. To ensure compliance with the Act, any permit, license, lease, right-of-way, or other authorization issued by an Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL for an activity on Federal or Tribal lands must include a requirement that the person responsible for the activity comply with § 10.5 upon the discovery of human remains or cultural items. Prior to any excavation of human remains or cultural items on Federal or Tribal lands, an Indian Tribe, Native Hawaiian organization, Federal

agency, or DHHL must comply with § 10.6.

(a) *Appropriate official.* To ensure compliance with the Act, the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL that has responsibility for human remains or cultural items on Federal or Tribal lands must designate one or more appropriate officials, as shown in Table 1 of this section. The appropriate official is responsible for carrying out the requirements of this subpart.

(b) *Plan of action.* On Federal lands in the United States or on Tribal lands in Hawai'i, a plan of action is required for any planned activity (including an excavation authorized under § 10.6) that is likely to result in a discovery or excavation of human remains or cultural items. Determining the likelihood of discovery or excavation must be based upon previous studies, discoveries, or excavations in the general proximity of the planned activity. Information from and the expertise of Native American cultural practitioners, while not required, may assist in determining the likelihood of discovery or excavation. In consultation with any lineal descendants, Indian Tribes, or Native Hawaiian organizations, the appropriate official must prepare, approve, and sign a plan of action.

(1) *Step 1—Initiate consultation.* Before the planned activity begins, the appropriate official must identify consulting parties and make a good-faith effort to invite the parties to consult.

(i) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(ii) An invitation to consult must be in writing and must include:

(A) A description of the planned activity and its general location;

(B) The names of all identified consulting parties; and

(C) A proposed timeline and method for consultation.

(iii) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted to the appropriate official at any time.

(2) *Step 2—Consult with requesting parties.* No later than 10 days after receiving a written request to consult, the appropriate official must respond in writing with a proposed timeline for consultation. The proposed timeline must allow for consultation to occur before the planned activity begins.

(i) In the response to the requesting party, the appropriate official must ask a requesting party for the following information, if not already provided:

(A) Recommendations on the proposed timeline and method for consultation; and

(B) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leaders, and known lineal descendant who should participate in consultation.

(ii) The consultation process must seek consensus, to the maximum extent possible, on the content of the plan of action.

(iii) The appropriate official must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. The appropriate official must record the concurrence, disagreement, or nonresponse of the requesting parties to the plan of action.

(3) *Step 3—Approve and sign the plan of action.* Before the planned activity begins, the appropriate official must approve and sign a plan of action and must provide a copy to all consulting parties. At a minimum, the written plan of action must include:

(i) A description of the planned activity and its general location;

(ii) A list of all consulting parties identified under paragraph (b)(1) of this section;

(iii) A record of consultation under paragraph (b)(2) of this section;

(iv) The preference of requesting parties for:

(A) Stabilizing and covering human remains or cultural items in situ;

(B) Protecting and relocating human remains or cultural items, if removed; or

(C) Providing the appropriate treatment, care, or handling of human remains or cultural items; and

(v) The timeline and method for:

(A) Informing all identified consulting parties of a discovery;

(B) Evaluating the potential need for an excavation; and

(C) Completing the disposition, to include publication of a notice of intended disposition, under § 10.7.

(c) *Comprehensive agreement.* To facilitate compliance with the Act, a Federal agency or DHHL may develop a written comprehensive agreement for all land managing activities on Federal or Tribal lands, or portions thereof, under its responsibility. The written comprehensive agreement must:

(1) Be developed in consultation with any Indian Tribe or Native Hawaiian organization identified under paragraph (b)(1) of this section and requesting to consult under paragraph (b)(2) of this section;

(2) Include, at minimum, a plan of action under paragraph (b)(3) of this section;

(3) Be consented to by a majority of requesting parties or lineal descendants identified under paragraph (b)(2) of this section. Evidence of consent will be by the authorized representative's signature on the agreement or by official correspondence to the Federal agency or DHHL; and

(4) Be signed by the appropriate official for the Federal agency or DHHL.

(d) *Federal agency coordination with other laws.* To manage compliance with the Act, a Federal agency may coordinate its responsibility under this subpart with its responsibilities under other relevant Federal laws. Compliance with this subpart does not relieve a Federal agency of the responsibility for compliance with the National Historic Preservation Act (54 U.S.C. 306108, commonly known as Section 106) or the Archeological and Historic Preservation Act (54 U.S.C. 312501–312508).

TABLE 1 TO § 10.4—APPROPRIATE OFFICIAL

For human remains or cultural items on . . .	The appropriate official is a representative for the . . .
Federal lands in the United States.	Federal agency with primary management authority.
Tribal lands in Alaska and the continental United States.	Indian Tribe.
Tribal lands in Hawai'i	DHHL.

§ 10.5 Discovery.

When a discovery of human remains or cultural items on Federal or Tribal lands occurs, any person who knows or has reason to know of the discovery must inform the appropriate official for the responsible Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL. For any planned activity on Federal lands in the United States or on Tribal lands in Hawai'i that is likely to result in a discovery of human remains or cultural items, the appropriate official must, in consultation with Indian Tribes and Native Hawaiian organizations, prepare, approve, and sign a plan of action under § 10.4(b), unless the discovery is already covered by a signed comprehensive agreement under § 10.4(c).

(a) *Report any discovery.* Any person who knows or has reason to know of a discovery of human remains or cultural items on Federal or Tribal lands must immediately report the discovery to the appropriate official and any additional point of contact shown in Table 1 of this section. The person making the

discovery must make a reasonable effort to secure and protect the human remains or cultural items, including, as appropriate, stabilizing or covering the human remains or cultural items. No later than 24 hours after the discovery, the person making the discovery must send written documentation of the discovery, including the steps taken to secure and protect the human remains or cultural items, to the appropriate official and the additional point of contact shown in Table 1 of this section.

(b) *Cease any nearby activity.* To ensure compliance with the Act, any permit, license, lease, right-of-way, or other authorization issued by an Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL for an activity on Federal or Tribal lands must include a requirement that the person responsible for the activity comply with this paragraph upon the discovery of human remains or cultural items. If a discovery is related to any such activity (including but not limited to construction, mining, logging, or agriculture), the person responsible for the activity must:

(1) Immediately stop all activity around the discovery;

(2) Immediately report the discovery to the appropriate official and any additional point of contact shown in Table 1 of this section;

(3) Make a reasonable effort to secure and protect the human remains or cultural items, including, as appropriate, stabilizing and covering the human remains or cultural items;

(4) No later than 24 hours after the discovery, send written documentation of the discovery to the appropriate official and any additional point of contact stating:

(i) The general location and contents of the discovery,

(ii) The activity related to the discovery,

(iii) The steps taken to secure and protect the human remains or cultural items, and

(iv) Confirmation that all activity around the discovery has stopped and will not resume until the date in a written certification issued under paragraph (e) of this section.

(c) *Respond to a discovery.* No later than three days after receiving written documentation of a discovery, the appropriate official must respond to a discovery. The appropriate official must comply with the requirements of this section immediately upon learning of the discovery even if the discovery has not been properly reported.

(1) The appropriate official must make a written record showing a reasonable effort to:

(i) Take steps to secure and protect the human remains or cultural items;

(ii) Verify that any activity around the discovery has stopped; and

(iii) Report the discovery to any additional point of contact shown in Table 1 of this section.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for the discovery to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (d) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for discoveries on its Tribal lands and then must respond to any discovery under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for discoveries, the appropriate official for DHHL is responsible for completing the requirements in paragraph (d) of this section for any discoveries on those Tribal lands of an NHO.

(d) *Approve and sign a plan of action.* On Federal lands in the United States or on Tribal lands in Hawai'i, the appropriate official, in consultation with Indian Tribes and Native Hawaiian organizations, must prepare, approve, and sign a plan of action under § 10.4(b) no later than 30 days after receiving written documentation of a discovery. To the maximum extent possible, the appropriate official must carry out the plan of action for any human remains or cultural items. This requirement does not apply if, before receiving written documentation of the discovery:

(1) The appropriate official signed a plan of action under § 10.4(b);

(2) The appropriate official signed a comprehensive agreement under § 10.4(c); or

(3) A Native Hawaiian organization agreed in writing to be responsible for discoveries on its Tribal lands under paragraph (c)(3) of this section.

(e) *Certify that an activity may resume.* No later than 35 days after receiving written documentation of a discovery, the appropriate official must send a written certification to the person responsible for the activity that the activity may resume. The written certification must provide:

(1) A copy of the signed plan of action or comprehensive agreement with redaction of any confidential or sensitive information to the extent of applicable law;

(2) Instructions for protecting, stabilizing, or covering the human remains or cultural items, if appropriate;

(3) A proposed timeline and method for evaluating the potential need for and authorization of an excavation of the human remains or cultural items, if applicable; and

(4) The date (no later than 30 days after the date of the written certification) on which lawful activity may resume around the discovery.

TABLE 1 TO § 10.5—REPORT A DISCOVERY ON FEDERAL OR TRIBAL LANDS

Where the discovery is on . . .	The appropriate official is the representative for the . . .	And the additional point of contact is the . . .
Federal lands in the United States*	Federal agency with primary management authority.	Any Indian Tribe or Native Hawaiian organization with potential affiliation, if known.
Tribal lands in Alaska and the continental United States.	Indian Tribe	Bureau of Indian Affairs or the Federal agency with primary management authority, if any.
Tribal lands in Hawai'i	DHHL	Any Native Hawaiian organization with potential affiliation, if known.
*Federal lands in Alaska selected but not yet conveyed under the Alaska Native Claims Settlement Act (ANCSA, 43 U.S.C. 1601).	Bureau of Land Management or Federal agency with primary management authority.	Alaska Native Corporation or group organized under ANCSA.

§ 10.6 Excavation.

When an excavation of human remains or cultural items on Federal or Tribal lands is needed, the appropriate official may authorize the excavation only after complying with this section. The appropriate official must take reasonable steps to evaluate the potential need for an excavation of human remains or cultural items. A permit under Section 4 of ARPA (16 U.S.C. 470cc) is required when the excavation is on Federal or Tribal lands that are also ARPA Indian lands or ARPA Public lands, and there is no applicable permit exception or exemption under the ARPA uniform regulations at 18 CFR 1312, 32 CFR 229, 36 CFR 296, or 43 CFR 7.

(a) *On Tribal lands.* Before an excavation of human remains or cultural items may occur, the appropriate official must consent in writing by providing a written authorization for the excavation.

(1) At minimum, the written authorization must document:

(i) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items; and

(ii) Any permit that the Indian Tribe or Native Hawaiian organization legally requires.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for authorizing the excavation to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (b) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for excavations on its Tribal lands and then must provide written authorizations under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for excavations, the appropriate official for DHHL is responsible for completing the requirements in paragraph (b) of this section for any excavations on those Tribal lands of an NHO.

(b) *On Federal lands in the United States or on Tribal lands in Hawai'i.* Before an excavation of human remains or cultural items may occur, the appropriate official, must prepare, approve, and sign a plan of action under § 10.4(b) and must provide a written authorization for the excavation.

(1) Prior to authorizing an excavation, the appropriate official, in consultation with Indian Tribes and Native Hawaiian organizations, must prepare, approve, and sign a plan of action under § 10.4(b). To the maximum extent possible, the appropriate official must carry out the plan of action for any human remains or cultural items. This requirement does not apply if prior to authorizing the excavation:

(i) The appropriate official signed a plan of action under § 10.4(b);

(ii) The appropriate official signed a comprehensive agreement under § 10.4(c); or

(iii) A Native Hawaiian organization agreed in writing to be responsible for excavations on its Tribal lands under paragraph (a)(3) of this section.

(2) At minimum, the written authorization must document:

(i) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items; and

(ii) Any permit that the Federal agency or DHHL legally requires.

§ 10.7 Disposition.

When human remains or cultural items are removed from Federal or Tribal lands, as soon as possible (but no later than one year) after the discovery or excavation of the human remains or cultural items, the appropriate official must determine the lineal descendant, Indian Tribe, or Native Hawaiian organization that has priority for disposition of human remains or cultural items using this section. On Federal lands in the United States or on Tribal lands in Hawai'i, when the appropriate official cannot reasonably determine any Indian Tribe or Native Hawaiian organization with priority for disposition of human remains or cultural items, the appropriate official must report the human remains or cultural items as unclaimed under paragraph (e) of this section.

(a) *Priority for disposition.* The disposition of human remains or cultural items removed from Federal or Tribal lands is determined in the following priority order:

(1) The known lineal descendants, if any, for human remains and associated funerary objects;

(2) The Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items originated;

(3) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(d); or

(4) For human remains or cultural items from adjudicated aboriginal land, the Indian Tribe with the strongest relationship to the human remains or cultural items who makes a claim for disposition, which is:

(i) The adjudicated aboriginal land Indian Tribe who claims the human remains or cultural items, or

(ii) A different Indian Tribe who claims the human remains or cultural items and shows, by a preponderance of the evidence, a stronger cultural relationship to the human remains or cultural items than the adjudicated aboriginal land Indian Tribe.

(b) *To a lineal descendant.* When a lineal descendant is determined for human remains and associated funerary objects removed from Federal or Tribal lands, the appropriate official for the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL must send a written disposition statement to the lineal descendant. The disposition statement must acknowledge and recognize the lineal descendant has ownership or control of the human remains and associated funerary objects.

(1) Before sending the disposition statement, the appropriate official must consult with the lineal descendant on the care, custody, and physical transfer of the human remains and associated funerary objects.

(2) After sending the disposition statement, the appropriate official must:

(i) Document any physical transfer by recording the contents, recipient, and method of delivery; and

(ii) Protect sensitive information, as identified by the lineal descendant, from disclosure to the general public to the extent consistent with applicable law;

(3) After the disposition statement is sent, nothing in the Act or this part:

(i) Limits the authority of the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL to enter into any agreement with the lineal descendant concerning the care or custody of the human remains and associated funerary objects, or

(ii) Limits any procedural or substantive right which may otherwise be secured to the lineal descendant.

(c) *On Tribal lands.* When a lineal descendant cannot be determined for human remains and associated funerary objects, or in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the appropriate official for the Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items were removed must complete a written disposition statement.

(1) The written disposition statement must acknowledge and recognize:

(i) A lineal descendant could not be ascertained and

(ii) The Indian Tribe or Native Hawaiian organization has control or ownership of the human remains or cultural items.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for disposition of human remains or cultural items to the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the appropriate official for the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (d) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for disposition of human remains or cultural items from its Tribal lands and then must provide written disposition statements under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for dispositions, the appropriate official for DHHL is responsible for completing the requirements in paragraph (d) of this section for any dispositions from those Tribal lands of an NHO.

(4) After the disposition statement is complete, nothing in the Act or this part:

(i) Limits the authority of a Federal agency to enter into any agreement with the Indian Tribe or Native Hawaiian organization concerning the care or custody of the human remains or cultural items,

(ii) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(iii) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

(d) O*n Federal lands in the United States or on Tribal lands in Hawai'i.* When a lineal descendant cannot be determined for human remains and associated funerary objects, or in the case of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the appropriate official for the Federal agency or DHHL must determine the Indian Tribe or Native Hawaiian organization with priority for disposition under paragraph (a) of this section. When the appropriate official cannot reasonably determine any Indian Tribe or Native Hawaiian organization with priority for disposition of human remains or cultural items, the Federal agency or DHHL must report the human remains or cultural items as unclaimed under paragraph (e) of this section. On Tribal lands in Hawai'i, this requirement is waived if the Native Hawaiian organization agreed in writing to be responsible for disposition of human remains or cultural items from its Tribal lands under paragraph (c)(3) of this section.

(1) *Step 1—Inform consulting parties.* As soon as possible but no later than six months after a discovery or excavation of human remains or cultural items, the appropriate official must send a written document informing all consulting parties identified in the plan of action under § 10.4(b)(1). Consultation on the disposition of human remains or cultural items may continue until publication of a notice of intended disposition under paragraph (d)(2) of this section. The appropriate official must send a written document to the consulting parties that includes:

(i) A description of the human remains or cultural items including the general location and date of discovery or excavation;

(ii) The name of each Indian Tribe or Native Hawaiian organization identified as having priority for disposition of the human remains or cultural items and a brief abstract of the information used to make that identification; and

(iii) A request that if the Indian Tribe or Native Hawaiian organization wishes to submit a claim for disposition of the human remains or cultural items, it should do so in writing no later than 30 days after publication of a notice in the **Federal Register**.

(2) *Step 2—Submit a notice of intended disposition.* No earlier than 30 days and no later than six months after informing consulting parties, the appropriate official must submit a notice of intended disposition to the Manager, National NAGPRA Program, for publication in the **Federal Register**. If the human remains or cultural items are evidence in an ongoing civil or criminal action under ARPA, the deadline for the notice is extended until the conclusion of the ARPA case.

(i) A notice of intended disposition must conform to the mandatory format of the **Federal Register** and include:

(A) A brief description of the human remains or cultural items, including the county and state where the human remains or cultural items were removed;

(B) The identity of the human remains or cultural items specifically as human remains, associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony, or both sacred objects and objects of cultural patrimony, and a brief abstract of the information used to make that identification;

(C) The name of each Indian Tribe or Native Hawaiian organization with priority for disposition of the human remains or cultural items and a brief abstract of the information used to make that identification;

(D) The name, phone number, email address, and mailing address for the appropriate official who is responsible for receiving written claims for disposition of the human remains or cultural items;

(E) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the appropriate official may send a disposition statement to a claimant; and

(F) The date (to be calculated by the **Federal Register** one year from the date of publication) on which the human remains or cultural items will become unclaimed human remains or cultural items if no written claim is received from an Indian Tribe or Native Hawaiian organization.

(ii) No later than 15 days after receiving a notice of intended disposition, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the **Federal Register** a notice of intended disposition that conforms to the requirements under paragraph (d)(2)(i) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not meet the requirements under paragraph (d)(2)(i) of this section.

(3) *Step 3—Receive and consider a claim for disposition.* After publication of a notice of intended disposition in the **Federal Register**, any Indian Tribe or Native Hawaiian organization may submit to the appropriate official a written claim for disposition of human remains or cultural items.

(i) A claim for disposition of human remains or cultural items must be received by the appropriate official before the appropriate official sends a disposition statement for the human remains or cultural items to a claimant under paragraph (d)(5) of this section or the transfer or reinterment of the human remains or cultural items under paragraph (e)(4) of this section. Any claim for disposition received by the appropriate official no later than 30 days after publication of a notice must be considered. A claim for disposition received by the appropriate official before the publication of the notice of

intended disposition is dated the same date the notice was published.

(ii) Claims from two or more Indian Tribes or Native Hawaiian organizations who agree to joint disposition of the human remains or cultural items are considered a single claim and not competing claims.

(iii) A claim for disposition must satisfy one of the following criteria:

(A) The claim is from an Indian Tribe or Native Hawaiian organization identified in the notice of intended disposition with priority for disposition, or

(B) The claim is not from an Indian Tribe or Native Hawaiian organization identified in the notice of intended disposition, and shows that the claimant is a lineal descendant, Indian Tribe, or Native Hawaiian organization having priority for disposition under paragraph (a) of this section.

(4) *Step 4—Respond to a claim for disposition.* No earlier than 30 days after publication of a notice of intended disposition but no later than 30 days after receiving a claim for disposition, the appropriate official must send a written response to the claimant with a copy to any other party identified in the notice with priority for disposition.

(i) In the written response, the appropriate official must state one of the following:

(A) The claim meets the criteria under paragraph (d)(3) of this section. The appropriate official will send a disposition statement to the claimant under paragraph (d)(5) of this section, unless the appropriate official receives additional, competing claims for disposition of human remains or cultural items.

(B) The claim does not meet the criteria under paragraph (d)(3) of this section. The appropriate official must provide a detailed explanation why the claim does not meet the criteria and an opportunity for the claimant to provide additional information to meet the criteria.

(C) The appropriate official has received competing claims for disposition of the human remains or cultural items that meet the criteria and must determine the most appropriate claimant using the procedures and timelines under paragraph (d)(4)(ii) of this section.

(ii) At any time before sending a disposition statement for human remains or cultural items under paragraph (d)(5) of this section, the appropriate official may receive additional, competing claims for disposition of the human remains or cultural items that meet the criteria under paragraph (d)(3) of this section. The appropriate official must determine the most appropriate claimant using the priority for disposition under paragraph (a) of this section.

(A) No later than 10 days after receiving a competing claim, the appropriate official must send a written letter to each claimant identifying all claimants and the date each claim was received,

(B) No later than 120 days after informing the claimants of competing claims, the appropriate official must send a written determination to each claimant identifying the most appropriate claimant(s), and

(C) No earlier than 30 days but no later than 90 days after sending a determination of the most appropriate claimant(s), the appropriate official must send a disposition statement to the most appropriate claimant(s) under paragraph (d)(5) of this section.

(5) *Step 5—Disposition of the human remains or cultural items.* No later than 90 days after responding to a claim for disposition that meets the criteria, the appropriate official must send a written disposition statement to the claimant(s) and a copy to the Manager, National NAGPRA Program. The disposition statement must acknowledge and recognize the claimant(s) has control or ownership of the human remains or cultural items. Disposition must be in a manner that, to the maximum extent possible, respects the traditions of the lineal descendant, Indian Tribe, or Native Hawaiian organization. In the case of joint claims for disposition, the disposition statement must be sent to and must identify all claimants.

(i) Before sending the disposition statement, the appropriate official must consult with the claimant(s) on the care, custody, and physical transfer of the human remains or cultural items.

(ii) After sending the disposition statement, the appropriate official must:

(A) Document any physical transfer by recording the contents, recipient(s), and method of delivery and

(B) Protect sensitive information, as identified by the claimant(s), from disclosure to the general public to the extent consistent with applicable law.

(iii) After the disposition statement is sent, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the Indian Tribe or Native Hawaiian organization concerning the care or custody of the human remains or cultural items,

(B) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

(e) *Unclaimed human remains or cultural items removed from Federal lands in the United States or from Tribal lands in Hawai'i.* When the appropriate official cannot complete the disposition of human remains or cultural items under paragraph (d) of this section, the Federal agency or DHHL must report the human remains or cultural items as unclaimed. The appropriate official must, to the maximum extent possible, respect the traditions of the Indian Tribe or Native Hawaiian organization that may have priority for disposition under paragraph (a) of this section.

(1) *Step 1—Submit a list of unclaimed cultural items.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the Federal agency or DHHL must submit to the Manager, National NAGPRA Program, a list of all unclaimed cultural items in its custody. The Federal agency or DHHL must submit updates to its list of unclaimed cultural items by December 31 each year.

(i) Human remains or cultural items are unclaimed when:

(A) One year after publishing a notice of intended disposition under paragraph (d)(2) of this section, no Indian Tribe or Native Hawaiian organization submits a written claim for disposition, or

(B) One year after discovery or excavation of the human remains or cultural items, the appropriate official could not reasonably identify any lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(ii) A list of unclaimed human remains or cultural items must include:

(A) A brief description of the human remains or cultural items, including the county and state where the human remains or cultural items were removed;

(B) The names of all consulting parties and an abstract of the results of consultation;

(C) If known, the identity of the human remains or cultural items specifically as human remains, associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony, or both sacred objects and objects of cultural patrimony, and a brief abstract of the information used to make that identification; and

(D) If known, the name of each Indian Tribe or Native Hawaiian organization

with priority for disposition under paragraph (a) of this section and a brief abstract of the information used to make that identification.

(iii) At any time before transferring or reinterring human remains or cultural items under paragraph (e)(4) of this section, the appropriate official may receive a claim for disposition of the human remains or cultural items and must evaluate whether the claim meets the criteria under paragraph (d)(3) of this section. Any agreement to transfer or decision to reinter the human remains or cultural items under this paragraph is stayed until the claim for disposition is resolved under paragraph (d) of this section. No later than 10 days after receiving a claim for disposition, the appropriate official must send a written letter to each claimant or requestor identifying all claimants and requestors and the date each claim or request was received.

(A) If the claim meets the criteria under paragraph (d)(3) of this section and a notice of intended disposition was published under paragraph (d)(2) of this section, the appropriate official must respond in writing under paragraph (d)(4) and proceed with disposition under (d)(5) of this section.

(B) If the claim meets the criteria under paragraph (d)(3) of this section but no notice of intended disposition was published, the appropriate official must submit a notice of intended disposition under paragraph (d)(2), respond in writing under paragraph (d)(4), and proceed with disposition under (d)(5) of this section.

(C) No later than 90 days after responding to a claim for disposition that meets the criteria, the appropriate official must send a written letter to each claimant or requestor identifying the claimant that has control or ownership of the human remains or cultural items.

(D) If the claim does not meet the criteria under paragraph (d)(3) of this section, the appropriate official must respond in writing under paragraph (d)(4) and may proceed with transfer or reinterment under paragraph (e)(2) of this section.

(2) *Step 2—Agree to transfer or decide to reinter human remains or cultural items.* Subject to the requirements in paragraph (e)(3) of this section, and at the discretion of the Federal agency or DHHL, a Federal agency or DHHL may:

(i) Agree in writing to transfer unclaimed cultural items to a requestor that agrees to treat the human remains or cultural items according to the requestor's laws and customs. Unclaimed cultural items must be requested in writing and may only be requested by:

(A) An Indian Tribe or Native Hawaiian organization, or

(B) An Indian group that is not federally recognized but has a relationship to unclaimed human remains or associated funerary objects.

(ii) Decide in writing to reinter unclaimed human remains or funerary objects according to applicable laws and policies.

(3) *Step 3—Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains or cultural items, the Federal agency or DHHL must submit a notice of proposed transfer or reinterment to the Manager, National NAGPRA Program for publication in the **Federal Register**. The Federal agency or DHHL must send a copy of the published notice to any Indian Tribe or Native Hawaiian organization identified as having a priority for disposition under paragraph (a) of this section.

(i) A notice of proposed transfer or reinterment must conform to the mandatory format of the **Federal Register** and include:

(A) The details provided in the list of unclaimed cultural items under paragraph (e)(1) of this section;

(B) The name of each Indian Tribe, Native Hawaiian organization, or Indian group requesting the human remains or cultural items or a statement that the Federal agency or DHHL will reinter the human remains or funerary objects;

(C) The name, phone number, email address, and mailing address for the appropriate official who is responsible for receiving written claims for disposition of the human remains or cultural items; and

(D) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the Federal agency or DHHL may proceed with the transfer or reinterment of the human remains or cultural items.

(ii) No later than 15 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the **Federal Register** a notice of proposed transfer or reinterment that conforms to the requirements under paragraph (e)(3)(i) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not meet the requirements under paragraph (e)(3)(i) of this section.

(4) *Step 4—Transfer or reinter the human remains or cultural items.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the appropriate official must transfer or reinter the human remains or cultural items.

(i) After transferring or reinterring, the appropriate official must:

(A) Document the transfer by recording the contents, recipient, and method of delivery,

(B) Document the reinterment by recording the contents of the reinterment,

(C) Protect sensitive information about the human remains or cultural items from disclosure to the general public to the extent consistent with applicable law.

(ii) After transfer or reinterment occurs, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the requestor concerning the care or custody of the human remains or cultural items,

(B) Limits any procedural or substantive right which may otherwise be secured to the Indian Tribe or Native Hawaiian organization, or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its control or ownership of human remains, funerary objects, or sacred objects.

Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies

§ 10.8 General.

Each museum and Federal agency that has possession or control of a holding or collection that may contain human remains, funerary objects, sacred objects, or objects of cultural patrimony must comply with the requirements of this subpart, regardless of the physical location of the holding or collection. Each museum and Federal agency must identify one or more authorized representatives who are responsible for carrying out the requirements of this subpart.

(a) *Museum holding or collection.* A museum must comply with this subpart for all holdings or collections under its possession or control that contain human remains or cultural items, including a new holding or collection or a previously lost or previously unknown holding or collection.

(1) A museum must determine whether it has sufficient interest in a holding or collection to constitute possession or control on a case-by-case basis given the relevant information about the holding or collection.

(i) A museum may have custody of a holding or collection but not possession

or control. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

(ii) If a museum has custody of a holding or collection, the museum may be required to report the holding or collection under paragraphs (c) or (d) of this section.

(2) Any museum that completes repatriation of human remains and cultural items or transfers or reinters human remains and associated funerary objects in good faith under this subpart shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of the Act or this part.

(b) *Federal agency holding or collection.* A Federal agency must comply with this subpart for all holdings or collections in its possession or control that contain human remains and cultural items, including a previously lost or previously unknown holding or collection. A Federal agency must determine if a holding or collection:

(1) Was in its possession or control on or before November 16, 1990; or

(2) Came into its possession or control after November 16, 1990, and was removed from:

(i) An unknown location, or

(ii) Lands that are neither Federal nor Tribal lands as defined in this part.

(c) *Museums with custody of a Federal agency holding or collection.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each museum that has custody of a Federal agency holding or collection that contains Native American human remains or cultural items must submit a statement describing that holding or collection to the authorized representatives of the Federal agency most likely to have possession or control and to the Manager, National NAGPRA Program.

(1) No later than 120 days following receipt of a museum's statement, the Federal agency must respond to the museum and the Manager, National NAGPRA program, with a written acknowledgement of one of the following:

(i) The Federal agency has possession or control of the holding or collection;

(ii) The Federal agency does not have possession or control of the holding or collection; or

(iii) The Federal agency and the museum have joint possession or control of the holding or collection.

(2) Failure to issue such a determination by the deadline will constitute acknowledgement that the Federal agency has possession or control. The Federal agency is ultimately responsible for the requirements of this subpart for all holdings or collections under its possession or control, regardless of the physical location of the holdings or collection.

(d) *Museums with custody of other holdings or collections.* No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each museum that has custody of a holding or collection that contains Native American human remains or cultural items and for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program.

(e) *Contesting actions on repatriation.* An affected party under § 10.12(c)(1) who wishes to contest actions made by museums or Federal agencies under this subpart is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. Informal negotiations may include requesting the assistance of the Manager, National NAGPRA Program, or the Review Committee under § 10.12.

§ 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Each museum and Federal agency that has possession or control of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony must follow the steps in this section. The purpose of this section is to provide general information about a holding or collection to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

(a) *Step 1—Complete a summary of a holding or collection.* Based on the information available, a museum or Federal agency must submit to the Manager, National NAGPRA Program, a summary describing its holding or collection that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony. Depending on the scope of the holding or collection, a museum or Federal agency may organize its summary into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the summary is comprehensive and covers all holdings or collections relevant to this section.

(1) A summary must include:

(i) The estimated number and a general description of the holding or collection, including any potential unassociated funerary objects, sacred objects, and objects of cultural patrimony;

(ii) The county and state where the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony were removed;

(iii) The acquisition history (provenance) of the potential unassociated funerary objects, sacred objects, and objects of cultural patrimony;

(iv) Other information relevant for identifying:

(A) A lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(B) Any object or item as an unassociated funerary object, sacred object, or object of cultural patrimony; and

(v) The presence of any potentially hazardous substances used to treat any of the unassociated funerary objects, sacred objects, or objects of cultural patrimony, if known.

(2) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

(3) Prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a museum or Federal agency must have submitted a summary to the Manager, National NAGPRA Program:

(i) By November 16, 1993, for unassociated funerary objects, sacred objects, and objects of cultural patrimony subject to the Act;

(ii) By October 20, 2007, for unassociated funerary objects, sacred objects, and objects of cultural patrimony acquired or located after November 16, 1993;

(iii) By April 20, 2010, for unassociated funerary objects, sacred objects, and objects of cultural patrimony in the possession or control of a museum that received Federal funds for the first time after November 16, 1993;

(iv) Within six months of acquiring or locating unassociated funerary objects,

sacred objects, and objects of cultural patrimony after October 20, 2007; or

(v) Within three years of receiving Federal funds for the first time after April 20, 2010.

(4) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], when a holding or collection previously included in a summary is transferred to a museum or Federal agency, The museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed summary. The museum or Federal agency must submit the previously completed summary to the Manager, National NAGPRA Program, no later than 30 days after acquiring the holding or collection. The museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section and must initiate consultation under paragraph (b) of this section.

(b) *Step 2—Initiate consultation.* No later than 30 days after completing a summary, a museum or Federal agency must identify consulting parties based on information available and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

(i) The summary described in paragraph (a)(1) of this section;

(ii) The names of all identified consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of intended repatriation under paragraph (f) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than six months after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the **Federal Register** pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3—Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on an unassociated funerary object, sacred object, or object of cultural patrimony may continue until the museum or Federal agency sends a repatriation statement for that object to a requestor under paragraph (g) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

(i) Recommendations on the proposed timeline and method for consultation; and

(ii) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leader, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, to the maximum extent possible, on determining:

(i) Lineal descendants;

(ii) Indian Tribes or Native Hawaiian organizations with cultural affiliation;

(iii) The types of objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

(iv) The appropriate treatment, care, and handling of unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before a museum or Federal agency sends a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section, the museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to the holding or collection. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the unassociated funerary object, sacred object, or object of cultural patrimony.

(d) *Step 4—Receive and consider a request for repatriation.* After a summary is complete, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony.

(1) A request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for that unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section. A request for repatriation received by the museum or Federal agency before the deadline for completing a summary is dated the same date as the deadline for completing the summary.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony are considered a single request and not competing requests.

(3) A request for repatriation must satisfy all the following criteria:

(i) Each unassociated funerary object, sacred object, or object of cultural patrimony being requested meets the definition of an unassociated funerary object, a sacred object, or an object of cultural patrimony;

(ii) The request is from a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation; and

(iii) The request includes information to support a finding that the museum or Federal agency does not have right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

(e) *Step 5—Respond to a request for repatriation.* No later than 60 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor. Using all information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request for repatriation satisfies the criteria under paragraph (d) of this section. In the written response, the museum or Federal agency must state one of the following:

(1) The request meets the criteria under paragraph (d) of this section. The museum or Federal agency will submit a notice of intended repatriation under paragraph (f) of this section.

(2) The request does not meet the criteria under paragraph (d) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria and an opportunity for the requestor to provide additional information to meet the criteria.

(3) The request meets the criteria under paragraph (d)(3)(i) and (ii) of this section, but the museum or Federal agency asserts a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony and refuses to complete repatriation of the requested object to the requestor. The museum or Federal agency must provide information to prove that the museum or Federal agency has a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

(4) The museum or Federal agency has received competing requests for repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (h) of this section.

(f) *Step 6—Submit a notice of intended repatriation.* No later than 30 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must submit a notice of intended repatriation to the Manager, National NAGPRA Program, for publication in the **Federal Register**. The museum or Federal agency may include in a single notice all unassociated funerary objects, sacred objects, or objects of cultural patrimony with the same requestor.

(1) A notice of intended repatriation must conform to the mandatory format of the **Federal Register** and include:

(i) The number of unassociated funerary object, sacred object, or object of cultural patrimony and a brief description of each object (counted separately or by lot);

(ii) The county and state where the unassociated funerary object, sacred object, or object of cultural patrimony were removed;

(iii) The acquisition history (provenance) of the unassociated funerary object, sacred object, or object of cultural patrimony, including the circumstances surrounding its acquisition;

(iv) The identity of each unassociated funerary object, sacred object, or object of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony, and a brief abstract of the information used to make that identification;

(v) The lineal descendant, Indian Tribe, or Native Hawaiian organization requesting repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony and a brief abstract of the information showing the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation;

(vi) Information about the presence of any potentially hazardous substances used to treat the unassociated funerary object, sacred object, or object of cultural patrimony, if known;

(vii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(viii) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(2) No later than 15 days after receiving a notice of intended repatriation, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the **Federal Register** a notice of intended repatriation that conforms to the requirements under paragraph (f)(1) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (f)(1) of this section.

(3) If the number or identity of unassociated funerary objects, sacred objects, or objects of cultural patrimony stated in a published notice of intended repatriation changes before the museum or Federal agency sends a repatriation statement under paragraph (g) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA Program. A museum or Federal agency is not required to submit a correction notice if there are additional pieces belonging to an unassociated funerary object, sacred object, or object of cultural patrimony previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number or new identity of the unassociated funerary object, sacred object, or object of cultural patrimony, the museum or Federal agency must submit a correction notice containing, as applicable:

(i) The corrected number of unassociated funerary object, sacred object, or object of cultural patrimony and corrected brief description of each object;

(ii) The corrected identity of the unassociated funerary objects, sacred objects, or objects of cultural patrimony specifically as an unassociated funerary object, a sacred object, an object of cultural patrimony, or both a sacred object and an object of cultural patrimony, and corrected brief abstract of the information used to make that identification;

(iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(iv) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(4) At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (h) of this section.

(g) *Step 7—Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.* No earlier than 30 days and no later than 90 days after publication of a notice of intended repatriation, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested unassociated funerary object, sacred object, or object of cultural patrimony. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony,

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the unassociated funerary object, sacred object, or object of cultural patrimony by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public to the extent consistent with applicable law.

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the unassociated funerary object, sacred object, or object of cultural patrimony.

(h) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony under paragraph (g) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of that object that meet the criteria under paragraph (d) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) For an unassociated funerary object or sacred object, in the following priority order, the most appropriate requestor is:

(i) The lineal descendant, if any, or

(ii) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(d).

(2) For an object of cultural patrimony, the most appropriate requestor is the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(d).

(3) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request was received.

(4) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined and the competing requests were received before the publication of a notice of intended repatriation. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) Submit a notice of intended repatriation in accordance with paragraph (f) of this section no later than 30 days after sending the determination, and

(C) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(ii) The most appropriate requestor has been determined and a notice of intended repatriation was previously published. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section.

(iii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (i) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(i) *Stay of repatriation.* Repatriation under paragraph (g) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (h) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (g) of this section.

(3) Before the publication of a notice of intended repatriation under paragraph (f) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.

(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study commenced, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the unassociated funerary object, sacred object, or object of cultural patrimony is indispensable for completion of the study;

(D) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

(E) Provide the position titles of the persons responsible for each step in the schedule; and

(F) Affirm that the study has in place the requisite funding.

(ii) If the Secretary concurs with the request, the Secretary will send a written concurrence and specify the date by which the scientific study must be completed.

(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (f) of this section.

(iv) No earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation, the museum or Federal agency must send a

repatriation statement to the requestor under paragraph (g) of this section.

TABLE 1 TO § 10.9—DEADLINES FOR COMPLETING A SUMMARY

If a museum or Federal agency . . .	. . . a summary must be submitted . . .
acquires possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony.	6 months after acquiring possession or control of the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
locates previously lost or unknown unassociated funerary objects, sacred objects, or objects of cultural patrimony.	6 months after locating the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
receives Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and has possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony.	3 years after receiving Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

§ 10.10 Repatriation of human remains and associated funerary objects.

Each museum and Federal agency that has possession or control of a holding or collection that contains human remains or associated funerary objects must follow the steps in this section. The purpose of this section is to provide determinations, following consultation, about human remains and associated funerary objects to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

(a) *Step 1—Compile an itemized list of human remains and associated funerary objects.* Based on information available, a museum or Federal agency must compile a simple itemized list of the human remains and associated funerary objects in its holding or collection. Depending on the scope of the holding or collection, a museum or Federal agency may organize its inventory into sections based on geographic area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section. The itemized list must include:

(1) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one;

(2) The number of associated funerary objects and types of objects (counted separately or by lot);

(3) The county and state where the human remains and associated funerary objects were removed;

(4) The acquisition history (provenance) of the human remains and associated funerary objects;

(5) Other information relevant for identifying a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation; and

(6) The presence of any potentially hazardous substances used to treat any of the human remains or associated funerary objects, if known.

(b) *Step 2—Initiate consultation.* Based on information available, a museum or Federal agency must identify consulting parties and make a good-faith effort to invite the parties to consult.

(1) Consulting parties are any lineal descendant and any Indian Tribe or Native Hawaiian organization with potential affiliation.

(2) An invitation to consult must be in writing and must include:

(i) The simple itemized list described in paragraph (a) of this section;

(ii) The names of all identified consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) Any consulting party, regardless of whether the party has received an invitation to consult, must submit a written request to consult. A written request to consult may be submitted at any time before the publication of a notice of inventory completion under paragraph (e) of this section.

(4) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must make a good-faith effort to invite the party to consult and must send an invitation to consult under paragraph (b)(2) of this section. An invitation to consult must be sent to new consulting parties:

(i) No later than 10 days after identifying a new consulting party based on new information; or

(ii) No later than two years after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the **Federal Register** pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3—Consult with requesting parties.* No later than 10 days after receiving a written request to consult, a museum or Federal agency must respond in writing with a proposed timeline for consultation. Consultation on human remains and associated funerary objects may continue until the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects to a requestor under paragraph (h) of this section.

(1) In the response to the requesting party, a museum or Federal agency must ask a requesting party for the following information, if not already provided:

(i) Recommendations on the proposed timeline and method for consultation; and

(ii) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leaders, and known lineal descendant who should participate in consultation.

(2) The consultation process must seek consensus, to the maximum extent possible, on determining:

(i) Lineal descendants;

(ii) Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation;

(iii) The types of objects that might be associated funerary objects, including any objects that were made exclusively for burial purposes or to contain human remains; and

(iv) The appropriate treatment, care, and handling of human remains and associated funerary objects.

(3) The museum or Federal agency must prepare a record of consultation that includes the effort made to seek consensus. If recommendations by requesting parties are not possible, the record of consultation must describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the museum or Federal agency must record the concurrence, disagreement, or nonresponse of the requesting parties.

(4) At any time before the museum or Federal agency sends a repatriation statement for human remains and associated funerary objects to a

requestor under paragraph (h) of this section, a museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to those human remains and associated funerary objects. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining affiliation and acquisition history of the human remains and associated funerary objects.

(d) *Step 4—Complete an inventory of human remains and associated funerary objects.* Based on information available and the results of consultation, a museum or Federal agency must submit to all consulting parties and the Manager, National NAGPRA Program, an inventory of all human remains and associated funerary objects in its holding or collection.

(1) An inventory must include:

(i) The names of all consulting parties and an abstract of the results of consultation;

(ii) The information from the simple itemized list compiled under paragraph (a) of this section;

(iii) For each entry in the itemized list, a determination of one or more of the following:

(A) There is a known lineal descendant,

(B) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through cultural affiliation,

(C) There is a connection between the human remains and associated funerary objects and an Indian Tribe or Native Hawaiian organization through geographical affiliation, or

(D) There is no connection between the human remains and associated funerary objects and any Indian Tribe or Native Hawaiian organization; and

(iv) An abstract of the information supporting that determination including:

(A) The lineal descendant or the Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation, or

(B) An explanation why no Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation could be reasonably identified.

(2) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, by the deadline in Table 1 of this section.

(3) Prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a museum or Federal agency must have submitted an inventory to all consulting parties and the Manager, National NAGPRA Program:

(i) By November 16, 1995, for human remains or associated funerary objects subject to the Act;

(ii) By April 20, 2009, for human remains or associated funerary objects acquired or located after November 16, 1995;

(iii) By April 20, 2012, for human remains or associated funerary objects in the possession or control of a museum that received Federal funds for the first time after November 16, 1995;

(iv) Within two years of acquiring or locating the human remains or associated funerary objects after April 20, 2009; or

(v) Within five years of receiving Federal funds for the first time after April 20, 2012.

(4) No later than [DATE 760 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], for any human remains or associated funerary objects listed in an inventory but not published in a notice of inventory completion prior to [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a museum or Federal agency must:

(i) Initiate consultation as described under paragraph (b) of this section;

(ii) Consult with requesting parties as described under paragraph (c) of this section;

(iii) Update its inventory to include the requirements described under paragraph (d)(1) of this section and ensure the inventory is comprehensive and covers all holdings or collections relevant to this section; and

(iv) Submit an updated inventory to all consulting parties and the Manager, National NAGPRA Program.

(5) Any museum may request an extension to complete or update its inventory if it has made a good faith effort but will be unable to do so by the appropriate deadline. A request for an extension must be submitted to the Manager, National NAGPRA Program, before the appropriate deadline. The Manager, National NAGPRA Program will publish in the **Federal Register** a list of all museums who request an extension and the Secretary's determination on the request. A request for an extension must include:

(i) Information showing the initiation of consultation and any requests to consult;

(ii) The names of all consulting parties and an abstract of the results of consultation;

(iii) The estimated number of the human remains and associated funerary objects in the holding or collection; and

(iv) A written plan for completing or updating the inventory, which includes, at minimum:

(A) The specific steps required to complete or update the inventory;

(B) A schedule for completing each step and estimated inventory completion or update date;

(C) Position titles of the persons responsible for each step in the schedule; and

(D) A proposal to obtain any requisite funding needed to complete or update the inventory.

(6) After [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], when a holding or collection previously included in an inventory is transferred to a museum or Federal Agency, subject to the limitations in 18 U.S.C. 1170 (a), the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed or updated inventory. The museum or Federal agency must submit the previously completed or updated inventory to the Manager, National NAGPRA Program no later than 30 days after acquiring the holding or collection and must initiate consultation under paragraph (b) of this section. The museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, no later than the deadline in Table 1 of this section.

(e) *Step 5—Submit a notice of inventory completion.* No later than six months after completing or updating an inventory under paragraph (d) of this section, a museum or Federal agency must submit a notice of inventory completion for human remains and associated funerary objects with a known lineal descendant or a connection to an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation. The museum or Federal agency may include in a single notice all human remains and associated funerary objects having the same lineal descendant or the same Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation.

(1) The notice of inventory completion must be sent to the:

(i) Lineal descendants and Indian Tribes or Native Hawaiian organizations identified in the inventory, and

(ii) Manager, National NAGPRA Program, for publication in the **Federal Register**.

(2) A notice of inventory completion must conform to the mandatory format of the **Federal Register** and include:

(i) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.

(ii) The number of associated funerary objects and types of objects (counted separately or by lot);

(iii) The county and state where the human remains and associated funerary objects were removed;

(iv) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surrounding their acquisition;

(v) The lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation and a brief abstract of the information used to make that identification;

(vi) When cultural affiliation has been determined, a statement whether cultural affiliation was clearly identified or was based on the totality of the circumstances surrounding acquisition history of the human remains and associated funerary objects;

(vii) Information about the presence of any potentially hazardous substances used to treat the human remains or associated funerary objects, if known;

(viii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(ix) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to a requestor.

(3) No later than 15 days after receiving a notice of inventory completion, the Manager, National NAGPRA Program, will:

(i) Approve for publication in the **Federal Register** a notice of inventory completion that conforms to the requirements under paragraph (e)(2) of this section; or

(ii) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (e)(2) of this section.

(4) If the number of individuals or the number of associated funerary objects stated in a published notice of inventory completion changes before the museum or Federal agency sends a repatriation statement under paragraph (h) of this section, the museum or Federal agency must submit a correction notice to the Manager, National NAGPRA Program. A museum or Federal agency is not required to publish a correction notice if there are additional pieces belonging to human remains or associated funerary objects previously identified in a notice and repatriation is to the same requestor. No later than 10 days after determining the new number of individuals or associated funerary objects, the museum or Federal agency must submit a correction notice containing, as applicable:

(i) The corrected number of individuals;

(ii) The corrected number of associated funerary objects and types of objects,

(iii) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation, and

(iv) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to the requestor.

(f) *Step 6—Receive and consider a request for repatriation.* After publication of a notice of inventory completion in the **Federal Register**, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of human remains and associated funerary objects.

(1) A request for repatriation of human remains and associated funerary objects must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for those human remains and associated funerary objects under paragraph (h) of this section. Any request for repatriation received by the museum or Federal agency no later than 30 days after publication of a notice must be considered. A request for repatriation received by the museum or Federal agency before the publication of the notice of inventory completion is dated the same date the notice was published.

(2) Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests.

(3) A request for repatriation must satisfy one of the following criteria:

(i) The request is from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, or

(ii) The request is not from a lineal descendant, Indian Tribe, or Native Hawaiian organization identified in the notice of inventory completion, and shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural or geographical affiliation.

(g) *Step 7—Respond to a request for repatriation.* No earlier than 30 days after publication of a notice of inventory completion but no later than 30 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor with a copy to any other party identified in the notice of inventory completion. Using all information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request satisfies the criteria under paragraph (f) of this section.

(1) In the written response, the museum or Federal agency must state one of the following:

(i) The request meets the criteria under paragraph (f) of this section. The museum or Federal agency will send a repatriation statement to the requestor under paragraph (h) of this section, unless the museum or Federal agency receives additional, competing requests for repatriation.

(ii) The request does not meet the criteria under paragraph (f) of this section. The museum or Federal agency must provide a detailed explanation why the request does not meet the criteria, and an opportunity for the requestor to provide additional information to meet the criteria.

(iii) The museum or Federal agency has received competing requests for repatriation that meet the criteria and must determine the most appropriate requestor using the procedures and timelines under paragraph (i) of this section.

(2) At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, the museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meet the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor the procedures and timelines under paragraph (i) of this section.

(h) *Step 8—Repatriation of the human remains and associated funerary objects.* No later than 90 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. The repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested human remains and associated funerary objects. In the case of joint requests for repatriation, the repatriation statement must be sent to and must identify all requestors.

(1) Before sending the repatriation statement, the museum or Federal agency must consult with the requestor on the care, custody, and physical transfer of the human remains and associated funerary objects.

(2) After sending the repatriation statement, the museum or Federal agency must:

(i) Document any physical transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery, and

(ii) Protect sensitive information, as identified by the requestor, from disclosure to the general public to the extent consistent with applicable law.

(3) After the repatriation statement is sent, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.

(i) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for human remains and associated funerary objects under paragraph (h) of this section, a museum or Federal agency may receive additional, competing requests for repatriation of those human remains and associated funerary objects that meets the criteria under paragraph (f) of this section. The museum or Federal agency must determine the most appropriate requestor using this paragraph.

(1) In the following priority order, the most appropriate requestor is:

(i) The known lineal descendant, if any; or

(ii) The Indian Tribe or Native Hawaiian organization with the closest affiliation according to the priority order at § 10.3(d).

(2) No later than 10 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request for repatriation was received.

(3) No later than 120 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

(i) The most appropriate requestor has been determined. The museum or Federal agency must:

(A) Identify the most appropriate requestor and explain how the determination was made,

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal agency must send a repatriation statement to the most appropriate requestor under paragraph (h) of this section.

(ii) The most appropriate requestor cannot be determined, and the repatriation is stayed under paragraph (j) of this section. The museum or Federal agency must explain why the most appropriate requestor could not be determined.

(j) *Stay of repatriation.* Repatriation under paragraph (h) of this section is stayed if:

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the written statement, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section, unless a court of competent jurisdiction directs otherwise.

(2) The museum or Federal agency has received competing requests for repatriation and, after complying with paragraph (i) of this section, cannot determine the most appropriate requestor. When a most appropriate requestor is determined by an agreement between the parties, binding arbitration, or means of resolution other than through a court of competent jurisdiction, the museum or Federal agency must:

(i) No later than 10 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program,

(ii) No earlier than 30 days and no later than 90 days after sending the determination, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(3) Before the publication of a notice of inventory completion under paragraph (e) of this section, the museum or Federal agency has both requested and received the Secretary's written concurrence that the human remains and associated funerary objects are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the people of the United States.

(i) To request the Secretary's concurrence, the museum or Federal agency must send to the Manager, National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

(A) Be on the letterhead of the requesting museum or Federal agency and be signed by an authorized representative;

(B) Describe the specific scientific study, the date on which the study commenced, and how the study would be of major benefit to the people of the United States;

(C) Explain why retention of the human remains and associated funerary objects is indispensable for completion of the study;

(D) Describe the steps required to complete the study, including any destructive analysis, and provide a completion schedule and completion date;

(E) Provide the position titles of the persons responsible for each step in the schedule; and

(F) Affirm that the study has in place the requisite funding.

(ii) If the Secretary concurs with the request, the Secretary will send a written concurrence and specify the date by which the scientific study must be completed.

(iii) No later than 30 days after the completion date in the Secretary's concurrence, the museum or Federal agency must submit a notice of intended repatriation in accordance with paragraph (e) of this section.

(iv) No earlier than 30 days after publication of the notice of inventory completion and no later than 90 days after responding to a request for repatriation, the museum or Federal agency must send a repatriation statement to the requestor under paragraph (h) of this section.

(k) *Transfer or reinter human remains and associated funerary objects.* For human remains and associated funerary objects with no connection to an Indian

Tribe or Native Hawaiian organization determined in the inventory, a museum or Federal agency, at its discretion, may agree to transfer or decide to reinter the human remains and associated funerary objects. The museum or Federal agency must ensure it has initiated consultation under paragraph (b) of this section, if any.

(1) *Step 1—Agree to transfer or decide to reinter.* Subject to the requirements in paragraph (k)(2) of this section, a museum or Federal agency may:

(i) Agree in writing to transfer the human remains and associated funerary objects to a requestor that agrees to treat the human remains and associated funerary objects according to the requestor's laws and customs. Human remains and associated funerary objects must be requested in writing and may only be requested by:

(A) An Indian Tribe or Native Hawaiian organization, or

(B) An Indian group that is not federally recognized but has a relationship to the human remains and associated funerary objects.

(ii) Decide in writing to reinter the human remains and associated funerary objects according to applicable laws and policies.

(2) *Step 2—Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains and associated funerary objects, the museum or Federal agency must submit a notice of proposed transfer or reinterment to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

(i) A notice of proposed transfer or reinterment must conform to the mandatory format of the **Federal Register** and include:

(A) The number of individuals determined in a reasonable manner based on the information available. No additional study or analysis is required to determine the number of individuals. If human remains are in a holding or collection, the number of individuals is at least one.;

(B) The number of associated funerary objects and type of objects (counted separately or by lot);

(C) The county and state where the human remains and associated funerary objects were removed, if known;

(D) The acquisition history (provenance) of the human remains and associated funerary objects, including the circumstances surround their acquisition;

(E) The names of all consulting parties and an abstract of the results of consultation;

(F) A brief abstract of the information that explains why no Indian Tribes or Native Hawaiian organizations with cultural or geographical affiliation could be reasonably identified;

(G) Information about the presence of any potentially hazardous substances used to treat the human remains and associated funerary objects, if known;

(H) The Indian Tribe, Native Hawaiian organization, or Indian group requesting the human remains and associated funerary objects or a statement that the museum or Federal agency will reinter the human remains and associated funerary objects;

(I) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and

(J) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may proceed with the transfer or reinterment of the human remains and associated funerary objects.

(ii) No later than 15 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, will:

(A) Approve for publication in the **Federal Register** a notice of proposed transfer or reinterment that conforms to the requirements under paragraph (k)(2)(i) of this section; or

(B) Return to the museum or Federal agency any submission that does not meet the requirements under paragraph (k)(2)(i) of this section.

(iii) After publication of a notice, if the museum or Federal agency receives a request for repatriation of the human remains and associated funerary objects before transfer or reinterment, the museum or Federal agency must evaluate whether the request meets the criteria under paragraph (f) of this section.

(A) If the request for repatriation meets the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with repatriation under paragraph (h) of this section.

(B) If the request does not meet the criteria under paragraph (f) of this section, the museum or Federal agency must respond in writing under paragraph (g) of this section and proceed with transfer or reinterment under paragraph (k)(3) of this section.

(3) *Step 3—Transfer or reinter the human remains and associated funerary objects.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the museum or Federal agency must transfer or reinter the human remains and associated funerary objects. After transferring or reinterring, the museum or Federal agency must:

(i) Document the transfer of the human remains and associated funerary objects by recording the contents, recipient, and method of delivery,

(ii) Document the reinterment by recording the contents of the reinterment,

(iii) Protect sensitive information from disclosure to the general public to the extent consistent with applicable law.

(4) After transfer or reinterment occurs, nothing in the Act or this part limits the authority of the museum or Federal agency to enter into any agreement with the requestor concerning the care or custody of the human remains and associated funerary objects.

TABLE 1 TO § 10.10—DEADLINES FOR COMPLETING AN INVENTORY

If a museum or Federal agency . . .	an inventory must be submitted . . .
acquires possession or control of human remains or associated funerary objects.	2 years after acquiring possession or control of human remains or associated funerary objects.
locates previously lost or unknown human remains or associated funerary objects.	2 years after locating the human remains or associated funerary objects.
receives Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and has possession or control of human remains or associated funerary objects.	5 years after receiving Federal funds for the first time after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

§ 10.11 Civil penalties.

Any museum that fails to comply with the requirements of the Act or this subpart may be assessed a civil penalty by the Secretary. This section does not apply to Federal agencies, but a Federal agency's failure to comply with the requirements of the Act or this part may be subject to other remedies under Federal law. Each instance of failure to comply will constitute a separate violation. The Secretary must serve the museum with a written notice of failure to comply under paragraph (d) of this section or a notice of assessment under paragraph (g) of this section by personal delivery with proof of delivery date, certified mail with return receipt, or private delivery service with proof of delivery date.

(a) *File an allegation.* Any person may file an allegation of failure to comply by sending a written allegation to the Manager, National NAGPRA Program. Each allegation:

(1) Must include the full name, mailing address, telephone number, and (if available) email address of the person alleging the failure to comply;

(2) Must identify the specific provision or provisions of the Act or this subpart that the museum is alleged to have violated;

(3) Must enumerate the separate violations alleged, including facts to support the number of separate violations. The number of separate violations is determined by establishing relevant factors such as:

(i) The number of lineal descendants, Indian Tribes, or Native Hawaiian organizations named in the allegation and determined to be aggrieved by the failure to comply; or

(ii) The number of individuals or the number of funerary objects, sacred objects, or objects of cultural patrimony involved in the failure to comply;

(4) Should include information showing that the museum has possession or control of the Native American cultural items involved in the alleged failure to comply; and

(5) Should include information showing that the museum receives Federal funds.

(b) *Respond to an allegation.* Within 90 days of receiving an allegation, the Secretary must review the allegation and determine if the allegation meets the requirements of paragraph (a) of this section. After review, the Secretary may investigate the facts in an allegation to ensure all relevant information is available.

(1) The Secretary may request any additional relevant information from the person making the allegation, the museum, or other parties. The Secretary may conduct any investigation that is necessary to determine whether an alleged failure to comply is substantiated. The Secretary may also investigate appropriate factors for justifying an increase or reduction to any penalty amount that may be calculated.

(2) The Secretary, after reviewing all relevant information, must determine one of the following for each alleged failure to comply:

(i) The alleged failure to comply is substantiated, the number of separate violations is identified, and a civil penalty is an appropriate remedy. The Secretary will calculate the proposed penalty amount under paragraph (c) of this section and notify the museum under paragraph (d) of this section;

(ii) The alleged failure to comply is substantiated, the number of separate violations is identified, but a civil penalty is not an appropriate remedy. The Secretary will notify the museum under paragraph (d) of this section; or

(iii) The alleged failure to comply is unsubstantiated. The Secretary will send a written determination to the person making the allegation and to the museum.

(c) *Calculate the penalty amount.* If the Secretary determines under paragraph (b)(2)(i) of this section that a civil penalty is an appropriate remedy for a substantiated failure to comply, the Secretary will calculate the amount of the penalty in accordance with this paragraph. The penalty for each separate violation will be calculated as follows:

(1) The base penalty amount is $7,475, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74).

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(ii) The archaeological, historical, or commercial value of the human remains or cultural items involved;

(iii) The economic and non-economic damages suffered by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization, including expenditures by the aggrieved party to compel the museum to comply with the Act or this subpart;

(iv) The number of prior violations by the museum that have occurred; or

(v) Any other appropriate factor justifying an increase.

(3) The base penalty amount may be reduced if:

(i) The museum comes into compliance;

(ii) The museum agrees to mitigate the violation in the form of an actual or an in-kind payment to an aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(iii) The penalty constitutes excessive punishment under the circumstances;

(iv) The museum is unable to pay the full penalty and the museum has not previously been found to have failed to comply with the Act or this subpart. The museum has the burden of proving it is unable to pay by providing verifiable, complete, and accurate financial information to the Secretary. The Secretary may request that the museum provide such financial information that is adequate and relevant to evaluate the museum's financial condition, including the value of the museum's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the museum's ability to pay in installments over time. If the museum does not submit the requested financial information, the museum will be presumed to have the ability to pay the civil penalty; or

(v) Any other appropriate factor justifies a reduction.

(d) *Notify a museum of a failure to comply.* If the Secretary determines under paragraph (b)(2)(i) or (b)(2)(ii) of this section that an alleged failure to comply is substantiated, the Secretary must serve the museum with a written notice of failure to comply and send a copy of the notice to each person alleging the failure to comply and any lineal descendant, Indian Tribe, or Native Hawaiian organization named in the notice of failure to comply. The notice of failure to comply must:

(1) Provide a concise statement of the facts believed to show a failure to comply;

(2) Specifically reference the provisions of the Act and this subpart with which the museum has failed to comply;

(3) Include the proposed penalty amount calculated under paragraph (c) of this section;

(4) Include, where appropriate, any initial proposal to reduce or increase the penalty amount or an explanation for why the Secretary has determined that a penalty is not an appropriate remedy;

(5) Identify the options for responding to the notice of failure to comply under paragraph (e) of this section; and

(6) Inform the museum that the Secretary may assess a daily penalty amount under paragraph (m)(1) of this

section if the failure to comply continues after the date the final administrative decision of the Secretary takes effect.

(e) *Respond to a notice of failure to comply.* Within 45 days of receiving a notice of failure to comply, a museum may take no action and await service of a notice of assessment under paragraph (g) of this section, or a museum may file a written response to the notice of failure to comply. A response which is not timely filed will not be considered. Any written response must be signed by an authorized representative of the museum and must be sent to the Secretary. In the written response, a museum may:

(1) Seek an informal discussion of the failure to comply;

(2) Request either or both of the following forms of relief, with a full explanation of the legal or factual basis for the requested relief:

(i) That the Secretary reconsider the determination of a failure to comply, or

(ii) That the Secretary reduce the proposed penalty amount; or

(3) Accept the determination of a failure to comply and agree in writing that the museum will do the following, which will constitute an agreement between the Secretary and the museum:

(i) Pay the proposed penalty amount, if any,

(ii) Complete the mitigation required to reduce the penalty, if offered in the notice, and

(iii) Waive any right to receive notice of assessment under paragraph (g) of this section and to request a hearing under paragraph (i) of this section.

(f) *Assess the civil penalty.* After serving a notice of failure to comply, the Secretary may assess a civil penalty and must consider all available, relevant information related to the failure to comply, including information timely provided by the museum during any informal discussion or request for relief, furnished by another party, or produced upon the Secretary's request.

(1) The assessment of a civil penalty is made after the latter of:

(i) The 45-day period for a response has expired and the museum has taken no action;

(ii) Conclusion of informal discussion, if any;

(iii) Review and consideration of a petition for relief, if any; or

(iv) Failure to meet the terms of an agreement established under paragraph (e)(3) of this section.

(2) If a petition for relief or informal discussion warrants a conclusion that no failure to comply has occurred, the Secretary must send written notification to the museum revoking the notice of failure to comply. No penalty is assessed.

(g) *Notify the museum of an assessment.* If the Secretary determines to assess a civil penalty, the Secretary will serve the museum with a notice of assessment. Unless the museum seeks further administrative remedies under this section, the notice of assessment is the final administrative decision of the Secretary. The notice of assessment must:

(1) Specifically reference the provisions of the Act or this subpart with which the museum has not complied;

(2) Include the final amount of any penalty calculated under paragraph (c) of this section and the basis for determining the penalty amount;

(3) Include, where appropriate, any increase or reduction to the penalty amount or an explanation for why the Secretary has determined that a penalty is not an appropriate remedy;

(4) Include the daily penalty amount that the Secretary may assess under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Secretary takes effect. The daily penalty amount for each continuing violation shall not exceed $1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74);

(5) Identify the options for responding to the notice of assessment under paragraph (h) of this section; and

(6) Notify the museum that it has the right to seek judicial review of the final administrative decision of the Secretary only if it has exhausted all administrative remedies under this section, as set forth in paragraph (l) of this section.

(h) *Respond to an assessment.* Within 45 days of receiving a notice of assessment, a museum must do one of the following:

(1) Accept the assessment and pay the penalty amount by means of a certified check made payable to the U.S. Treasurer, Washington, DC, sent to the Secretary. By paying the penalty amount, the museum waives the right to request a hearing under paragraph (i) of this section.

(2) File a written request for a hearing under paragraph (i) of this section to contest the failure to comply, the penalty assessment, or both. If the museum does not file a written request for a hearing within 45 days, the museum waives the right to request a hearing under paragraph (i) of this section.

(i) *Request a hearing.* The museum may file a written request for a hearing with the Departmental Cases Hearings Division (DCHD), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the notice of assessment, or by electronic means in accordance with an OHA Standing Order which is available on OHA's website at the web address specified in the notice of assessment. A copy of the request must be served on the Solicitor of the Department of the Interior at the address specified in the notice of assessment. The request for hearing and any document filed thereafter with the DCHD under paragraphs (i) or (j) of this section are subject to the rules that govern the method and effective date of filing under 43 CFR 4.22 and 4.422(a). The request for a hearing must:

(1) Include a copy of the notice of failure to comply and the notice of assessment;

(2) State the relief sought by the museum; and

(3) Include the basis for challenging the facts used to determine the failure to comply or the penalty assessment.

(j) *Hearings.* Upon receiving a request for a hearing, DCHD will assign an administrative law judge to the case and promptly give notice of the assignment to the parties. Thereafter, each filing must be addressed to the administrative law judge and a copy served on each opposing party or its counsel.

(1) To the extent they are not inconsistent with this section, the general rules in 43 CFR part 4, subparts A and B apply to the hearing process.

(2) Subject to the provisions of 43 CFR 1.3, a museum may appear by authorized representative or by counsel and may participate fully in the proceedings. If the museum does not appear and the administrative law judge determines that this absence is without good cause, the administrative law judge may, at his or her discretion, determine that the museum has waived the right to a hearing and consents to the making of a decision on the record.

(3) The Department of the Interior counsel, designated by the Solicitor of the Department of the Interior, represents the Secretary in the proceedings. Within 20 days of receipt of its copy of the written request for hearing, Departmental counsel must file with the DCHD an entry of appearance on behalf of the Secretary and the following:

(i) Any written communications between the Secretary and the museum during any informal discussions under paragraph (e)(1) of this section;

(ii) Any petition for relief submitted under paragraph (e)(2); and

(iii) Any other information considered by the Secretary in reaching the decision being challenged. Thereafter, the museum must serve each document filed with the administrative law judge on Departmental counsel.

(4) In a hearing on the penalty assessment, the amount of the penalty assessment must be determined in accordance with paragraph (c)(2) of this section and will not be limited to the amount originally assessed or by any previous reduction, increase, or offer of mitigation.

(5) The administrative law judge has all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, and to render a decision under 5 U.S.C. 554–557.

(6) The administrative law judge will render a written decision based upon the hearing record. The decision must set forth the findings of fact and conclusions of law, and the reasons and basis for them.

(7) The administrative law judge's decision takes effect as the final administrative decision of the Secretary 31 days from the date of the decision unless the museum files a notice of appeal as described in paragraph (k) of this section.

(k) *Appealing the administrative law judge's decision.* Any party who is adversely affected by the decision of the administrative law judge may appeal the decision by filing a written notice of appeal within 30 days of the date of the decision. The notice of appeal must be filed with the Interior Board of Indian Appeals (IBIA), Office of Hearings and Appeals, U.S. Department of the Interior, at the mailing address specified in the administrative law judge's decision, or by electronic means in accordance with an OHA Standing Order which is available on OHA's website at the web address specified in the administrative law judge's decision. The notice of appeal must be accompanied by proof of service on the administrative law judge and the opposing party. The notice of appeal and any document filed thereafter with the IBIA is subject to the rules that govern the method and effective date of filing in 43 CFR 4.310.

(1) To the extent they are not inconsistent with this section, the provisions of 43 CFR part 4, subpart D, apply to the appeal process. The appeal board's decision must be in writing and takes effect as the final penalty assessment and the final administrative decision of the Secretary on the date that the appeal board's decision is rendered, unless otherwise specified in the appeal board's decision.

(2) OHA decisions in proceedings instituted under this section are posted on OHA's website.

(l) *Exhaustion of administrative remedies.* A museum has the right to seek judicial review, under 5 U.S.C. 704, of the final administrative decision of the Secretary only if it has exhausted all administrative remedies under this section. No decision, which at the time of its rendition is subject to appeal under this section, shall be considered final so as to constitute agency action subject to judicial review. The decision being appealed shall not be effective during the pendency of the appeal.

(m) *Failure to pay penalty or continuing failure to comply.* (1) If the failure to comply continues after the date the final administrative decision of the Secretary takes effect, as described in paragraphs (g), (j)(6), or (k)(1) of this section, or after a date identified in an agreement under paragraph (e)(3) of this section, the Secretary may assess an additional daily penalty amount for each continuing violation not to exceed $1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74). In determining the daily penalty amount, the Secretary will consider the factors in paragraph (c)(2) of this section. This penalty will start to accrue on the day after the effective date of the final administrative decision of the Secretary or on the date identified in an agreement under paragraph (e)(3) of this section.

(2) If the museum fails to pay the penalty, the Attorney General of the United States may institute a civil action to collect the penalty in an appropriate U.S. District Court. In such action, the validity and amount of the penalty are not subject to review by the court.

(n) *Additional remedies.* The assessment of a penalty under this section is not deemed a waiver by the Department of the Interior of the right to pursue other available legal or administrative remedies.

Subpart D—REVIEW COMMITTEE

§ 10.12 Review Committee.

The Review Committee advises the Secretary and Congress on matters relating to sections 5, 6, and 7 of the Act and other matters as specified in section 8 of the Act. The Review Committee is subject to the Federal Advisory Committee Act (FACA, 5 U.S.C. App.)

(a) *Recommendations.* Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act. Findings and recommendations made by the Review Committee will be published in the **Federal Register** within 90 days of making the finding or recommendation.

(b) *Nominations.* The Review Committee consists of seven members appointed by the Secretary of the Interior.

(1) Three members are appointed from nominations submitted by Indian Tribes, Native Hawaiian organizations, and traditional religious leaders. At least two of these members must be traditional Indian religious leaders. A traditional Indian religious leader is a person who, based on cultural, ceremonial, or religious practices, is recognized by an Indian Tribe as being responsible for performing cultural ceremonies or exercising a leadership role.

(2) Three members are appointed from nominations submitted by national museum organizations or national scientific organizations. An organization that is created by, is a part of, and is governed in any way by a parent national museum or scientific organization must submit a nomination through the parent organization. National museum organizations and national scientific organizations are organizations that:

(i) Focus on the interests of museums and science disciplines throughout the United States, as opposed to a lesser geographic scope;

(ii) Offer membership throughout the United States, although such membership need not be exclusive to the United States; and

(iii) Are organized under the laws of the United States Government.

(3) One member is appointed from a list of more than one person developed and consented to by all other appointed members specified in paragraphs (b)(1) and (b)(2) of this section.

(c) *Findings of fact or disputes on repatriation.* The Review Committee may assist any affected party through consideration of findings of fact or disputes related to the inventory, summary, or repatriation provisions of the Act. One or more of the affected parties may request the assistance of the Review Committee or the Secretary may direct the Review Committee to consider a finding of fact or dispute. Requests for assistance must be made before repatriation of the human remains or cultural items has occurred.

(1) An affected party is either a:

(i) Museum or Federal agency that has possession or control of the human remains or cultural items, or

(ii) Lineal descendant, or an Indian Tribe or Native Hawaiian organization with potential affiliation to the human remains or cultural items.

(2) The Review Committee may make an advisory finding of fact on questions related to:

(i) The identity of an object as human remains or cultural items,

(ii) The cultural or geographical affiliation of human remains or cultural items, or

(iii) The repatriation of human remains or cultural items.

(3) The Review Committee may make an advisory recommendation on disputes between affected parties. To facilitate the resolution of disputes, the Review Committee may:

(i) Consider disputes between an affected party identified in paragraph (c)(1)(i) of this section and an affected party identified in paragraph (c)(1)(ii) of this section;

(ii) Not consider disputes among lineal descendants, Indian Tribes and Native Hawaiian organizations;

(iii) Not consider disputes among museums and Federal agencies;

(iv) Request information or presentations from any affected party; and

(v) Make advisory recommendations directly to the affected parties or to the Secretary.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

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Part IV

Department of Homeland Security

U.S. Customs and Border Protection

Department of the Treasury

19 CFR Parts 24 and 111
Elimination of Customs Broker District Permit Fee and Modernization of the Customs Broker Regulations; Final Rules

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 24 and 111

[USCBP–2020–0010; CBP Dec. 22–22]

RIN 1515–AE43

Elimination of Customs Broker District Permit Fee

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to eliminate customs broker district permit fees. Concurrently with this final rule, CBP is publishing a final rule to, among other things, eliminate customs broker districts (*see* ''Modernization of the Customs Broker Regulations'' RIN 1651–AB16). Specifically, CBP is transitioning all brokers to national permits and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. As a result of the elimination of customs broker districts, CBP is amending in this document the regulations to eliminate customs broker district permit fees.

DATES: Effective December 19, 2022.

FOR FURTHER INFORMATION CONTACT: Melba Hubbard, Chief, Broker Management Branch, (202) 863–6986, *melba.hubbard@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits; provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits or assessment of monetary penalties; and, provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect the public and the revenue of the United States and to carry out the provisions of section 641.

The regulations issued under the authority of section 641 are set forth in part 111 of title 19 of the Code of Federal Regulations (CFR) (19 CFR part 111) and provide for, among other things, fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7). The existing customs broker regulations are based on a district system in which ports within a district handle entry, entry summary, and post-summary activity, and for which a broker district permit is required.

On June 5, 2020, U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (85 FR 34549), proposing the elimination of customs broker district permit fees in parts 24 and 111. The NPRM solicited public comments on the proposed rulemaking, with a 60-day comment period, which closed on August 4, 2020. No comments were received in response to this NPRM.

In a concurrent NPRM, published elsewhere in the same issue of the **Federal Register** (*see* ''Modernization of the Customs Broker Regulations'' RIN 1651–AB16)(85 FR 34836)), CBP proposed to amend its regulations by modernizing the customs broker regulations to coincide with the development of CBP trade initiatives, including the Automated Commercial Environment (ACE) and the Centers of Excellence and Expertise (Centers). Specifically, CBP proposed to transition all brokers to national permits and expand the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. To accomplish this, CBP proposed to eliminate broker districts and district permits, which would also eliminate the need for district permit waivers and the requirement for brokers to maintain district offices. CBP received 55 public comments during the 60-day solicitation period and addressed those comments in a concurrent final rule document, published elsewhere in this issue of the **Federal Register** (*see* ''Modernization of the Customs Broker Regulations'' RIN 1651–AB16)(hereinafter, referred to as the ''concurrent final rule document'').

II. Discussion of Regulatory Changes to Parts 24 and 111

Part 24

Part 24 of title 19 of the CFR (19 CFR part 24) sets forth regulations concerning customs financial and accounting procedures. Section 24.22 describes the customs Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees and corresponding limitations for certain services. Specifically, paragraph (h) of § 24.22 deals with the annual customs broker permit user fee. In this final rule, CBP has eliminated in §§ 24.22(h) and (i)(9), references to the customs broker district permit user fee, conforming with amendments in the concurrent final rule document, which eliminates broker districts and district permits.

In the concurrent NPRM, CBP had proposed to add a new definition in § 111.1 for a ''Designated Center'', which was defined as the Center through which an individual, partnership, association, or corporation submits an application for a broker's license, or as otherwise designated by CBP for already-licensed brokers. After further consideration of how CBP will be processing broker matters and taking into account the public comments received with regard to the proposed definition, CBP has determined in the concurrent final rule document to modify the proposed definition to better align with current and future processes regarding brokers.

CBP has concluded that a definition of ''Processing Center'' much better reflects how CBP will manage broker applications and broker submissions.[1] As described in the concurrent final rule document, the term ''Processing Center'' means the broker management operations of a Center that processes applications for licenses under § 111.12(a) and permits under § 111.19(b), as well as submissions by already-licensed brokers required in part 111. The applications and submissions will be managed by Center personnel, who are broker management officers (BMOs) in 41 port locations throughout the U.S. customs territory.[2] Current brokers will continue to submit any submissions to a location where the broker license was issued, and any new applicants for a license or permit should choose a location where the applicant intends to reside and or conduct customs business. Thus, CBP changed the proposed language in § 24.22(h) from ''designated Center'' to ''processing

[1] In this document, CBP uses ''Processing Center'' in quotes to denote a replacement of the proposed term ''Designated Center''; when the words ''processing Center'' without quotation marks are used, CBP is referring to the Center of Excellence and Expertise that is actually performing a processing function.

[2] A chart of all 41 BMO locations can be found online on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers,* by clicking on the tab titled ''Broker Management Officer (BMO) Contact Information.''

Center (see § 111.1)'', adding a reference as to where the definition for processing Center may be found.

Part 111

Elimination of District Permits

Section 111.19 provides the procedures for obtaining broker permits, responsible supervision and control requirements for permits, and review procedures for the denial of a permit. Specifically, paragraph (c) describes permit fees. As CBP is eliminating district permits in the concurrent final rule document, this document makes conforming amendments to § 111.19 by eliminating fees for district permits. In addition, CBP has removed the specific permit application and permit user fee amounts and replaced the numerical figures with a reference to the relevant fee provision in § 111.96(b) and (c). CBP changed the proposed term ''designated Center'' to ''processing Center'', as explained above, in § 111.19(c), and revised the second half of the second sentence of paragraph (c) to replace the reference to ''online'' submission of the fee payment with a reference to the use of a CBP-authorized EDI system. This last change was made to conform references to electronic submissions throughout part 111. In addition, CBP re-phrased the last part of the sentence in paragraph (c), without changing the meaning, to state that the fee needs to be submitted at the time the permit application is submitted. The changes to § 111.96(b) can be found in the concurrent final rule document.

Elimination of District Permit Fees

Section 111.96 describes fees required throughout part 111. Paragraph (c) of § 111.96 describes the permit user fee. To reflect the elimination of broker districts and district permits, CBP has eliminated the customs broker district permit user fee, and specified that the user fee is applicable for national permits only, issued under § 111.19(a).

As discussed in the concurrent final rule document, CBP published an interim final rule that transferred certain trade functions from the port director to the Center director (*see* 81 FR 92978, December 20, 2016). Similarly, certain broker management functions previously performed by the port directors are transferred to the processing Centers as part of this final rule. CBP has revised the last sentence of § 111.96(c) by splitting it into two sentences, with the second sentence providing that the processing Center will notify the broker in writing of the failure to pay and the revocation of the permit. For the reasons explained above, CBP replaced the proposed term ''designated Center'' in § 111.96(c) with the term ''processing Center''. CBP also removed the reference to ''director'' to clarify that submissions must be made to the broker management operations of a Center, meaning to one of the BMO locations throughout the U.S. customs territory. As not only Center directors will be handling broker matters, but any BMO, depending on where the broker license was issued, CBP determined that the removal of the reference to ''director'' was more appropriate.

III. Other Conforming Amendments

The authority for part 111 currently provides a specific authority citation for § 111.3. When the text of § 111.3 was transferred to § 111.2 in a final rule published in the **Federal Register** (65 FR 13880) on March 15, 2000, CBP inadvertently did not revise the specific authority citation for either section. CBP has corrected this oversight in this final rule document by adding a specific authority citation for § 111.2, and by removing the specific authority citation for § 111.3. An identical amendment is made in the concurrent final rule document.

IV. Conclusion

Upon further consideration, CBP has decided to adopt, with changes as described above, as final the proposed regulations published in the **Federal Register** (85 FR 34549) on June 5, 2020.

V. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

As mentioned above, on June 5, 2020, CBP published in the **Federal Register** an NPRM titled, ''Elimination of Customs Broker District Permit Fee,'' and received no comments from the public. Therefore, CBP adopts the regulatory amendments specified in the NPRM, with the addition of a change to the proposed term ''Designated Center.'' ''Designated Center'' will be replaced with ''Processing Center,'' in accordance with the same change made in the concurrent final rule document, as explained above, as well as additional minor changes for consistency purposes. With the adoption of the proposed regulatory amendments, CBP applies the 2020 proposed rule's economic analysis approach to this final rule, updating the data as necessary.

This final rule is not a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation. CBP has prepared the following analysis to help inform stakeholders of the impacts of this final rule.

1. Need and Purpose of the Final Rule

Current customs broker regulations are based on the district system in which entry, entry summary, and post-summary activity are all handled by the ports within a permit district. In the concurrent final rule document, CBP is modernizing the regulations governing customs brokers to better reflect the current work environment and streamline the customs broker permitting process to save money. Under the terms of the concurrent final rule document, CBP is transitioning all brokers to national permits and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. By transitioning to a national permit, CBP is eliminating the requirement for brokers to maintain district permits and pay the annual user fee. Therefore, this final rule eliminates customs broker district permit annual user fees. CBP has prepared the following analysis to help inform stakeholders of the impacts of this final rule.

2. Background

The customs territory of the United States is divided into seven customs regions. Within each region, the customs territory of the United States is further divided into districts; there are currently 40 customs districts.[3] Under the baseline, or the world as it was without this final rule, a district permit was required for each district in which a customs broker intended to conduct customs business. Brokers could apply for district permits either concurrently with their licenses or later on in their careers. Brokers who hold at least one

[3] In addition to the 40 geographically defined customs districts, there are three special districts that are responsible for specific types of imported merchandise. These special districts include districts 60, 70 and 80. District 60 refers to entries made by vessels under their own power. District 70 refers to shipments with a value under $800. District 80 refers to mail shipments. These three special districts do not require the use of a licensed broker with a specific district permit and as a result are not affected by this final rule.

district permit also had the option to hold a national permit, which allows a broker to operate throughout the customs territory of the United States.[4]

The concurrent final rule document eliminates the district permitting process and automatically grants a national permit to each district permit holder who does not already hold a national permit. Going forward, licensed brokers have the option to apply for a single national permit either concurrently with their licenses or later in their careers. With this final rule in place, district permit user fees are eliminated, and brokers continue to pay permit fees only for national permits. Each district or national permit requires a one-time permit fee of $100 and an annual user fee.[5] The annual user fee is $153.19 for calendar year 2022, but is adjusted for inflation each year.[6] Given the uncertainty of future inflation, for the purposes of this analysis, we use this fee amount for the full period of analysis.

The number of new permits issued each year depends, in part, on the number of new licenses issued. CBP issues both individual broker licenses as well as corporate licenses, which may be held by partnerships, associations, or corporations.[7] The number of licenses issued has been declining for the last several years at a rate of one percent for corporate licenses and four percent for individual licenses (*see* Table 1). Additionally, not all licensed brokers choose to apply for a permit. Although virtually all corporate license holders do hold a permit, many individual brokers work under the auspices of a corporate permit and never hold their own permit. Based on data from CBP's Broker Management Branch (BMB), approximately 13.5 percent of individual brokers hold a district permit.[8]

TABLE 1—LICENSING HISTORY

Year	Total licenses issued	Corporate licenses issued	Individual licenses issued
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020	187	7	180
2021	496	31	465

3. Benefits

Brokers must pay an annual permit user fee for each permit held. The permit user fee is payable for each district permit and national permit a customs broker holds, including when a district permit is issued concurrently with the broker's license. As a result of the concurrent final rule document, district permits are eliminated and customs brokers only need to pay an annual user fee for a single national permit.[9] Therefore, the savings accrued to brokers and CBP as a result of many fewer user fees paid qualifies as a benefit and not as a transfer payment because CBP is eliminating the district permits themselves, as well as the work that goes along with processing and issuing them.[10]

Under the baseline, both brokers holding existing permits and brokers issued new permits must pay the annual user fee for each permit held. As of January 2022, there were 15,226 active, licensed customs brokers.[11] 2,365 brokers hold at least one district permit.[12] Of those, 1,914 brokers hold a national permit in addition to their district permit(s). The 2,365 brokers who hold at least one district permit hold a total of 3,345 district permits, for an average of 1.4 district permits per permitted broker.

Based on recent licensing history, CBP projects that over the period of analysis from 2022–2026, 2,072 new individual licenses and 75 new corporate licenses will be issued.[13] As stated above, 13.5 percent of individual brokers and 100 percent of corporate brokers hold at least one district permit. Under the baseline, an average of 1.4 district permits held by each broker results in 396 new individual permits and 105 new corporate permits, for a total of 501 permits. *See* Table 2 for a summary of licensing and permitting over the period of analysis under baseline conditions.

[4] When first introduced in 2000, the national permit was restricted to certain activities, allowing a broker to place an employee in the facility of a client for whom the broker is conducting customs business; file electronic drawback claims; participate in remote location filing; and make representations after the entry summary has been accepted. Since the national permit was introduced, and with the full implementation of ACE, restrictions have been gradually eliminated such that only some activities requiring physical presence at the port require a district permit in lieu of a national permit. Those restrictions will be lifted with the concurrent final rule document in place.

[5] If a broker chooses to receive a permit with the license, then the $100 permit fee is waived. Under the new national permitting system, brokers receiving a national permit will pay the $100 permit fee regardless of when they do so.

[6] The annual user fee payable for calendar year 2022 is $153.19 (86 FR 66573). It will be adjusted for inflation each year. Sections 24.22 and 24.23 of title 19 CFR provide for and describe the procedures that implement the requirements of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, December 4, 2015), which amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA), requiring the Secretary of the Treasury to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation. Specifically, section 24.22(k) sets forth the methodology to determine the change in inflation as well as the factor by which the fees and limitations will be adjusted, if necessary.

[7] 19 U.S.C. 1641(b)(3). For any corporate license, at least one member of the organization must hold an individual license.

[8] Data pulled from ACE on May 10, 2021 and March 31, 2022.

[9] The reduction of the fee revenue will result in fewer funds available for CBP operations, but this is offset by the reduction in costs to process the permits. Thus, there is no net effect to CBP in reducing this revenue.

[10] As described in OMB Circular A–4, transfer payments occur when ''. . . monetary payments from one group [are made] to another [group] that do not affect total resources available to society.''

[11] Data supplied by BMB on May 10, 2021 and March 31, 2022. Data is pulled from ACE. The 12,861 brokers who do not hold any permits are unaffected by this final rule.

[12] This figure represents all current licensed brokers that are permit holders, regardless of what year they received their license.

[13] The COVID–19 pandemic and the resulting delays and closures resulted in anomalous data for 2020 for corporate licenses. Therefore, CBP removed 2020 from the projection, and used data from 2015–2019 instead to project over the period of analysis from 2022–2026.

TABLE 2—PROJECTION OF LICENSING AND PERMITTING UNDER BASELINE CONDITIONS

Year	New individual licenses	New individual ermits	New corporate licenses issued	New corporate permits	Total permits
2022	447	86	15	21	107
2023	430	82	15	21	103
2024	414	79	15	21	100
2025	398	76	15	21	97
2026	383	73	15	21	94
Total	2,072	396	75	105	501

*Totals may not sum due to rounding.

With the concurrent final rule document in place, newly licensed brokers choosing to hold a permit require only a single national permit. Therefore, CBP will issue 355 new permits over the period of analysis (*see* Table 3). Because CBP is eliminating the district permit system, these 355 permits will be issued as national permits even though, under baseline conditions, they would have been district permits.

TABLE 3—PROJECTION OF PERMITS UNDER THE FINAL RULE

Year	New individual licenses	New individual permits	New corporate permits	Total new national permits
2022	447	60	15	75
2023	430	58	15	73
2024	414	56	15	71
2025	398	54	15	69
2026	383	52	15	67
Total	2,072	280	75	355

*Totals may not sum due to rounding.

With the final rule in place, brokers currently holding only district permits or holding a national permit in addition to their district permit(s) continue to pay the annual user fee for a single national permit.[14] As of January 2021, 9 brokers each hold more than one district permit and do not hold a national permit.[15] Altogether, those brokers hold 18 district permits, for an average of 2 permits each. With the final rule in place, those brokers each pay for a single national permit instead of paying for the 18 district permits they currently collectively hold. Furthermore, there are 1,914 brokers holding at least one district permit and one national permit. Those brokers hold a total of 2,880 district permits. With the final rule in place, these brokers only need to pay the user fee for their national permits and will no longer pay fees for their 2,880 district permits. Overall, brokers holding permits at the start of the period of analysis will no longer need to pay for 2,889 permits.[16]

Combining both existing and projected permits, over the period of analysis brokers who hold permits will pay the user fee for 364 permits under the terms of the final rule. This includes 355 new national permits issued during the period of analysis in place of 396 new district permits (see Tables 2 and 3 above). An additional 9 existing district permits held by brokers only holding district permits under the baseline will be transitioned to national permits. Those 9 brokers will no longer pay for the 9 additional district permits currently held, which will be eliminated. Finally, 1,914 brokers who hold a national permit and at least one district permit under the baseline will only continue paying for their national permits and will no longer pay for 2,880 district permits. Overall, brokers will no longer pay for 3,035 district permits over the period of analysis. With a 2022 user fee of $153.19 per permit, brokers will save $2,281,330 from 2022–2026. *See* Table 4 for a summary of these savings.

[14] As stated above, those brokers only holding district permits will be automatically granted a national permit under the terms of the concurrent final rule document.

[15] Brokers who hold a single district permit will have that district permit transitioned to a national permit and will continue to pay the same amount in user fees. Therefore, they are financially unaffected by the final rule.

[16] This includes the 9 permits forgone by brokers holding only more than one district permit and the 2,880 district permits held by brokers holding both district and national permits.

[17] Under the baseline, these permits would be issued as district permits. Under the final rule, they will be issued as national permits.

[18] For the first three columns, the total number of permits is additive throughout the period of analysis instead of at the end of the period (that is, all permits issued in 2021 must also be paid for in 2022, 2023, 2024, and 2025 in addition to new permits issued in those years) so the total is equal to the number of permits existing in the final year. The total savings are calculated by summing the savings in each year.

TABLE 4—TOTAL SAVINGS [2022 U.S. DOLLARS]

Year	Total district permits under the baseline	Total permits under the final rule[17]	District permits no longer paid for	Savings
2022	3,005	84	2,921	$447,393
2023	3,108	158	2,950	$451,959
2024	3,208	229	2,979	$456,398
2025	3,305	298	3,007	$460,709
2026	3,399	364	3,035	$464,871
Total[18]	3,399	364	3,035	$2,281,330

4. Costs

The elimination of the annual user fee for district permits does not result in any costs to brokers, but as noted above, this final rule yields the aforementioned savings.

5. Net Benefits

The total annual monetized savings for customs brokers results from switching from a district permitting system to a national permitting system. Specifically, brokers will only pay the annual permit user fee for a single national permit instead of for each of the potentially several district permits held. As shown in Table 5 below, total savings over the period of analysis are approximately $2.3 million dollars.

TABLE 5—TOTAL ANNUAL UNDISCOUNTED SAVINGS FOR BROKERS FROM 2022–2026

[2022 U.S. dollars]

Year	Total savings
2022	$447,393
2023	451,959
2024	456,398
2025	460,709
2026	464,871
Total	2,281,330

Note: Values may not sum to total due to rounding.

Table 6 summarizes the monetized costs and benefits of this final rule to individual and corporate customs brokers. As shown, the total monetized present value net benefit of this final rule over a five-year period of analysis from 2022–2026 ranges from approximately $1.9 to $2 million and the annualized net benefit is approximately $456,000. In 2022, we estimate that 462 brokers will receive their broker licenses (447 individual licenses plus 15 corporate licenses). The adoption of this final rule will result in an average annual net benefit per broker in 2022 of $987 ($456,000 annualized net benefit/462 total new brokers for 2022).

TABLE 6—PRESENT VALUE AND ANNUALIZED NET BENEFIT OF FINAL RULE

	3% Discount rate		7% Discount rate	
	Present value	Annualized	Present value	Annualized
Total Cost	$0	$0	$0	$0
Total Benefit	2,027,555	456,008	1,868,359	455,675
Total Net Benefit	2,027,555	456,008	1,868,359	455,675

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The final rule will apply to all customs brokers, regardless of size. Accordingly, the final rule will affect a substantial number of small entities. However, as stated above in section V.5 ''Net Benefits,'' the final rule will result in an average annualized savings per customs broker of $987. Since brokers, on average, will benefit as a result of this final rule, and the savings are relatively small on a per broker basis, it will not have a significant impact on customs brokers. Accordingly, CBP certifies that this final rule does not have a significant impact on a substantial number of small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information contained in these

regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers) and by OMB control number 1651–0076 (Recordkeeping Requirements). This final rule does not change the burden under these information collections.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of her or his delegate) to approve regulations related to certain customs revenue functions.

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects

19 CFR Part 24

Accounting, Claims, Exports, Freight, Harbors, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 111

Administrative practice and procedure, Brokers, Penalties, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons set forth in the preamble, parts 24 and 111 of title 19 of the Code of Federal Regulations (19 CFR parts 24 and 111) are amended as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general and specific authority citations for part 24 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

Section 24.22 also issued under Sec. 892, Pub. L. 108–357, 118 Stat. 1418 (19 U.S.C. 58c); Sec. 32201, Pub. L. 114–94, 129 Stat. 1312 (19 U.S.C. 58c); Pub. L. 115–271, 132 Stat. 3895 (19 U.S.C. 58c).

§ 24.22 [Amended]

■ 2. In § 24.22:

■ a. Paragraph (h) is amended by:

■ i. Removing the phrase ''each district permit and for'' in the first sentence;

■ ii. Removing the second sentence; and

■ iii. Removing the word ''port'' from the third sentence and adding in its place the words ''processing Center (see § 111.1)''; and

■ b. Paragraph (i)(9) is amended by removing the phrase ''for district permits, class code 497;'' from the first sentence.

PART 111—CUSTOMS BROKERS

■ 3. The general and specific authority citations for part 111 are revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624; 1641.

Section 111.2 also issued under 19 U.S.C. 1484, 1498;

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

■ 4. In § 111.19, revise the section heading and paragraph (c) to read as follows:

§ 111.19 National permit.

* * * * *

(c) *Fees.* A national permit issued under paragraph (a) of this section is subject to the permit application fee specified in § 111.96(b) and to the customs user permit fee specified in § 111.96(c). The fees must be paid at the processing Center (*see* § 111.1) or through a CBP-authorized EDI system at the time the permit application is submitted.

* * * * *

■ 5. In § 111.96, revise paragraph (c) to read as follows:

§ 111.96 Fees.

* * * * *

(c) *Permit user fee.* Payment of an annual permit user fee defined in § 24.22(h) of this chapter is required for a national permit granted to an individual, partnership, association, or corporate broker. The permit user fee is payable with the filing of an application for a national permit under § 111.19(b), and for each subsequent calendar year at the processing Center referred to in § 111.19(b). The permit user fee must be paid by the due date as published annually in the **Federal Register**, and must be remitted in accordance with the procedures set forth in § 24.22(i) of this chapter. When a broker submits an application for a national permit under § 111.19(b), the full permit user fee must be remitted with the application, regardless of the point during the calendar year at which the application is submitted. If a broker fails to pay the annual permit user fee by the published due date, the permit is revoked by operation of law. The processing Center will notify the broker in writing of the failure to pay and the revocation of the permit.

* * * * *

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

Approved:

Thomas C. West, Jr.,

Deputy Assistant Secretary of the Treasury for Tax Policy.

[FR Doc. 2022–22151 Filed 10–17–22; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 24 and 111

[USCBP–2020–0009;CBP Dec. 22–21]

RIN 1651–AB16

Modernization of the Customs Broker Regulations

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as final, with changes, proposed amendments to the U.S. Customs and Border Protection (CBP) regulations modernizing the customs broker regulations. CBP is transitioning all customs brokers to a single national permit and expanding the scope of the national permit authority to allow national permit holders to conduct any type of customs business throughout the customs territory of the United States. To accomplish this, CBP is eliminating broker districts and district permits, which in turn removes the need for the maintenance of district offices, and district permit waivers. CBP is also updating, among other changes, the responsible supervision and control oversight framework, ensuring that customs business is conducted within the United States, and requiring that a customs broker have direct communication with an importer. These changes are designed to enable customs brokers to meet the challenges of the modern operating environment while maintaining a high level of service in customs business. Further, CBP is increasing fees for the broker license application to recover some of the costs associated with the review of customs

broker license applications and the necessary vetting of individuals and business entities (*i.e.,* partnerships, associations, and corporations). Additionally, CBP is announcing the deployment of a new online system, the eCBP Portal, for processing broker submissions and electronic payments. Lastly, CBP is publishing a concurrent final rule document to eliminate all references to customs broker district permit user fees (*see* ''Elimination of Customs Broker District Permit Fee'' RIN 1515–AE43) to align with the changes made in this final rule document.

DATES: This final rule is effective December 19, 2022.

FOR FURTHER INFORMATION CONTACT: Melba Hubbard, Chief, Broker Management Branch, (202) 325–6986, *melba.hubbard@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

The Role of Licensed Customs Brokers in Conducting Customs Business

Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), provides that individuals and business entities must hold a valid customs broker's license and permit to transact customs business on behalf of others. The statute also sets forth standards for the issuance of broker licenses and permits; provides for disciplinary action against brokers in the form of suspension or revocation of such licenses and permits, or assessment of monetary penalties; and, provides for the assessment of monetary penalties against other persons for conducting customs business without the required broker's license. Section 641 authorizes the Secretary of the Treasury to prescribe rules and regulations relating to the customs business of brokers as may be necessary to protect importers and the revenue of the United States and to carry out the provisions of section 641.[1]

The regulations issued under the authority of section 641 are set forth in part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) and provide for, among other things, the rules for license and permit requirements; recordkeeping and other duties and responsibilities of brokers; the grounds and procedures for the cancellation, suspension or revocation of broker licenses and permits, and monetary penalties in lieu of suspension or revocation; and, rules pertaining to the imposition of a monetary penalty, and fee payment requirements applicable to brokers under section 641 and 19 U.S.C. 58c(a)(7).

Customs brokers are private individuals and/or business entities (partnerships, associations, or corporations) that are licensed and regulated by U.S. Customs and Border Protection (CBP) to assist importers in conducting customs business. Customs brokers have an enormous responsibility to their clients and to CBP, which requires them to properly prepare importation documents, file these documents timely and accurately, classify and value goods properly, pay duties, taxes, and fees, safeguard their clients' information, and protect their licenses from misuse.

The existing customs broker regulations are based on the district system. A district is the geographic area covered by a customs broker permit other than a national permit. Customs brokers are currently required to maintain a physical presence within a district so that the broker is physically close to the ports of entry within the district in order to file any paperwork associated with an entry, entry summary, or post-summary activity. Entry, entry summary, and certain post-summary activities are customs business activities for which a district permit is required. *See* 19 CFR 111.1; 111.2(b)(1). As a rule, all merchandise imported into the United States is required to be entered, unless specifically excepted. The act of entering merchandise consists of the filing of paper or electronic data with CBP containing sufficient information to enable CBP to determine whether imported merchandise may be released from CBP custody. *See* 19 CFR 141.0a(a). Additionally, entry summary refers to documentation that enables CBP to assess duties, collect statistics on imported merchandise, and determine whether other requirements of law or regulation are met. *See* 19 CFR 141.0a(b). Pursuant to the existing regulations, customs business includes certain post-summary activities such as the refund, rebate, or drawback of duties, taxes, or other charges.

The Impact of the Centers of Excellence and Expertise and the Automated Commercial Environment on Licensed Customs Brokers

Two major developments, the establishment of the Centers of Excellence and Expertise (Centers) and the creation of the Automated Commercial Environment (ACE), have fundamentally changed the traditional ways that customs brokers and CBP interact. After a four-year transition of operational trade functions from ports of entry and port directors to Centers and Center directors, CBP published an interim final rule in the **Federal Register** (81 FR 92978), which codified the role of the Centers as strategic locations around the country to focus CBP's trade expertise on industry-specific issues and provide tailored support for importers. This permanent shift to Centers was made in order to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. The interim final rule transferred to the Centers and Center directors a variety of post-release trade functions that were handled by port directors, including decisions and processing related to entry summaries; decisions and processing related to all types of protests; suspension and extension of liquidations; decisions and processing concerning free trade agreements and duty preference programs; decisions concerning warehouse withdrawals wherein the goods are entered into the commerce of

[1] The Homeland Security Act of 2002 generally transferred the functions of the U.S. Customs Service from the Department of the Treasury to the Secretary of the Department of Homeland Security (DHS). *See* Public Law 107–296, 116 Stat. 2142. The Act provides that the Secretary of the Treasury retains the customs revenue functions unless delegated to the Secretary of DHS. The regulation of customs brokers is encompassed within the customs revenue functions set forth in section 412 of the Homeland Security Act. On May 15, 2003, the Secretary of the Treasury delegated authority related to the customs revenue functions to the Secretary of DHS subject to certain exceptions. *See* Treasury Order No. 100–16 (Appendix to 19 CFR part 0). Because the authority to prescribe the rules and regulations related to customs brokers is not listed as one of the exceptions, this authority now resides with the Secretary of DHS. However, the regulation of user fees is encompassed within the customs revenue functions set forth in section 412 of the Act. *See* Appendix to 19 CFR part 0.

the United States; all functions and decisions concerning country of origin marking issues; functions concerning informal entries; and, classification and appraisement of merchandise. With the transfer of trade functions to the Centers, a significant portion of these activities, including entry summary and post-summary, are now handled directly by the Centers. The Center structure is based on subject matter expertise, as opposed to geographic location, placing the Centers outside of the district system. Consequently, the existing broker regulations based on the district system do not fully reflect how trade functions are currently being processed by CBP.

The other relevant major development was the creation of ACE. In an effort to modernize the business processes essential to securing U.S. borders, facilitating the flow of legitimate shipments, and targeting illicit goods pursuant to the Customs Modernization Act (Mod Act) (passed as part of the North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. 103–182 § 623 (1993)), and the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. 109–347, 120 Stat. 1884), CBP developed ACE to ultimately replace the Automated Commercial System (ACS) as the CBP-authorized electronic data interchange (EDI) system.[2]

On October 13, 2015, CBP published an interim final rule in the **Federal Register** (80 FR 61278) that designated ACE as a CBP-authorized EDI system, effective November 1, 2015. ACE now offers the operational capabilities necessary to enable users to transmit a harmonized set of import data elements, via a ''single window,'' to obtain the release and clearance of goods. As a result, the International Trade Data System (ITDS) eliminates redundant reporting requirements and facilitates the transition from paper-based reporting and other procedures to faster and more cost-effective electronic submissions to, and communication among, government agencies. These electronic capabilities that allow brokers to file entry information in ACE reduce the need for brokers to be physically close to the ports of entry, as required under the district permit regulations.

The Availability of a Remote Option for the Customs Broker License Examination

On April 21, 2021, the bi-annual customs broker license exam was administered at over 120 testing locations, and for the first time, via remote proctor delivery. CBP provided information regarding system requirements for the remote testing option, testing room requirements, and other general exam information on its website for prospective exam applicants.[3] CBP continues to offer a remotely proctored exam if the exam provider is equipped to administer such type of testing. CBP does want to emphasize, however, that the availability of a remote examination is at CBP's sole discretion. If a remote exam is available, applicants who prefer to take the exam in a remote setting for convenience or to avoid travel may select the remote option at the time of registration for the exam. However, a remote examination cannot be requested, a spot might not be assured due to limited capacity, and the lack of availability of a remote exam cannot be appealed. CBP will notify prospective applicants of whether the remote option is available at the time the exam is announced on CBP's website.

Proposed Rulemaking To Modernize the Customs Broker Regulations

On June 5, 2020, CBP published a notice of proposed rulemaking (NPRM) in the **Federal Register** (85 FR 34836) proposing to modernize the customs broker regulations in part 111 of the CFR to align with the development of CBP trade initiatives, including ACE and the Centers, and reflect the changes to a more automated commercial environment for both customs brokers and importers. Specifically, CBP proposed to eliminate broker districts and district permits, and transition all brokers who hold only a district permit to a national permit. Further, CBP proposed to expand the scope of the national permit authority to allow all national permit holders to conduct business throughout the customs territory of the United States. In addition, CBP proposed to increase the license application fee in order to recover some of CBP's costs for reviewing license applications and vetting applicants. The NPRM provided for a 60-day comment period, which ended on August 4, 2020. Concurrently, CBP published an NPRM in the **Federal Register** (85 FR 34549) proposing the elimination of customs broker district permit user fees to conform with the proposed elimination of broker districts and district permits. CBP received no comments to the latter NPRM.

II. Discussion of Comments

CBP received 55 documents in response to the publication of the part 111 NPRM, two of which were duplicate submissions, and one of which was a two-part submission by one commenter discussing the same issue. In effect, 52 different documents were received. Commenters raised some concerns about the proposed changes and recommended changes for improvement, but overall expressed support of CBP's effort to modernize customs broker regulations, and welcomed the changes being made to reflect the reality of a rapidly changing world of international trade for both brokers and CBP. Commenters expressed appreciation for CBP's recognizing the broker community's needs to have clarity as to their duties and minimal regulatory burdens to target the essential needs to protect the revenue and enforce the relevant laws. The commenters further acknowledged CBP's efforts in providing the least bureaucratic framework over the years and collaborating with the broker community, including the latest effort in modernizing some of the outdated reporting requirements. For instance, one commenter welcomed the addition of specific language to cover convictions of committing or conspiring to commit an act of terrorism in § 111.53 as a ground for suspension or revocation of a license or permit. Commenters also supported the proposed removal of the

[2] Pursuant to 19 CFR 143.32(b), an authorized EDI is defined as any established mechanism approved by the Commissioner of CBP through which information can be transferred electronically. In addition to ACE, which is the system through which the trade community reports imports and exports, and the government determines admissibility, the ACE Secure Data Portal (ACE Portal), the electronic Customs and Border Protection (eCBP) portal and the Automated Broker Interface (ABI) are examples of such authorized EDIs. The ACE Portal is a web-based entry point for ACE to connect CBP, trade representatives and government agencies who are involved in importing goods into the United States. The eCBP portal, developed as part of CBP's Revenue Modernization (Rev Mod) program, is currently the access point for a new system for electronic payments of licensed customs broker fees. When fully implemented, the eCBP portal will allow for easy collection of many types of duties, taxes, and fees. Lastly, ABI is a functionality that allows entry filers to transmit immediate delivery, entry and entry summary data electronically to, and receive electronic messaging from, CBP and receive transmissions from ACE or any other CBP-authorized EDI system. *See* 19 CFR 143.32(a). It is a voluntary program available to brokers, importers, carriers, port authorities and independent service centers. For additional information regarding the transmission of entry summary and cargo release data via an EDI, *see* the CBP and Trade Automated Interface Requirements (CATAIR), specifically the chapter entitled Entry Summary Create/Update, which is available online at *https://www.cbp.gov/document/technical-documentation/entry-summary-createupdate-catair* and the chapter entitled Cargo Release, which is available online at *https://www.cbp.gov/document/guidance/ace-catair-cargo-release-chapter.*

[3] Information regarding the customs broker license exam, especially the remotely-proctored exam, may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers/license-examination-notice-examination.*

requirement to submit an answer in duplicate to the charges against the broker in § 111.62(e) as this change aligns with the current electronic business environment.

CBP recognizes a licensed broker's vital role in the international trade environment and in interactions with clients and CBP. A broker is tasked with the responsibility to exercise the highest level of accuracy and knowledge when filing entries, navigate the complex nature of international trade, ensure that the clients' needs are met timely and accurately, and facilitate the movement of legitimate cargo. Brokers need to be knowledgeable about the governing rules and regulations as well as any changes, maintain a good relationship with clients, and provide a high-quality service to their clients. CBP determined that it was important to modernize customs broker regulations and clarify existing regulations since the creation of Centers and the increasingly automated environment have changed the way customs business is conducted. Due to those changes, a broker may need to make contact with CBP personnel in parts of the customs territory that are not within the broker's district. The elimination of district permits and expansion of the scope of activities allowed under a national permit will provide brokers with the flexibility to easily conduct customs business anywhere within the customs territory of the United States. In addition, the elimination of district permits also eliminates the burden on brokers of maintaining permits for multiple districts or appointing subagents in districts in which they do not have permits. This change also provides cost savings for CBP when it comes to the processing of license and permit applications.

The changes made to the broker regulations will increase efficiency and flexibility as submission requirements are updated, additional electronic submission options are provided, and electronic communication options for certain submissions are added. This update of the regulations will further increase a broker's professionalism due to the addition of grounds to justify the denial of license in § 111.16, the addition of required information or arguments in support of an application during review of the denial of the application in § 111.19, and a new reporting requirement in § 111.30 for inactive brokers.

The submissions received in response to the NPRM contained comments on multiple topics regarding the proposed regulations. The public comments, together with CBP's analysis, were grouped by topic within a subpart of part 111, and are set forth below:

Subpart A. General Provisions.

Comment: CBP proposed adding a new term ''Designated Center'' for the submission of applications for a broker's license by an individual, partnership, association, or corporation. Several commenters expressed concern with the use of this term as the structure of Centers is not necessarily conducive to broker management, nor were the Centers designed to include brokers filing entries on a broad range of commodities. The commenters requested that CBP maintain a dedicated Broker Management Division or unit with offices reporting to CBP Headquarters, including full-time, dedicated personnel on a national level, with each broker assigned to one team or office for management purposes (as suggested by Commercial Customs Operations Advisory Committee (COAC) recommendation No. 10048 (April 27, 2016)). The commenters reasoned that this approach would ensure a uniform and efficient process for both CBP and brokers, and thus proposed to change the term ''Designated Center'' to ''Designated Broker Management Office'' to better reflect the structure that is more suitable for broker matters. Ideally, according to some commenters, CBP would create a new Center for broker licensing and management issues only or expand the broker management division in CBP's Office of Trade.

Response: CBP appreciates the opportunity to clarify that brokers will not be assigned to a specific Center, and CBP will not create a Center solely for broker licensing and management issues. Brokers operate within a unique business model as their clientele have different Center interests, thus, an assignment to one specific Center would not be beneficial to brokers' business filings concerning different commodities. In addition, to prevent any disruption of dealings with brokers in case of personnel changes or workload distributions within Centers, CBP does not see a benefit to assigning a broker to a particular Center. Broker management officers (BMOs), who are Center personnel at 41 port locations throughout the U.S. customs territory, will handle the administration of all activities conducted under a broker's license and permit. Prior to the creation of Centers, these BMOs were assigned to a port and managed broker applications and other submissions. With the transition of certain trade functions from ports to Centers, the assignment of BMOs transitioned as well. Thus, Center personnel will process new applications for licenses and permits and will also manage submissions provided by already-licensed brokers. A current broker will continue to contact the BMO at a location where the broker's license was issued. After the effective date of this final rule, a BMO will also process any matters relating to a national permit of a broker at that same location. A district permit holder whose permit is transitioned to a national permit will continue to contact the BMO at the location where the broker's license was issued. Any new applicant for a permit or license should contact a BMO in the geographic area where the applicant is located and/or intends to do customs business. CBP has published a chart with all of the locations and contact information for BMOs on its website.[4]

In order to better describe CBP's responsibilities for broker licensing and management issues, CBP changed the proposed term ''Designated Center'' to ''Processing Center'' in this final rule. A ''Processing Center'' means the broker management operations of a Center that processes applications for a license under § 111.12(a) and applications for a national permit under § 111.19(b) for an individual, partnership, association, or corporation, as well as submissions required in part 111 by already-licensed brokers.[5] The revision of the proposed language clarifies that brokers are not assigned to a specific Center, and that Center personnel at any of the 41 port locations may process applications and submissions, depending on the broker's filings and location. All references to ''Designated Center'' in the proposed regulations are updated in this final rule to reference ''Processing Center.'' In addition, CBP removed any references to ''director of'' a Center throughout part 111 to simply state ''Processing Center'', keeping the regulatory language more general. This change aligns with the statutory language in 19 U.S.C. 1641 that references ''employees of U.S. Customs and Border Protection'' or ''duly accredited officers'' without pointing out a specific title or position within CBP. This change also provides the agency more flexibility in processing

[4] The BMO contact information for the 41 port locations may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers* by clicking on the tab titled ''Broker Management Officer (BMO) Contact Information''.

[5] In this document, CBP uses ''Processing Center'' in quotes to denote a replacement of the proposed term ''Designated Center''; when the words ''processing Center'' without quotation marks are used, CBP is referring to the Center of Excellence and Expertise that is actually performing a processing function.

brokers' applications and submissions, without any changes for the brokers.

Comment: Two commenters asked for clarification as to how brokers would be assigned to a Center, including contact information for the designated Center. Another commenter sought further clarification on the process that CBP will use to assign brokers with existing national permits to a specific Center. One commenter suggested that a primary point of contact be assigned for each of the ten (10) Centers.

Commenters also asked that CBP have a reporting structure in place to allow for an escalation process so brokers could properly address a designated broker management office. Some commenters argued that a broker should also have the opportunity to request a specific Center to align with the broker's business model familiar with the commodities, transactions and types of entry processes by the broker. Additionally, some commenters suggested that there should be an avenue for a broker to request re-assignment to a specific Center.

Response: As there will be no designated Centers, there will be no assignment to a Center by CBP, and brokers will not have to request an assignment to a specific Center or a re-assignment to another Center. As mentioned above, BMOs who are currently managing broker submissions and questions will continue to do so. If a broker is unsatisfied with the handling of a matter by a BMO, a broker may escalate an issue to the supervisor of the BMO. The names of the Assistant Center Directors, who may be contacted for purposes of escalation, are listed on the contact information chart mentioned above.

Comment: One commenter suggested that ''certain functions,'' as mentioned in the NPRM, that were previously performed by the port director and transitioned to the Center director, should be clarified in the ''Broker Management Handbook'' and the ''Centers of Excellence and Expertise Trade Process Document'' to provide clear policy direction to CBP and the trade community in order to assist with a smooth transition to a Center. The commenter further stated that CBP must consider a full transition of all brokers to a designated Center versus a staged approach. The commenter recommended further that the Centers prepare for the transition and implement their oversight at the same time, ensuring a fair and consistent treatment of brokers. The commenter also strongly recommended that CBP consider a broker working group which would provide feedback to the Centers on operational trade and post-summary functions, mirroring the current working group in place today.

Response: The ''Centers of Excellence and Expertise Trade Process Document'' already includes most of the information regarding the transition from ports to Centers. Any updates made with this final rule will be communicated to the broker community on CBP's website. Additionally, CBP has created a guidance document containing operational information regarding the regulatory changes, as well as general information on various broker matters. This document will be published concurrently with the publication of this final rule. In time for the publication of this final rule, CBP will issue additional specific operational guidance regarding certain regulatory changes on CBP's website.

As mentioned above, current license and permit holders will continue to contact the BMO who has been processing brokers' licensing and permitting matters. Center personnel are ready and able to continue to do so. To ensure uniformity among Center personnel and efficiency in handling broker matters, BMOs at the various locations will continue to receive guidance from CBP Headquarters regarding the implementation of any updates or changes to current processes. CBP will continue to exercise oversight over the BMO locations to ensure that BMOs apply the same standards, and process broker submissions and respond to questions from brokers consistently and uniformly.

Regarding the request for CBP to consider a working group, CBP will continue general broker outreach and keep the broker community informed of any changes through various channels, such as Cargo System Messaging Service (CSMS) messages, webinars, and postings on CBP's website. Accordingly, a specific working group is not needed at this time.

Comment: Another commenter acknowledged the importance of building a strong connection between the Centers and brokers but stressed that it is crucial that CBP avoid severing the relationship between brokers and port directors entirely. The commenter stated that a strong relationship is key in the efficient facilitation of cargo and merchandise. As there is no proposed regulatory language regarding any administrative actions that include port directors, the commenter asked that CBP clarify this point in the final rule.

Response: CBP recognizes the importance of the relationship between the brokers and port directors and assures the trade community that port directors will continue to be involved. Port directors or their designees will present the brokers' licenses in locations where there is no Center director, or Assistant Center director, and CBP will ensure that the port and Center management maintain open communications regarding local broker issues. However, ultimately, Center directors maintain the final authority over any decisions pertaining to broker issues. CBP does not believe that the regulation needs to be amended.

Comment: One commenter agreed that reliable channels of communication between CBP and the brokers are essential but disagreed with the requirement to designate a primary location pursuant to the proposed definition of ''broker's office of record'' in § 111.1 for overseeing the administration of the part 111 provisions. The commenter proposed to revise the definition to include language which clarifies that the office of record is the primary location that *acts as the point of contact* (emphasis added) for the administration of the provisions of part 111 because businesses may not always have one location that oversees all the activities conducted under a national permit.

Another commenter suggested that CBP utilize electronic reporting systems as the method of communication rather than designating a specific location. The commenter argued that flexibility of administration and effective communication are not dependent on location.

Response: CBP disagrees with the first commenter's request to modify the definition of the broker's office of record. CBP determined that the proposed definition should be adopted because the primary office that oversees the administration of all activities conducted under a national permit may be different from the primary office that acts as the point of contact. The addition of the words suggested by the commenter would change CBP's intended meaning of this definition. As district offices will no longer exist, CBP needs to not only know the point of contact for the administration of the part 111 regulations, but also the location that has been identified as the office overseeing the transactions occurring under the national permit. This may not be the only location through which broker activities occur, but it would be the primary location to which CBP would send correspondence and where CBP would conduct a physical inspection pursuant to § 111.27. Moreover, the primary location is also the address that is provided in the application for a national permit and

must be kept up to date for so long as a broker holds a license and permit.

In response to the second commenter, CBP is already utilizing electronic reporting tools, such as ACE and the eCBP portal, and is using email when corresponding with a broker. The eCBP portal is CBP's new payment and submission system, streamlining the payment and submission process for broker examination applications and triennial status reports. Additional reporting capabilities for brokers will follow, as discussed in more detail below in Section IV. Despite the availability of the above-mentioned electronic reporting tools, a broker has the responsibility to establish an actual location for purposes of visits and audits but is free to determine where to establish his or her office(s) within the U.S. customs territory. CBP understands that flexibility is needed when it comes to establishing a primary office, especially during the COVID–19 pandemic, which caused many brokers to work from home. Thus, CBP appreciates the opportunity to clarify that the primary location does not have to be an office location but can be the broker's home as long as there is a physical location at which the broker can be reached.

Comment: One commenter suggested that CBP make a small change in the definition of ''permit'' in § 111.1 by replacing the word ''any'' with ''a'' to clarify that CBP requires only one permit per business, even if a business operates a drawback business and a consulting business, or an entry business.

Response: CBP agrees with the commenter. In the NPRM, CBP already proposed this change, and now finalized this change to clarify that there is only one national permit that a broker needs to hold in order to conduct customs business within the U.S. customs territory.

Comment: Several commenters expressed support for the elimination of the district permits as it reflects a shift toward modern practice of working with the Centers and filing entries in ACE. However, one commenter requested clarification of CBP's statements in the preamble of the NPRM that the granting of a national permit to current district permit holders would be automatic, but that CBP would, at the same time, provide guidance regarding the permit transition upon the adoption of the final regulations. The commenter stated that the need to provide further instructions as to the transition did not seem to make the transition ''automatic''. In addition, the commenter asked whether there would be a grace period to ensure an uninterrupted and smooth transition. Lastly, the commenter also stated that the grandfathering rules should be included in the regulation, and not merely in the preamble, as they are critical to a smooth transition.

Response: CBP appreciates the opportunity to clarify that the transition for a district permit holder to a national permit will be automatic, without any actions to be taken by the brokers. CBP will use the ACE data that is on file for each district permit holder who or which does not already have a national permit and automatically create a national permit for each current district permit holder. In addition, to ensure an uninterrupted transition, active district permits will not be cancelled until all national permits have been issued. District permit holders will be able to continue to conduct customs business without any interruptions or delays. CBP will notify current district permit holders by email (if an email address is on file with CBP) that a new national permit will be issued; otherwise, CBP will notify by mail at the permit holder's business location on file. The transition of permits will occur between the date of publication of this final rule and the date of effectiveness of the final regulations, which will be 60 days after publication. In addition to the notification of the permit holders by email or mail, CBP will issue a CSMS message informing district permit holders of the transition to national permits.

With regard to the transition of the district permits to national permits, it is a one-time event and, thus, there is no need for including the transition to national permits in the regulations. Any new applicants for a national permit will apply pursuant to the final regulations.

Comment: Three commenters expressed disagreement with CBP's proposal to eliminate the district permits. One commenter argued that eliminating the district permits would drastically affect the broker's ability to provide optimum responsible supervision and control over brokerage operations. Brokers should at least have one permit holder per district. The commenter explained that in some cases, a face-to face meeting with a national permit holder might be impossible, so the district permit holder would be able to have such a meeting. It would also be more convenient and more time efficient to resolve questions quickly with a district permit holder who is located closer to a CBP office. In addition, a local expert is more familiar with the port nuances, staff, and different hours of operations, to name a few. With the proposed elimination, a district permit holder might consider not renewing the individual license, which could lead to the elimination of hundreds, if not thousands, of licenses, which in a time when import volumes are increasing seems unreasonable.

Response: CBP understands that the transition from a district permit system requiring multiple local permits to a single national permit may raise new or unique concerns for customs brokers in ensuring proper exercise of responsible supervision and control over the customs business they conduct. However, CBP disagrees with the commenter that responsible supervision and control will be more difficult to maintain because customs brokers will no longer need to expend time and resources monitoring several district offices. Brokers may consolidate operations and focus on a single nationally permitted office to ensure that optimal responsible supervision and control is maintained. Under the national permit system, customs brokers may also choose to continue to operate locally by liaising with the port where entries are filed and imports are released from customs custody, while conducting customs business and engaging with clients at a national level. Regardless of whether a broker decides to eliminate offices or personnel in a particular location or continues to conduct customs business in its current locations, brokers remain responsible for the customs business they perform and over which they have supervision no matter where that is occurring under the purview of their license. Existing responsibilities of a broker do not disappear simply because district permits are eliminated. In addition, prior to the publication of the NPRM, CBP had conducted outreach to the broker community through webinars, port meetings, and broker association meetings to solicit feedback on brokerage needs in the modern business environment. COAC had recommended that CBP enable brokers to operate through a single, national permit, in light of the changes to CBP's operational structure and growing technological capabilities. CBP incorporated the broker community's feedback and COAC's recommendation in the final regulations, reflecting the modern technological and business environment of customs brokers, and highlighting the importance of electronic process advancements to communicate with local ports, and to submit broker information and entry filings.

It is CBP's goal to ensure that the communication between brokers and CBP (ports and Centers) is easy and

efficient. CBP always strives to improve the dialogue with brokers, as exemplified by CBP's ongoing effort to utilize electronic tools for reporting and communicating. If in-person meetings are not possible due to timing or distance, meetings can be held via video conferencing to quickly and efficiently resolve any questions or concerns. A current district permit holder who does not hold a national permit prior to the transition to national permits will possibly have to familiarize himself or herself with the nuances of a particular port, hours of operation and particular staff. However, the benefits gained from the elimination of district permits and the transition to one national permit will outweigh the initial inconveniences that some brokers may experience.

Comment: One commenter argued that because customs business is generally conducted in connection with logistics and handling of cargo, both customs business and logistics would become more consolidated outside the ports without any consideration for the local ports' interests, including revenue in connection with those services. In addition, responsible supervision and control of customs business would change and prove much more difficult in a remote setting. The commenter is of the opinion that if a broker wishes to perform customs business in a certain physical location, he or she should be required to have a permit issued by that local port.

Response: CBP does not agree with the commenter's concern. When it comes to logistics and cargo handling, local ports will still be involved. Revenue collection will continue to be carried out at the ports. Supervision over employees who are not local will continue to be exercised, especially in light of the updated responsible supervision and control standards, adding, among other factors, the requirement that brokerage firms employ a sufficient number of licensed brokers to satisfy the supervision standard, and the requirement for new permit holders to have a supervision plan in place to ensure that reasonable supervision and control is exercised over the customs business conducted under a national permit. In response to this comment, CBP further wishes to emphasize the importance of the accuracy and completeness of broker submissions to ensure that CBP has sufficient information available to exercise its oversight over broker operations.

National permits cover local ports across the U.S. customs territory; thus, a broker may still perform customs business in a specific location if the broker so chooses. The national permit allows customs business within the entire U.S. customs territory and for brokers to perform any activities allowed under the permit, thus providing a broker with the choice of where to perform customs business and lessening the burden on a broker to work within the scope of a district permit for a geographic area. These regulatory changes will benefit the customs broker community without CBP's losing oversight over broker entities responsible for supervising their employees.

Comment: Several commenters recommended that CBP define ''customs business'' in § 111.3 and explain when a license is required and when it is not. One commenter stated that the term ''customs business'' should be redefined to reflect the commercial activities and the roles the individual parties play in a transaction. The commenter explained that customs business can mean something different for different brokers, depending on what role the broker plays in a transaction, from the mere gathering of data for submission to assisting an importer with the entire importation process.

Response: CBP disagrees with the commenters that a revised definition of customs business is needed, as the applicable statute and regulations already provide extensive definitions. Section 1641(a)(2) of title 19 of the United States Code defines ''customs business'' as those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collection by CBP upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. ''Customs business'' also includes the preparation, and activities relating to the preparation, of documents or forms, the electronic transmission of such documents, invoices, bills, or parts thereof, which are intended to be filed with CBP in furtherance of such activities. The regulatory definition in § 111.1 mirrors the statutory definition in section 1641(a)(2), except for the additional explanation that ''corporate compliance activity'' is not considered customs business. In addition, CBP issued a Headquarters Ruling Letter (Headquarters ruling) H272798 (January 26, 2017), which provided an in-depth analysis of what customs business entails in several different scenarios provided by the ruling requester.[6] The ruling serves as guidance to other brokers who encounter the same scenarios. CBP does not believe that further explanations or clarifications are needed.

The commenter correctly pointed out that the role of a broker in a specific transaction depends on the broker's involvement and knowledge of the facts, thus, decisions as to what constitutes customs business are made in a case-by-case analysis to take into account the specific facts and circumstances. If a broker is unsure whether a certain transaction is considered customs business, he or she can request a ruling pursuant to 19 CFR 177.1.

Comment: Several commenters raised concerns with respect to the interaction of § 111.3, concerning customs business, and § 111.2(a)(2) concerning transactions for which a customs broker's license is not required. The commenters stated that the proposed § 111.3 only mentions the customs broker's location and point of contact, along with a reference to § 111.1 for the definition of customs business. Meanwhile, § 111.2(a)(2) lists transactions for which a license is not required, and thus, which fall outside of the customs business definition. The commenters suggested that, in order to avoid any confusion, CBP either state in § 111.2(a)(2) that the listed transactions are not considered customs business or list the specific transactions in § 111.3 and clarify that because they do not constitute customs business, they do not require a license. One commenter asserted that CBP should make it clear in § 111.3 that customs business must be conducted within the U.S. customs territory, as opposed to the transactions listed in § 111.2(a)(2), which may be conducted outside of the U.S. customs territory.

Response: CBP disagrees with the commenters' suggestion to cross-reference the two mentioned regulations. CBP believes that the regulations, as written, make clear that a customs broker's license is required to conduct customs business, and that customs business must be conducted within the U.S. customs territory. Whether a transaction that is not specifically mentioned in the statutory definition of section 1641(a)(2) or in the regulatory definition in § 111.1 is considered customs business can be determined by requesting a ruling, as mentioned above. CBP cannot exhaustively list all transactions that are

[6] The cited Headquarters ruling, and other Headquarters rulings mentioned in this final rule, may be viewed in CBP's searchable database, the Customs Rulings Online Search System (CROSS), which may be found on CBP's website at *https://rulings.cbp.gov/home.*

(or are not) covered by the customs business definition. A determination as to whether a specific activity is considered customs business is based on a fact-specific analysis, which is better addressed in a CBP ruling letter than a regulation.

Comment: Two commenters expressed disagreement with the requirement in § 111.3(b) for a broker's designation of a knowledgeable point of contact to be available to CBP ''outside of normal operating hours''. One commenter argued that this requirement goes beyond the requirements set forth in 19 U.S.C. 1641. Another commenter argued that this requirement should only pertain to cargo security matters, such as Customs Trade Partnership Against Terrorism (CTPAT) matters, and CBP should clarify that in the regulation.

Response: CBP disagrees with the commenters. Due to the shift from multiple district permits (and multiple points of contact) to one national permit (and one point of contact), the one individual who is a knowledgeable point of contact for a broker needs to be available to cover all the ports of entry where the brokerage enters goods, which could mean coverage beyond normal operating hours of any one port of entry. Although CBP does not require 24-hour availability, CBP does need one point of contact to cover the operating hours across all time zones to address situations where a port may need to contact an importer regarding the release of goods. While questions relating to the CTPAT program may certainly occur outside of normal operating hours, those are not the only situations that are covered.

Comment: One commenter stated that § 111.3(a) does not address the use of offshore resources to assist importers and/or licensed brokers with the classification process under the Harmonized Tariff Schedule of the United States (HTSUS). The commenter requested clarification on three scenarios: (1) whether § 111.3(a) prohibits the classification of goods either at the four- or six-digit HTSUS levels by unlicensed offshore resources located outside of the customs territory, if the HTSUS codes will be used for the purpose of making customs entry globally, including in the United States (and whether the answer would be different if the offshore resources were employees of a U.S. importer or U.S. licensed broker); (2) whether § 111.3(a) prohibits the classification of goods either at the eight- or ten-digit HTSUS levels by unlicensed offshore resources/persons located outside of the customs territory if a U.S. importer or U.S. licensed broker only uses this classification as a resource to determine the classification of goods consistent with Headquarters ruling H272798; [7] and, (3) whether a U.S. licensed broker is permitted to use acceptable sampling methods to review the classification determinations undertaken by its employees (or unlicensed offshore resources if scenarios (1) or (2) above are permissible) to assist with satisfying the ''responsible supervision and control'' and ''due diligence'' standards in §§ 111.28(a) and 111.39(b).

With regard to the third scenario, the commenter noted that the use of statistical sampling methods is explicitly codified in the customs regulations, for instance, in 19 CFR 162.74(j), with respect to prior disclosures, and 19 CFR 163.11(c) with respect to customs audits. Thus, the regulations in part 111 would benefit from the inclusion of specific guidance regarding the acceptability of statistical sampling methods for the purposes of satisfying the responsible supervision and control standard of § 111.28(a) and the ''due diligence'' standard of § 111.39(b). The commenter further suggested to add the adequacy of a satisfying technique as a 16th factor for responsible supervision and control in § 111.28(a) that CBP may consider, and the final rule should also include specific guidance addressing the sampling methods that would be acceptable to CBP.

Response: CBP has clarified in Headquarters ruling H045695 (October 15, 2010) that classification at the six-digit HTSUS level does not constitute customs business. In addition, classification at a level lower than six digits, such as the four-digit HTSUS level, is not considered customs business either. Even though CBP neither regulates non-customs business, nor whether a domestic importing company uses foreign staff to conduct non-customs business, U.S. licensed brokers are required to exercise special caution to ensure that any unlicensed contractor or employee operating on behalf of the brokerage abroad does not perform any tasks that may cross the line into conducting customs business. *See* Headquarters ruling H302355 (January 29, 2019).

Regarding scenario (2), generally, classification determinations at the eight- and ten-digit HTSUS levels are considered customs business, and customs business must be conducted by a licensed broker. The term ''resources'' used by the commenter is vague and CBP is not able to fully respond to this comment as to whether such advice would constitute impermissible engagement in customs business. The commenter should seek a ruling to determine whether the specific proposal is permissible. However, in Headquarters ruling H272798 (January 27, 2018), CBP cautioned a requester, citing Headquarters ruling H115248 (August 28, 2011), that ''even when there is a 'possibility' that classification information will end up on an entry, a broker's license is required 'to gather classification data which will be reflected on the entry.' ''

To respond to the commenter's third scenario, in general, the use of sampling methods is an adequate technique, but it depends on the circumstances of a particular situation whether a specific sampling technique is sufficient to ensure responsible supervision and control pursuant to § 111.28(a). The due diligence standard in revised paragraph (b) of § 111.39 requires that a broker ascertain the correctness of any information which the broker imparts to a client, thus, certain sampling techniques may or may not be appropriate to exercise due diligence, depending on the facts of the specific situation.

The commenter points to 19 CFR 162.74(j), which states that a private party may use statistical sampling to ''disclose the circumstances of a violation'' and for calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, provided that the statistical sampling satisfies the criteria in 19 CFR 163.11(c)(3). Section 163.11 generally sets forth the ''audit procedures'' for CBP auditors pursuant to 19 U.S.C. 1509(b). CBP believes that those cited regulations are not geared towards broker audits; the notable difference being that the sampling results are submitted to CBP in a prior disclosure, whereas the results of a broker's own compliance activities (*e.g.,* review of classification determinations) are not submitted to CBP. CBP does not have any obligation to instruct brokers on how to conduct their own audits, and, thus, CBP does not agree that the use of adequate sampling methods be added as a 16th factor in paragraph § 111.28(a), or

[7] Headquarters ruling H272798 held that a company would not be unlawfully engaged in the conduct of ''customs business'' by creating a tariff classification database to be used by a licensed broker in preparing to file an entry so long as the company issues a disclaimer cautioning clients that the specific tariff classification to be filed for an entry of merchandise must be determined by a licensed customs broker. The disclaimer must also caution that the opinion of the broker takes priority over the proposed classification in the database. Creation of a classification database is permissible only if the database is used as a resource and will not direct a client or a licensed customs broker in the preparation or filing of a specific entry.

that CBP provide additional guidance as to adequate sampling methods.

Comment: One commenter stated that CBP should confirm that § 111.3(a) does not require that any activity falling within the definition of ''corporate compliance activity'' in § 111.1, including potential classification support by a related business entity, be conducted within the U.S. customs territory.

Response: The last sentence of the ''customs business'' definition in § 111.1 specifically states that ''corporate compliance activity'' is not considered customs business. Section 111.3(a) states that customs business must be conducted within the U.S. customs territory, meaning non-customs business need not be conducted within the U.S. customs territory. CBP believes that the regulations are clear and additional clarification is not needed.

Subpart B—Procedure To Obtain License or Permit

Comment: Several commenters expressed support for the proposed changes in § 111.12 as they eliminate certain outdated requirements for broker license applicants. However, one commenter recommended changing the requirement under § 111.12(a) to provide documentation regarding the applicant's authority to use a trade or fictitious name in one or more states in which the applicant plans to operate. The commenter argued that under a port-based system, where ports lacked access to a centralized database and asked for documentation regarding the applicant's authority to use a trade or fictitious name in a state other than the applicant's home state, that was a reasonable request; however, in an automated world with a single license and national permit and where the broker's filer code is linked to the broker's information in ACE, this is no longer practical or necessary. Other than with respect to the license and the broker's office of record state, documentation showing that a broker is operating in additional states purportedly has no impact on CBP's statutory or regulatory authority over brokers. Therefore, the commenter proposed to delete the advance notice requirement with respect to trade names both with respect to licenses and permits.

Response: CBP disagrees with the commenter. If an applicant proposes to operate under a trade or fictitious name in one or more states, evidence of the applicant's authority to use the name in each of those states must accompany the application. CBP needs to know in which states the applicant is doing customs business, along with the name associated with the applicant's business. If the address provided by the broker for the national permit office is in a different state from the address provided for the national license office, then CBP requires documentation for both the license and permit. If they are one and the same and the broker only operates in one state, then only documentation for that state is required.

Comment: One commenter raised the concern that the CBP examination results letters do not always notify examinees of their right to appeal the examination results or mention the 60-day deadline to file an appeal, pursuant to paragraphs (e) and (f) of § 111.13. The commenter pointed out that the preamble of the NPRM states that examinees who wish to appeal the examination results should submit those requests in accordance with the instructions provided in the results letter. The commenter asked that CBP make sure that the results letters always notify applicants of the reasons for the denial and the right to appeal within 60 days.

The commenter also asked CBP to clarify in the regulations that applicants may be represented in their appeals by an attorney or other agents. The commenter stated that CBP recently eliminated language that appeals must be written in the applicant's own words; however, there is still confusion as to whether an applicant may contract with an attorney or others to assist with the appeal.

Response: Regarding the commenter's first point, CBP will continue to ensure that the examination results letters contain information as to the examinee's right to file an appeal, along with instructions on how to file, and the 60-day deadline to submit an appeal. The results letters contain the examinee's score, as well as the minimum passing score. The results letters for the October 2020 examination also included an electronic filing option for appeals, which was proposed in the NPRM, and has been included in the final regulation. Additionally, examinees may find instructions on how to appeal the exam results on CBP's website.[8]

With respect to the ''own words'' language that the commenter refers to, results letters still include language that states that the examinee has to submit a compelling argument (''in your own words'') explaining why the examinee's answer is better than CBP's official answer, or why the appealed question has no possible correct answer. CBP continues to use this language in the results letters because it is expected that an applicant has the knowledge to draft the appeal document and provide arguments that support the appeal for a particular question. The focus of the appeal is of course on the articulation of why the answer provided by the examinee on the exam should be given credit. The written examination is a test of the applicant's knowledge of the pertinent material, not someone else's knowledge. A third person should not be the one to write the appeal on behalf of the examinee; CBP understands, however, that in some instances a third person may assist with formulating and/or submitting the appeal.

Comment: One commenter expressed support of the scope expansion for the background investigation in § 111.14 to include the financial responsibility of an applicant, and any association with any individuals or groups that may present a risk to the security or to the revenue collection of the United States, but also noted that the facts to be investigated under § 111.14 should be included in the requirements to apply for a license in § 111.12.

Response: CBP disagrees with the commenter's suggestion to include the non-exhaustive list of factors used in the background investigation pursuant to § 111.14 as requirements for the application for a license. Section 111.12 describes the formalities of the application process, which includes the submission of CBP Form 3124 (Application for Customs Broker License or Permit), along with the application fee, and any additional required documentation pursuant to paragraph (a). In contrast, § 111.14 lists facts and circumstances that CBP will ascertain during the background investigation to determine whether an applicant is qualified to hold a license. The background investigation is a separate step in the application process that follows the submission of the application and fee, and the scope of each investigation depends on the facts and circumstances presented by the applicant and of which CBP becomes aware during its investigation. Including all the considerations that are part of CBP's background investigation as part of the general application process would confuse the requirements for the basic application process with the requirements to qualify for a license after a thorough investigation of more information by CBP.

Comment: One commenter objected to the addition of new grounds to justify the denial of a license in § 111.16(b). The commenter wrote that no due

[8] Instructions on how to appeal may be found online at *https://www.cbp.gov/trade/programs-administration/customs-brokers/how-appeal.*

process opportunity is provided to challenge CBP's denial of a license.

Response: CBP disagrees with the commenter. CBP always provides a reason in the denial notice as to why the license was not issued; decisions are not made arbitrarily. Section 111.17 further provides the applicant the opportunity to have the denial of the application reviewed, and upon the affirmation of the denial of the license, the applicant has a second opportunity to request an additional review by the Executive Assistant Commissioner, Office of Trade, and a third opportunity to appeal the decision to the Court of International Trade. Revised § 111.17(a) provides greater flexibility to the applicant and CBP by allowing the applicant to file additional information or arguments in support of the license application, and request to appear in person, by telephone, or other acceptable means of communication by which an applicant may provide further information to CBP. These avenues provide sufficient notice and due process to an applicant under the regulations.

Comment: Several commenters expressed concern with the proposed term ''financial responsibility'' in § 111.16(b)(3) and argued that it should not be a factor in the determination whether a license should be denied, especially during the COVID–19 pandemic. One commenter argued that CBP could conceivably deny a license based on a blemish on an applicant's credit history, which would be unfair. One commenter asked CBP to provide a clear definition of ''pertinent facts'' in § 111.16(b)(5) if CBP wished to penalize an applicant for the omission of pertinent facts in the application or interview. Commenters also expressed confusion as to what constitutes ''detrimental'' commercial transactions in § 111.16(b)(6), especially to whom the transactions have to be detrimental, and whether the term could include poor business decisions that are unrelated to a brokerage or customs business but are detrimental to the individual making the decision. One commenter expressed great concern with the grounds for denial of a license in paragraph § 111.16(b)(8) that includes ''any other relevant information uncovered over the course of the background investigation'' as it is over-reaching, which the commenter equated to CBP's being able to deny a license for any reason.

Response: CBP appreciates the opportunity to clarify that the financial responsibility of a license applicant has always been an expectation when determining an applicant's qualification to hold a license, as part of the business integrity requirement in § 111.16(b)(3). A business integrity evaluation includes the provision of financial reports, which reflect upon the financial responsibility of an individual. By expressly including this factor in the final regulation, CBP confirms that the financial responsibility of an applicant is part of the determination whether a license is issued or denied. Nonetheless, CBP has always taken into account the personal circumstances of an applicant when making a decision. It has been CBP's practice to follow up with the applicant with any questions or concerns that arise during the review of the provided information and request additional information and/or request information regarding an applicant's plan to mitigate any debt or other financial difficulties, before making the determination to deny a license.

''Pertinent facts'' in § 111.16(b)(5) are those facts that are requested on CBP Form 3124 when applying for a license, the facts gathered during the interview with the applicant, and during the background investigation. These are the same pertinent facts about which an applicant should not make a willful misstatement under the existing regulations. Those same facts should not be omitted, as the omission of those may be just as significant as a misstatement of those facts. The addition of the word ''detrimental'' along with the word ''unfair'' in § 111.16(b)(6) better reflects CBP's intent of including not only unfair transactions but also those that would be detrimental, *e.g.,* those that may cause financial harm, to a client, CBP, or any other individual or entity implicated in a commercial transaction. Whether an applicant's conduct is deemed detrimental is determined on a case-by-case basis, considering the circumstances surrounding the commercial transaction.

Lastly, CBP included a catch-all provision in § 111.16(b)(8) to account for any other relevant information that CBP uncovers over the course of the investigation that may influence CBP's decision to accept or deny a license application, but that is not mentioned in the non-exhaustive list in § 111.16(b)(1) through (7). Each application is reviewed individually, and because factors (1) through (7) do not cover every aspect that could lead to a denial of a license, a provision that covers any other relevant information is necessary to assist with CBP's determination.

Comment: One commenter stated that the requirement to provide a copy of the documentation issued by a State or local government that establishes the legal status and reserves the business name of the entity pursuant to § 111.19(b)(3) is already on file with respect to the license. Given that there is now unity between the scope of the license and permit, this requirement appears redundant. Moreover, another commenter argued that there is no regulatory reason for other offices covered by the national permit to supply such information when the broker's office of record is provided. Therefore, the commenter proposed to delete this requirement.

Response: While it is true that a license applicant who proposes to operate under a trade or fictitious name in one or more states has to provide evidence of the applicant's authority to use the name in each of those states pursuant to § 111.12(a), and that information is already in CBP's records, it is possible that a broker has an office in one state under which the license application was filed, but then later applies for a national permit and provides a different office in a different state with a different trade or fictitious name. In this scenario, CBP would not know about a broker's second office if the broker did not provide this information. Due to the elimination of district permits and a district permit holder's responsibility to provide information for the local office, CBP needs to ensure that all the information regarding the broker's various offices, which could be operating in different states, potentially under different names, is provided to CBP. Having this information available enables CBP to exercise oversight over a broker's customs business and verify whether the broker is exercising responsible supervision and control in each of the broker's customs business locations. Thus, CBP disagrees with the elimination of the requirement in § 111.19(b)(3).

Comment: More than one commenter maintained that the proposed requirement for a supervision plan in § 111.19(b)(8) is vague and CBP does not describe what such a plan would include. Therefore, CBP should provide at least minimum criteria for brokers to be able to determine what such a plan should look like. Another commenter stated that it is not clear from the proposed regulation whether a current national permit holder is required to submit a supervision plan, and whether a current national permit holder is subject to cancellation of the permit if CBP deems the supervision plan unacceptable, or whether there is a grace period for the broker to adjust the plan. The commenter also noted that the NPRM did not state whether single port or single office brokers are also subject to filing a supervision plan even though

effectively they are operating as though they had a single port permit.

Response: What a supervision plan should look like depends, among other things, on the size of a broker entity, the experience of the employees overseen by a licensed broker, the complexity of the customs business, and the types of transactions that a broker entity handles. CBP believes it is prudent for a broker entity to have more supervision, *i.e.,* more licensed brokers and/or more training, and guidance for employees, in place if the broker entity is large and deals with complex business transactions. CBP agrees with the commenters that general guidance on expectations for a supervision plan is helpful, and, thus, CBP will provide such guidance on its website and/or through other electronic forms of communication, such as CSMS messages.

Further, CBP welcomes the opportunity to clarify that current national permit holders are not required to provide a supervision plan pursuant to the new § 111.19(b)(8), however, CBP wishes to emphasize that having a supervision plan in place is highly encouraged and should be a best practice for every permit holder. The same applies to current district permit holders whose district permit will be transitioned to a national permit. As for single port or single office brokers who currently hold a district permit, or a national permit, a supervision plan is not required pursuant to the new regulations, but will be required of new permit applicants, even if they only have a single office or work at a single port.

Comment: Two commenters stated that they disagreed with CBP's proposal to eliminate the requirement that an applicant for a license on behalf of an association or corporation be an officer (and not only a licensed broker). The commenters argued that the broker and CBP are best served when an officer of an association or corporation demonstrates knowledge of customs regulations through its licensed customs broker designation. The commenters believe that the current requirement under § 111.11(c)(2) should remain in place.

Response: CBP agrees with the commenter that it is important to have at least one officer in an association or corporation, and at least one member in a partnership who is a licensed broker. CBP did not propose to eliminate this requirement in § 111.11(c)(2). CBP stated in the preamble of the NPRM that if the application is on behalf of an association, corporation, or partnership, then the applicant is not required to be an officer but is required to be a licensed broker. This relaxation of CBP's prior practice provides the broker entity with flexibility as to who may submit the application for a national permit, but it does not eliminate the requirement under § 111.11(c)(2) to have at least one officer in an association or corporation, or at least one member in a partnership under § 111.11(b), who is a licensed broker. It is further important to note that the individual applying for and obtaining the license on behalf of the entity must be delegated the proper agency authority to obtain the license and serve as the license qualifier, thus, binding the entity with respect to the customs business it later performs.

Comment: One commenter pointed to § 111.16, pursuant to which CBP is required to specify the reasons for denial of a license and stated that there is no comparable requirement to specify a reason for denial of a permit based upon the adequacy of a supervision plan under § 111.19. The commenter recommended that a permit denial include a detailed explanation of the reason(s) for denial, so a broker has clear direction as to what needs to be addressed.

Response: CBP includes a reason as to why a permit application is denied when issuing a denial letter to an applicant. CBP does not agree that there is a need to include language in § 111.19 to state that a reason for the denial will be provided, merely because of comparable language in § 111.16.

Comment: Three commenters suggested that CBP allow brokers to have multiple national permits if they maintain separate, although related, business entities and allow for more than one licensed broker to qualify for the permit. The commenters reasoned that in case of any issues with one national permit, the broker could continue to work under a separate national permit for a related entity.

Response: CBP disagrees with the commenters. CBP moved from the district permit system to a national permit system in order to provide brokers with the flexibility to conduct customs business within the entire U.S. territory with just one license and one permit. Allowing more than one national permit for related business entities defeats the purpose of eliminating multiple district permits in favor of one national permit per broker. The concern that one entity under a parent company is not exercising responsible supervision and control and potentially putting other related entities at risk, needs to be addressed within the entity itself. CBP will not provide more than one national permit to an entity so that a broker may have a backup permit for a related entity in case that entity is not exercising responsible supervision and control or not complying with other laws and requirements.

Additionally, it is CBP's practice to send an informed compliance or warning letter to a broker who is not complying with regulations. Usually, CBP provides the broker an opportunity to address any issues that CBP had raised as a concern before revoking a permit. A broker will usually not lose a permit upon one incident of noncompliance unless the incident was so grave that CBP determines that a broker is no longer qualified to hold a license to exercise customs business.

Subpart C—Duties and Responsibilities of Customs Brokers

Comment: Several commenters stated that the use of the term ''breach'' in § 111.21(b) is vague and overbroad and should be defined. One commenter asked whether only breaches that involve customer data are included in the regulation. Some commenters stated that the proposed regulation does not clarify the types of breaches that are included, and whether any breaches need to be reported or only material/serious breaches. Several commenters suggested to hold brokers to the CTPAT cybersecurity standards, and simply indicate in the regulations regarding ''record of transactions'' (§ 111.21) and ''responsible supervision and control'' (§ 111.28) that brokers need to have a procedure in place to address data breaches and to report them to CBP as appropriate. Some commenters also noted that the proposed regulation is silent on how a breach should be reported to CBP.

Response: CBP intends for the common meaning of 'breach' to apply and does not believe a regulatory definition is necessary. Some considerations underlying this new regulatory provision, however, are things such as a physical or electronic intrusion into the broker's records whereby any information is compromised, but particularly confidential information of the broker's clients that might have been viewed, copied, or used without permission. Proposed § 111.21(b) specifically states that records relating to a broker's customs business are at issue. The proposed regulation further states that ''any'' known breach that affects customer data, physical or electronic, will have to be reported. The regulation does not distinguish between a material/serious and non-material/non-serious breach. Pursuant to § 111.21(a), ''records'' include documents reflecting

financial transactions as a broker. Any breach that affects those records that are maintained in a broker's customs business needs to be reported as part of CBP's overall risk management to prevent identity theft.

CBP disagrees with the use of the CTPAT standard in this context. The CTPAT standard applies mainly to importers and cargo carriers who are partners of the CTPAT program. Very few brokers are CTPAT partners, therefore, this standard would not be applicable to the majority of brokers. Lastly, CBP wishes to take the opportunity to clarify that security incidents, such as a breach discussed here, that have any effect on the security posture of CBP must be reported electronically to the CBP Office of Information Technology (OIT) Security Operations Center (CBP SOC) at *cbpsoc@cbp.dhs.gov,* and not the broker's designated Center, as proposed in the NPRM. Brokers may call CBP SOC at 703–921–6507 with questions as to the reporting of the breach, if any guidance is needed or if brokers are unable to send an electronic notification due to the breach. In addition, CBP added the email address to § 111.21 as the method for reporting a breach, and added the CBP SOC as the appropriate location for reporting a breach.

Comment: Several commenters disagreed with the proposed requirement in § 111.21(b) to provide notification to CBP within 72 hours of discovery of any known breach with a list of all compromised importer identification numbers as it is unreasonable. One commenter argued that if the breach were to happen on a weekend followed by a holiday, the broker would already be outside of the window of time allotted by CBP. Other commenters pointed out that this requirement is especially challenging for brokers who use third-party information technology (IT) providers. Such a short time frame may also lead to incomplete reports. Also, one commenter argued that the risk of a data breach seems to be minimal given CBP's advance targeting system detecting anomalies in shipping patterns.

Different commenters suggested different approaches as an alternative to the 72-hour requirement, such as an agreed upon time frame after the initial reporting of the fact that a breach occurred; reporting ''as soon as practicable''; or, allowing for two weeks or ten (10) business days for the investigation and notification of the breach from the time of discovery. Another suggestion was to allow for a process similar to the one set forth in 19 CFR 162.74(b)(4) in the context of prior disclosures, providing information within 30 days of the initial disclosure date.

Response: As identify theft is a major concern, CBP requires brokers to provide any known breach of importer identification numbers within a short time frame to CBP. Receiving the compromised importer identification numbers soon after the discovery of the breach will allow for a better targeting analysis and, thus, enhance CBP's overall risk management. However, CBP understands that 72 hours may in some instances not be sufficient to provide CBP with the complete information regarding the breach. Therefore, CBP revised the proposed requirement for brokers to provide electronic notification of the fact that a breach occurred and any known compromised importer identification numbers within 72 hours of discovery. In addition, within ten (10) business days of the notification, a broker must electronically provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must electronically provide that information within 72 hours of discovery. The broker is encouraged to work with CBP to gather the remaining information as quickly as possible from the broker's own system or a third-party software vendor to provide a comprehensive report. CBP believes that the revision of the proposed language should provide sufficient time to provide CBP with the breach information, but also satisfy CBP's need to gather and analyze any breach information soon after its discovery.

Comment: One commenter stated that the requirement pursuant to § 111.21(b) to identify affected records in the electronic system is far beyond most brokers' capability and should instead be imposed on the software vendors that CBP certifies. Most brokers use third-party software and most smaller brokers use software hosted by the provider. The software interfacing with CBP is approved by CBP and, therefore, CBP should be requiring these interdiction tools as part of their certification requirements. Unless a broker is using custom software, identification of a breach and the affected records should be the responsibility of the CBP-approved software vendor.

Response: CBP agrees that an agreement between CBP and a CBP-approved software vendor imposes the requirement on the software vendor to report any security incidents that have any effect on the security posture of CBP. However, a broker has an independent responsibility to notify CBP of any breach that compromised importer identification numbers, as discussed above. Also, brokers who do not engage a CBP-approved software vendor have the responsibility to provide the breach information either from their own server or from a third-party software vendor that the broker employed. Regardless of where the broker's information is stored and maintained, CBP's revision of the time frame for the reporting requirement, as mentioned above, should allow sufficient time for a broker to provide the required information.

Comment: One commenter stated that the notification of the breach to CBP should be treated as confidential information because making the breach public may subject an entity to undue harm.

Response: CBP treats information received from brokers as confidential within the Department of Homeland Security (DHS), however, information may be analyzed and possibly released under the rules pertaining to the Freedom of Information Act (FOIA), as amended (5 U.S.C. 552). Section 103.21 of 19 CFR sets forth the procedures with respect to the production or disclosure of any documents contained in CBP files, or any information relating to material contained in CBP files, in all federal, state, local and foreign proceedings when a subpoena, notice of deposition, order, or demand of a court, administrative agency or other authority is issued for such information. Notifications by brokers of a breach would be covered under these provisions.

Comment: One commenter stated that many companies do not designate one individual as the party responsible for brokerage-wide recordkeeping requirements, as proposed in § 111.21(d). In most cases, multiple individuals are responsible for records management of policy, legal and operational matters. Another commenter stated that CBP should understand that brokers may provide group mailboxes and centralized contact information, monitored by multiple ''knowledgeable'' persons, which should satisfy the recordkeeping requirement in § 111.21(d).

Response: CBP understands that within a broker entity, different individuals may be responsible for different reporting matters, however, CBP needs the contact information for one knowledgeable employee as the party responsible for brokerage-wide recordkeeping requirements in case CBP has any questions or concerns. The designated individual may contact other

individuals within the broker entity who have the knowledge on a particular recordkeeping matter to address CBP's question or concern. Under the new national permit framework, it will be especially important to maintain a current broker point of contact to facilitate efficient processing of entries and entry summaries. As to the second question, a general email address or group mailbox along with an individual's name as the point of contact is sufficient under § 111.21(d).

Comment: Commenters agree that paper or hard copy documents, as well as electronic documents maintained on a broker's privately owned, leased, or controlled server, should be located in the United States. However, where a broker uses a public third party to externally maintain or host the data, CBP should allow such a party to maintain or host the data outside of the United States, so long as that party is an entity operating and incorporated in the United States for jurisdictional purposes. This will provide a broker with the necessary flexibility to maintain data, while assuring CBP that the broker possesses the necessary authority to obtain such documents, when necessary. One commenter argued that so long as the information is kept securely, it should not matter if the information is kept within the U.S. customs territory or not, referring to Headquarters ruling H292868 (March 10, 2020). Another commenter argued that software programs exist that allow a company to file entries and declarations for multiple countries while the broker still works in the United States. The system being used could be securely accessed using a website and housed in another country where the broker entity may have its corporate entities. Such systems allow for enhanced corporate reporting and visibility into their customers' supply chains.

Response: A broker's paper and electronic records must be stored within the customs territory of the United States pursuant to proposed § 111.23(a). CBP has addressed the particular issue of maintaining copies and backups of a U.S. customs broker's digital records outside of the U.S. customs territory in Headquarters ruling H292868 (March 10, 2020). CBP determined in this ruling that a broker's electronic records hosted and maintained by a third-party software vendor must be maintained on a server physically located within the U.S. customs territory. Section 111.23(a) dictates that a licensed customs broker may maintain records relating to its customs transactions ''at any location within the customs territory of the United States'' in accordance with 19 CFR part 163. It is clear from the governing statutes (19 U.S.C. 1508, 1509(a)(2)) and regulations that a broker's electronic records must be maintained on a server physically located within the U.S. customs territory because this is where CBP has jurisdiction to issue a summons and inspect records. Nonetheless, CBP's Headquarters ruling also emphasized that a broker's duplicate or backup records may be stored outside of U.S. customs territory, so long as the recordkeeping requirements for the original records are satisfied. However, to make this position clearer in § 111.23(a), CBP added the words ''originals of'' before the word ''records'' to clarify that the requirement to maintain records in the U.S. customs territory pertains to original records, not backup records. This clarification does not change any of the substantive regulatory requirements and is consistent with CBP's prior rulings.

Comment: One commenter asked CBP to provide greater clarity as to what constitutes ''records''. The commenter argued that certain commercial circumstances dictate the disclosure of information that may not be permissible under the current proposed language in § 111.24, such as collections, banking, or financial matters. The commenter claimed that CBP should allow for more business-friendly flexibility, so that a broker should not have to obtain a waiver to perform normal business activities that are incidental to its provision of customs business; limiting disclosable information would possibly place additional liability on the broker in an unforeseen manner. Several commenters suggested that a revision of the regulation to include certain information, *e.g.,* necessary for screening or transportation of a client's cargo, would better reflect how data and information are transmitted and used by brokers in the commercial environment and their business dealings. One of the commenters argued that without such language, brokers would question whether they are complying with their obligation to maintain the confidentiality of their clients' information.

Response: The term ''records'' is used throughout part 111 to refer to those records that are kept in a customs broker's ordinary course of business and that pertain to certain activities, including information required in connection with any importation, declaration or entry. A more general definition of ''records'' can be found in 19 CFR 163.1(a)(1) and encompasses a wide range of information that is made or normally kept in the ordinary course of business that pertains to any activity listed in 19 CFR 163.1(a)(2).

CBP does not agree with expanding the scope of disclosure of confidential information to additional scenarios. CBP cannot give advance authorization for the disclosure of importer records, as that authority lies with the client (importer). A broker is merely an agent of the importer, and the broker must obtain a written release from a client allowing for the sharing of client information with third parties for certain purposes, as the scope of client information to be shared is determined by the client. Written authorization for specific disclosures may be granted by the client to the broker as part of a power of attorney, or as a separate release.

Comment: One of the commenters referred to Headquarters ruling H221355 (November 21, 2012) in which CBP determined that a broker is prohibited from disclosing the name and address of a client to a third party for security verification purposes. The commenter asked CBP to revise § 111.24 to provide that a broker is not precluded from disclosing client information to other third parties.

Response: CBP does not agree with the commenter's request. CBP continues its interpretation that, absent client consent, § 111.24 prevents the sharing of client contact information with a third party for security verification or other purposes, as determined in Headquarters ruling H221355. Any authorization for the broker to use client information must be set forth in the power of attorney that is agreed upon between the broker and the client or obtained in a separate written release. The confidentiality of a client's business information remains a paramount concern for CBP, but a client can always authorize the broker in writing to share information with third parties for certain purposes.

Comment: Several commenters asked CBP to consider revising the exemption that allows brokers to disclose information to representatives of DHS and limit the disclosure to representatives of CBP and U.S. Immigration and Customs Enforcement (ICE). The commenters argued that the agencies most directly involved with the business of the clients serviced by brokers are CBP and ICE, and only those agencies should be specified in the regulation. The commenters suggested to add the phrase ''or as requested, in writing, by employees of other government agencies as necessary and appropriate.'' to include DHS representatives. Alternatively, other

DHS agencies could fall under the catch-all phrase ''other duly accredited officers or agents of the United States'' in § 111.24.

One commenter pointed out that the proposed regulation does not contemplate that a broker may need to consult with an outside party, such as an attorney or consultant, or insurance underwriter/broker. The broker asserted that the broker should be able to discuss, and more importantly, disclose details of an incident, to an outside third party in the context of a damages claim by the client against the broker due to the broker's alleged error or omission.

Response: CBP proposed to replace the list of specific covered government employees to whom the broker records may be disclosed with a general reference to DHS representatives in order to include any government entity within DHS who may be involved in a broker matter. This language maintains CBP's flexibility to involve other entities within DHS, if deemed necessary. It is important to note that within DHS, all agencies are bound by the same information sharing rules to properly protect confidential information. Thus, CBP does not agree with limiting the general rule of disclosure of client information to CBP and ICE.

Additionally, DHS representatives are specifically mentioned in current § 111.26, in the context of interference with the examination of records. By revising §§ 111.24 and 111.25 and adding a reference to DHS, CBP is creating consistency among the regulations that deal with a broker's recordkeeping responsibilities.

Comment: One commenter, who expressed support for the addition of exemptions that permit information sharing, stated that the exemptions do not extend far enough to meet the needs of the modern business community. The commenter argued that many businesses have separate operating entities under one parent company that offers a broad set of services to customers. In a situation where one company acts as a broker, it should be allowed to share customer data within the larger corporate structure, assuming certain ownership and control metrics are met. Another commenter added that, at a minimum, the regulation should permit data sharing with a related corporate entity, such as a transportation provider, where the related entity originally provided the customs information to the broker.

Response: CBP disagrees with the commenter's suggestion to expand the scope of exemptions in § 111.24. Related entities within a larger corporate structure are still separate legal persons (*see* Headquarters ruling 116025 (September 29, 2003)), and no information may be shared among those related entities without a client's consent. As mentioned above, a client may consent to a broker's sharing client information within the larger corporate structure but consent to share information with related entities cannot be assumed, and it cannot be mandated by CBP.

Comment: One commenter, a surety association, asked CBP to amend § 111.24 to add an affirmative obligation to provide information to those entities specifically identified in that section, *i.e.,* when disclosure is allowed, it should be compulsory. The commenter argued that, as the regulation is written, the broker does not have an affirmative requirement to provide information to the client's surety on a particular entry. Even though a surety continues to be named as an exception to a list of parties to whom disclosure may be allowed, brokers do not always read that language as compulsory. The commenter proposed to add language indicating that a broker ''must'' disclose the contents of the records, or any information connected with the records to those clients to the entities listed in proposed § 111.24, or, in the alternative, add language to state that information may be disclosed if an unexpected or unanticipated matter arises and the broker considers it necessary to consult, inform, or engage with third-party experts.

Response: CBP does not agree with the commenter's suggestion and will not change the regulatory language to reflect that a broker ''must'' disclose client information to a surety. CBP will not mandate that brokers share confidential client information with the third parties listed in § 111.24. CBP maintains that sureties are third parties, incidental to the relationship between a broker and his or her client. Moreover, the surety is in a contractual relationship with its own client and should be able to establish an exchange of information with that client under the terms of their business relationship. It is therefore not appropriate for CBP to authorize in regulations the transmission of data to sureties pertaining to relations with unlicensed persons.

Comment: One commenter stated that the proposed regulations have not addressed a significant issue surrounding § 111.24, namely the storage of broker client data with cloud-based third-party providers. The commenter stated that CBP had addressed this issue with ''service bureaus'' in 19 CFR 143.4, but not with software service companies to whom brokers entrust the storage and security of client data and posed the question of whether data storage companies are considered ''service bureaus''.

Response: Service bureaus are software providers that provide communications facilities and data processing services for brokers and importers, but which do not engage in the conduct of customs business, pursuant to 19 CFR 143.1(a)(3), 143.4. Service bureaus transmit electronic data to CBP as part of a service provided to the broker, and this data is considered confidential and may not be disclosed to any persons other than the filer or CBP. Companies that provide data storage (whether cloud-based or otherwise) contract with the broker. In such a setting, the security requirements are based on an agreement between the company and the broker, and CBP is not involved in this arrangement. Thus, a third-party data storage company is not considered a ''service bureau'' pursuant to § 143.1, rendering the confidentiality requirement set forth in § 143.4 inapplicable.

Comment: A few commenters stated that the proposed standard of making the records available at a location specified by DHS in § 111.25(b) is vague and CBP should provide a clarification. The commenters suggested that CBP should specify that a broker shall make records available at its designated broker management unit within the appropriate Center, or at an alternative location mutually agreed upon by the broker and CBP. The regulation should further clarify that either paper or electronic copies of documents may be provided to ensure that neither the broker's physical presence nor any travel is necessary.

Response: It is CBP's current practice that the location for the inspection of records is either the broker's office or a CBP office, and CBP will continue to allow those two locations for the inspection of records. In addition, CBP welcomes the opportunity to clarify that CBP accepts both paper and electronic records for inspection purposes. In fact, CBP has been accepting electronic records in cases of audits and otherwise during the COVID–19 pandemic. However, CBP reserves the right to request original versions of documents if deemed necessary.

Comment: Two commenters stated that CBP should consider repealing 19 CFR 163.5, which requires advance written notification of an alternative storage method for records. In today's highly automated and virtual environment, such a notification should not be required and is an administrative

burden for both the trade and CBP. Two other commenters argued that the final rule should include the freedom to allow a broker to maintain electronic records of its brokerage tasks, as well as any other related documents, as long as these documents can be readily retrieved and are properly backed up to comply with the time period mandated under § 163.5, without having to request written authorization.

Response: CBP disagrees with the first two commenters' request to repeal § 163.5. Section 111.25(c) refers to part 163, setting forth the provisions for the maintenance, production, inspection, and examination of records. Section 163.5 deals with recordkeeping requirements in general, and applies not only to brokers, but also owners, brokers, consignees, entry filers or agents of those persons mentioned in § 163.2. Brokers mentioned in this section are only one of the groups of persons to which the recordkeeping requirements apply. For these reasons, CBP will not repeal this section.

Part 111 sets forth the specific recordkeeping requirements applicable to brokers, and the records that each customs broker must create and maintain, and make available for CBP examination, in addition to the requirements in part 163. As explained above, CBP will continue its current practice of requiring that original records be maintained within the U.S. customs territory, in a manner that they may be readily inspected. The regulations permit either paper or electronic storage of original records, such that any other method is deemed alternative and requires written authorization. *See* § 163.5(a). Backup records may be kept outside of the U.S. customs territory because CBP does not regulate these duplicate records.

Comment: Several commenters stated that the proposed standard in paragraph § 111.28(a) that a sole proprietorship, partnership, association, or corporation must employ a sufficient number of licensed brokers is vague, and a definition is needed for the term ''sufficient''. The commenters stated that CBP should not require a ''sufficient number'' of brokers as a factor, but rather set best practices as guidance for brokers in a revised Broker Management Handbook. Commenters stated that best practices would allow for an administrable and enforceable standard for brokers and CBP, as it is unclear under the proposed language how CBP would evaluate this obligatory standard (''must employ'') and how it is meant to complement the enumerated factors. A few commenters raised the same concerns with respect to proposed factor (6) in paragraph (a) requiring the availability of a sufficient number of individually licensed brokers for necessary consultation with employees of the broker. These commenters argued that the language should be revised with simpler language to require only the availability of licensed brokers for necessary consultation with employees of the broker.

One commenter recommended to delete ''sufficient'' and replace the language with a standard number that can be applied to all brokers. For example, if an office had more than 15 employees conducting customs business, then an additional broker would be required to maintain proper supervision and control. Another commenter suggested to have a certain number of brokers per number of employees conducting customs business.

Response: CBP does not agree that the term ''sufficient'' needs to be revised or removed. Allowing a broker entity to determine what is a sufficient number of licensed brokers gives the entity flexibility as to how to exercise responsible supervision and control. The sufficiency of licensed brokers employed by a sole proprietorship, partnership, association, or corporation is a fact-specific determination. CBP does not want to mandate a certain number of licensed brokers or a ratio of employees to licensed brokers, as the sufficiency of licensed brokers depends on multiple factors, such as the size of the broker entity, the skills and abilities of the employees and supervising employees, and the complexity and similarity of tasks that need to be completed. Each broker needs to evaluate his or her own business and see what is needed to provide high quality service to the clients. During the broker's internal reviews and audits, the broker entity will assess the sufficient number of licensed brokers required for the proper conduct of customs business. For example, if an entity has a lot of new employees, more licensed brokers may be necessary for oversight; a larger entity with many clients will most likely need more licensed brokers than a smaller entity with fewer clients. All determinations concerning sufficiency are fact-specific, and CBP does not want to specify a certain number of brokers that is required for a certain size of business. In addition, the Broker Management Branch at CBP Headquarters engages with the brokers to answer questions and resolve any issues as they arise, and thus, brokers may contact CBP if there are any questions. Additionally, with the inclusion of the ''sufficient number'' language in the proposed regulation, CBP incorporated COAC's recommendation to employ an adequate number of licensed brokers to ensure responsible supervision and control, as part of its recommendation to move to a national permit framework.

Comment: One commenter expressed the concern that the language ''sufficient number'' could be interpreted differently by different Centers. The commenter also asked what time frame would be provided for broker entities to come into compliance should a Center determine that the current number of brokers is not sufficient. Lastly, the commenter asked whether there would be ways to challenge a Center's decision, or at least challenge the methodology used to determine, for example, the adequacy of licensed brokers to entry writers.

Response: As mentioned above, CBP Headquarters provides guidance to all BMOs to ensure that brokers receive consistent answers to questions. CBP will continue to do so regarding any changes brought about by the final regulations, including the requirement to have a sufficient number of licensed brokers. Regarding the time frame for compliance in case CBP determines that a broker entity does not employ a sufficient number of licensed brokers, CBP will handle this matter in the same fashion as other broker matters where CBP might detect an error in entry filings or other submissions by the broker. CBP will address the issue (in this case, the insufficient number of licensed brokers) with the broker and state that action needs to be taken by the broker to correct the issue, such as additional licensed brokers to exercise responsible supervision and control. Then the broker will have an opportunity to address the issue and CBP will work with the broker on a plan of action to resolve the issue. If the broker does not follow the plan of action, then CBP will issue a warning. A decision by the BMO regarding the sufficiency of licensed brokers may be challenged by escalating the issue to a BMO's supervisor, the Assistant Center Director. Ultimately, however, the broker will need to follow the plan of action determined necessary by CBP. Continued failure to do so will warrant escalated CBP remedial actions including, possibly, a penalty, or suspension or revocation of a license. When the processes for a penalty, suspension, or revocation are invoked, the broker has the due process opportunities already afforded by CBP regulations.

Comment: One commenter stated that CBP should consider the number of

employees with a Certified Customs Specialist designation as a means to meet the responsible supervision and control requirement.

Response: CBP disagrees with the commenter's suggestion. The privately offered Certified Customs Specialist (CCS) certification must be distinguished from the profession of a licensed customs broker. To become a CCS, an individual must take the CCS course and an exam at the end of the course, and have at least one year of customs experience, but is not required to be a licensed customs broker. A CCS's position cannot be elevated to that of a licensed customs broker, and therefore, having a certain number of CCSs in a broker entity will not satisfy the responsible supervision and control standard. However, the fact that a broker entity employs numerous CCSs might affect CBP's evaluation of whether the entity employs a sufficient number of licensed customs brokers.

Comment: One commenter stated that CBP must provide guidance as to the responsible supervision and control standard for the broker community since a failure to comply with the standard could lead to penalties and suspension or revocation. Any guidance would encourage brokers to incorporate these standards into their compliance programs. The commenter further recommended that CBP create a procedure where brokers can get clearance on whether the number of licensed brokers is sufficient for a particular broker entity before any change in the number of brokers requirement is imposed, and create a program, which would permit brokers to get clearance on this question after the requirement is imposed.

One commenter stated that the regulation must be clarified, or otherwise removed, and added that even though CBP stated it will be providing guidance, this guidance would not be subject to review and comment, depriving the broker of any input on this issue.

Response: CBP disagrees with the first commenter's request that CBP should provide prior clearance on the issue of sufficient number of licensed brokers, or approval of the number of licensed brokers after employment of a set number of brokers. Prior clearance cannot be given to a broker entity because it is impossible for CBP to evaluate beforehand whether a certain number of licensed brokers will be sufficient to exercise responsible supervision and control. Such a determination depends on specific facts and circumstances of the individual broker's or broker entity's customs business. CBP assesses the sufficiency of licensed brokers in the context of the broker's business dealings; it is not an abstract decision that can be made. Further, CBP does not believe that creating a program to provide prior approval of a set number of licensed brokers for a broker entity would be beneficial. As with prior clearance, approval after the fact is not feasible because CBP would not know whether the broker entity will function properly and exercise responsible supervision and control until the entity is in fact conducting customs business.

Before CBP issues a suspension or revocation there is usually a history of a broker's failure to meet the supervision standard; in most cases, CBP does not automatically suspend or revoke a broker's license. There will be communication between the broker and CBP regarding the broker's failure to meet the supervision standard, and ways to mitigate that failure.

One of the commenters asked that any regulatory changes based on public comments be subject to review and comment by the public for a second time. CBP disagrees with this request. Pursuant to the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*), CBP solicited comments from the public regarding the proposed changes to part 111 and provided a 60-day comment period. Any change from the proposed regulations is either based on a public comment, a clarification of the proposed or current regulations, or a change that results in a benefit or convenience to the broker community without detriment to existing rights, such as additional automation of certain processes. CBP will not implement any major changes without seeking public input first. Thus, CBP does not see the need to provide a second opportunity for public comments on any guidance that CBP will issue before finalizing the proposed regulations.

Comment: Several commenters expressed a concern with respect to the change from the word ''will'', which used to be part of the definition of responsible supervision and control in § 111.1, to the word ''may'' in § 111.28(a). The commenters stated that this change indicates that CBP is no longer required to take into consideration all the listed factors when determining whether a broker exercises responsible supervision and control, and thus removes the protection from a broker by not obligating CBP to consider broker compliance efforts in their totality. One mistake could seemingly result in a broker penalty without regard to the other factors.

Several commenters urged CBP to continue to consider all enumerated factors in assessing responsible supervision and control to avoid any arbitrary and capricious determinations and prevent inconsistent decisions by different CBP officers. The commenters argued that keeping ''will'' in the regulation provides transparency and uniformity for brokers in executing operations and procedures, as well as for CBP officers in administering and enforcing this standard. A change to ''may'' would allow CBP to focus on whichever factor it deems appropriate to the exclusion of additional factors that are clearly relevant as to whether a broker is exercising responsible supervision and control. CBP should be required to review all factors in order to ensure that a broker receives a full and fair evaluation.

Response: CBP disagrees with the commenters. CBP needs flexibility in determining whether a broker is exercising responsible supervision and control over the customs business that it conducts, as this is a fact-specific assessment. It has been CBP's practice to give greater weight to the factors that are implicated in a broker's exercise of responsible supervision and control when making a determination. There may be instances where one or more factors will be more relevant than others in determining whether a broker did or did not exercise responsible supervision and control. While it is possible that CBP's determination that a customs broker has failed to exercise responsible supervision and control may be predicated on fewer factors, but ones that CBP considers relevant, this does not prevent the broker from presenting in its defense any factors it believes to be mitigating.

Comment: A few of the commenters stated that the change from ''will'' to ''may'' would be contrary to judicial precedent, citing a court case, *United States* v. *UPS Customhouse Brokerage, Inc.,* 575 F.3d 1376, 1382 (Fed. Cir. 2009), in which the court decided that CBP's failure to consider all ten factors to determine whether a broker exercised responsible supervision and control was improper.[9] In addition, a commenter argued that the proposed language is in violation of *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837 (1984), because agencies cannot implement regulations that are arbitrary and capricious.

Response: CBP disagrees with the commenters. CBP may only be bound by judicial precedent if the same regulatory language is still in place. If CBP decides

[9] The cited court case may be found online at *https://cite.case.law/f3d/575/1376/.*

to change the regulation through a process allowed by the APA, judicial precedent no longer binds CBP in making that change. Further, the proposed language in § 111.28(a) is not arbitrary and capricious. CBP proposed in the NPRM to keep the list of factors to determine responsible supervision and control set forth in § 111.1, and move it to § 111.28(a), along with some additions and modifications to reflect the changes brought about by the transition to a national permit framework. CBP further proposed to consider the relevant factors from among those listed on a case-by-case basis. No decisions will be made without a thorough evaluation of the relevant factors present that apply to an individual broker.

Comment: Several commenters stated that the newly proposed factors in § 111.28(a)(11) through (15) are vague and decrease a broker's certainty in adopting and executing the necessary processes to meet the supervision standard. The commenters suggested that the factors either be removed or at least incorporated into one general factor, for instance into factor (10), as an indication that an individually licensed broker has a real interest in the operations of a broker. In addition, commenters requested that any guidance as to the factors be provided as best practices in the Broker Management Handbook.

A few commenters suggested to remove the new factors because the current ten factors are adequate to determine that a licensed broker has a real interest in the operations. One commenter referred to COAC recommendation No. 010021 (April 27, 2016), which recommends that CBP provide guidance to brokers regarding the ten factors demonstrating responsible supervision and control, such as how to properly train employees, issue appropriate written instructions and internal controls, maintain an adequate ratio of employees to licensed brokers based on certain factors, and engage in supervisory contact, audit and review operations. The commenter is of the opinion that CBP has not done so in the NPRM.

Response: CBP disagrees with the comments to either remove or consolidate the proposed factors (a)(11) through (15) into existing factor (10). First, including all proposed factors in one factor would make the language complex and difficult to follow and enforce. Second, CBP added factors that reflect their importance in the modern brokerage environment and their importance in evidencing the proper transaction of customs business. For instance, filing entries late, paying the government late, or not returning client or CBP communications, are all evidence of a broker's failure to exercise responsible supervision and control. CBP provided an explanation as to each proposed change in the NPRM, and as mentioned above, has worked with the broker community in the past and has taken into account their recommendations. As mentioned above, a new guidance document, that will be published concurrently with the publication of this final rule, will include information as to the listed factors in § 111.28(a). In the meantime, brokers may find additional information and guides on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers* regarding the broker license exam, triennial status reporting requirements for current brokers, as well as additional information and resources for brokers.

Comment: One commenter raised a concern regarding proposed factor (11), *i.e.,* the broker's timeliness of processing entries and payments of duty, tax, or other debts owed to the government. Two commenters stated that a broker is not obligated to pay on behalf of an importer and asked how the timeliness factor can be judged in such a situation. Both commenters stated that the term ''timeliness'' is vague and does not provide a benchmark to which a broker can develop and execute processes, nor can CBP uniformly and transparently evaluate and enforce the standard. The same concern as to vagueness was raised for the term ''responsiveness'' in proposed factors (13) and (15).

Lastly, commenters stated that the term ''communications'' in proposed factors (12) (communications between CBP and the broker) and (14) (communications between the broker and its officer(s)) is too broad. One commenter explained that proposed factors (12) and (13) (the broker's responsiveness and action to communications, direction, and notices from CBP) do not explain what type of communication is covered, and proposed factors (14) and (15) (the broker's responsiveness and action to communications and direction from its officer(s)) cover communications between parties to which CBP would have no visibility. One commenter posed the question whether CBP will regularly make available to customs brokers examples of communications relevant for verification and training purposes.

Response: CBP disagrees that these proposed terms need to be further defined in the regulation. The timeliness factor looks at a broker's repeated failures to timely file entries and/or duties, taxes or other debts owed to the government, not just one incident alone. ''Timely'' generally means doing something by the time it is required to be done in statute or regulation, which is not a vague concept. If a broker frequently fails to timely submit entries and/or payments, CBP will consider the failure to comply with factor (11) in its determination as to whether a broker is exercising responsible supervision and control.

With respect to the term ''responsiveness'' in factors (13) and (15), a broker's failure to respond to any communications, direction and notices from CBP, and to communication and direction from its officer(s) or member(s) (*i.e.,* not returning phone calls or emails, etc.) will reflect negatively on whether a broker is exercising responsible supervision and control.

The term ''communications'' in the context of responsible supervision and control is used to assess how well and timely a broker is communicating with its officer(s) or member(s), and with CBP. CBP does not agree that examples of communications need to be provided to brokers for verification and training purposes. Brokers should be able to determine what, if any, communication is needed in a particular situation with CBP and officer(s) or member(s) of the broker entity.

To make the proposed language in § 111.28(a) more concise, CBP combined factors (12) and (13) into one new factor (12), which deals with the broker-CBP relationship, and combined factors (14) and (15) into one new factor (13), relating to the broker-officer/member relationship. In addition, CBP added a reference to ''member(s)'' in the new factor (13) to account for partnerships, in addition to associations and corporations as a type of broker entity.

Comment: Several commenters stated that it is unclear what the terms ''reject rate'' and ''various'' in proposed factor (4) of § 111.28(a) mean under the new supervision standard and argued that, without clarity, this metric is misleading and could be highly prejudicial. One commenter stated that the factor should be eliminated because it appears to be intended to account for a broker's mistakes (versus an importer's or other third party's mistake). Clear guidelines are necessary as to what CBP considers an actionable rejection, and only those instances where the broker is at fault (and not the third-party importer) should be taken into consideration.

Response: CBP does not agree with the commenters that the terms ''reject rate'' and ''various'' need to be clarified

in the regulation. The reject rate for the various customs transactions historically has been a factor in § 111.1 in the definition of responsible supervision and control. ''Various'' means not just one rejection, but several, over the course of time. CBP proposed to add language to this factor when moving it to factor (4) in § 111.28(a) to clarify that CBP looks at the reject rate by comparing the number of rejections with the broker's overall volume of entries. This revised language provides a better context to evaluate the quality of responsible supervision and control as CBP looks at the totality of the transactions conducted by the broker to determine whether the broker is properly filing entries. In addition, CBP relied on COAC recommendation No. 010020, which suggested a clarification of existing factor (4) to state that the reject rate resulting from entries or entry summaries be expressed as a percentage of the broker's overall business for the various customs transactions, when making this change to the original factor.

CBP agrees with the commenter who states that this factor is intended to account for a broker's mistakes, however, a broker's responsibility includes a duty to verify any information received from an importer. The broker must exercise due diligence and make sure that the data from the importer is correct, *e.g.,* that the classification of goods is correct. The broker must further verify, depending on the specific facts and circumstances, whether the importer has experience in gathering and providing the necessary information to the broker, whether the importer is a new client, and may need more assistance, or whether the client is experienced in providing the necessary information. CBP has no way to determine once a filing is made whether a mistake (and reject) was due to a broker's mistake, or due to incorrect information provided by the importer. Moreover, any type of rejection will be communicated to the broker, and the broker has the opportunity to make a clarification.

Comment: Further, several commenters requested that not all system rejects in Automated Broker Interface (ABI) should be considered as rejects as they are often due to contributory factors, such as system outages, delays in HTSUS updates, and programming changes for Partner Government Agencies (PGAs) and in the CBP and Trade Automated Interface Requirements (CATAIR) with short deployment time frames and highly complex filings causing numerous system rejects. One commenter added that ACE is too new and there have been problems with CBP processing, especially drawback filings, thus, this factor (4) in § 111.28(a) is not appropriate.

Response: In case of system outages or delays, where the broker is unable to file in ACE, the broker does not receive a reject. A reject occurs only if the broker successfully submitted a filing in ACE, which is considered filed, and because of the lack of accuracy of the filing, is rejected. As to the comment that ACE is too new, ACE has been the system of record since November 1, 2015, as mentioned above. Both CBP and the trade community have gained extensive experience over the last several years working with and in ACE. As to the commenter's second point, CBP usually announces programming changes, either in a **Federal Register** notice, or via a CSMS message, with guidance for the changes or updates to the process and provides additional time (usually 30 days) after the publication of a notice as to when announced changes or updates become operational. Lastly, drawback claims have been successfully filed in ACE since February 2018. The ACE drawback module has been enhanced significantly to include expanded filing capabilities for claimants, refined validations that reflect current import practices, and updated bonding policies for accelerated payments. In addition, CBP maintains extensive customer service resources for existing and new drawback filers.

Comment: Another commenter requested clarity about census warnings and asked that they not constitute rejects. Another commenter stated that the term ''reject rate'' lacks specificity and asked whether the term is the same as used in Customs Directive 099–3550–67.[10]

Response: Census warnings are informational messages that are part of the entry validation process. The U.S. Census Bureau (Census) provides CBP with specific data ranges at the HTSUS level that ACE uses to validate a variety of data elements (*e.g.,* line value, charge). If a line is transmitted that falls outside of the Census parameters, ACE will return a warning message to the filer. These warnings are described in the Appendix H of the CATAIR.[11] A Census warning is not a reject, as the entry summary is not incorrect, but the information provided is unlikely to be accurate, given Census' parameters. The filer is then required to submit the corrected line data or if the data is found to be correct as entered, submit the reason code for a Census ''override.''

With respect to the second commenter, the reject rate pursuant to § 111.28(a)(4) covers rejections of entry summaries as discussed in the Customs Directive mentioned above, even though some of the items in this Directive have become obsolete.

Comment: Another commenter suggested that rejects should only be counted after a broker has had the opportunity to agree or provide proof that the originally filed entry was correct. Another commenter asked whether CBP would consider listing rejected entries in ACE to allow the broker to review these entries for verification and training purposes. Lastly, one commenter stated that multiple rejects due to one problem should not be counted as multiple rejects.

Response: CBP does not agree with these comments. A filer receives an error message in ACE if there are any issues when filing. If the submission is rejected, comments are provided as to corrective action that is necessary. Whether a reject is a system reject or a manual reject by a CBP employee, the filer is notified either way as to the reason for the reject. With system rejects, an error code is provided, and the error codes are described in the ACE CATAIR Error Dictionary [12] for the filer to refer to and correct the error. For a manual reject, a CBP employee enters a message in an ACE user interface ''Notes'' field describing the error, along with instructions as to how to re-transmit the filing in proper form. This message is transmitted to the filer in ACE. For either type of reject, the filer is given sufficient information to re-submit the correct filing, thus, CBP does not believe that it is necessary for the filer to agree or provide proof that the originally filed entry was correct.

Lastly, if a filer makes multiple filings, based on the same incorrect information, the system does count each instance of filing as a reject. CBP notes that if a broker makes the same mistake in several filings and receives the same error code or message, and the filings are rejected, the broker should be aware for future filings as to the error and how to properly submit an entry. Additionally, the broker may always

[10] The Customs Directive may be found online at *https://www.cbp.gov/sites/default/files/documents/3550-067_3.pdf.*

[11] Appendix H provides a detailed resolution on each warning so that the party receiving the warning will know what elements are considered to be ''unlikely'' to be accurate. The appendix may be found online at *https://www.cbp.gov/document/technical-documentation/ace-catair-appendix-h-census-codes.*

[12] The ACE CATAIR Error Dictionary is available online at *https://www.cbp.gov/document/guidance/ace-catair-error-dictionary.*

contact CBP to ask for clarification as to a rejected submission, if necessary.

Comment: Some commenters stated that CBP should adjust the proposed language in factor (7) (supervisory visits) and factor (8) (audits and reviews) for § 111.28(a) to include virtual options for supervisory visits by an individually licensed broker of another office that does not have a licensed broker, as well as audits and reviews of the customs transactions that are handled by an employee of the broker in order to better reflect today's often virtual business environment. In addition, one commenter stated that CBP needs to define ''frequency'', otherwise, a broker cannot ensure compliance.

Response: Virtual options for supervisory visits, and for audits and reviews, are permissible. The factors, as written in the proposed regulation, do not limit supervisory visits, and audits and reviews, to a physical option. CBP understands, especially in the changed environment brought about by the COVID–19 pandemic, and the move from district permits to national permits, that both physical and virtual presence should be allowed for supervisory visits, as well as audits and reviews. However, whether a virtual supervisory visit or audit and review is sufficient in any given case to exercise responsible supervision and control depends on the specific circumstances of a broker's business, such as the size and complexity of a broker entity or the type of transactions that are handled by an employee. In addition, the term ''frequency'' is a fact-specific determination. As mentioned above, whether a broker exercises responsible supervision and control depends on how a broker conducts its customs business, and it is the broker's responsibility to determine how frequent the supervisory visits, audits and reviews should be. For example, more supervisory visits, and audits and reviews, may be necessary for new employees, or employees tasked with more complex transactions.

Comment: Several commenters did not agree with the proposed requirement in § 111.28(b) that a permit holder submit a list of the names of persons currently employed by the broker as this requirement may be too burdensome, especially on large companies. The commenters argued that CBP should require a list of names only of those employees who are engaged in customs business, given that the regulation specifically relates to supervision and control over the transaction of the customs business. For the same reasons, two commenters stated that the term ''broker employees'' used in paragraphs (a) and (b) of § 111.28 should be changed to ''employees who conduct customs business'' because the term ''broker employees'' could relate to any employee of the broker, regardless of the employee's responsibility, and those employees should not be included in the reporting requirement.

Response: CBP does not agree with the commenters. First, customs brokers are required to exercise responsible supervision and control over all of their employees, and in particular any of their employees who assist with the customs business and transactions of the brokerage. Requiring the customs broker to identify to CBP all of its employees contributes to both the customs brokers' and CBP's knowledge and awareness of the employees' status. Second, CBP requires the comprehensive information for all persons employed by a broker in order to be aware of all potential risks that any employee might present to the revenue of the United States or the public. Only by obtaining information on all employees can CBP properly engage in a dialogue with the customs broker to determine that none of the employees of the broker occupy a position within the brokerage that presents a risk to the revenue or the public. It is important to note that this final rule is not changing the reporting requirement for brokers. Brokers already have an obligation to submit a list of names of persons employed by a broker, and this obligation continues with this final rule, with the only change being that brokers have to report less information on their employees pursuant to the final regulation.

Comment: Two commenters stated that CBP should enhance ACE to better facilitate the electronic reporting of employee information, improve the reporting of information included in the triennial reporting process and the submission of payment of various broker fees. Specifically, the commenters suggested the addition of a section in the ACE portal where updates can be easily made for new employees, terminated employees, or a change of address. Another commenter stated that the electronic data reporting system within ACE is cumbersome and CBP should not adopt the proposed language in § 111.28(b) regarding the use of a CBP-authorized EDI in the final rule until a more modern system and interface are available, such as blockchain.

Response: Electronic employee reporting for new and terminated employees has been in place within ACE for several years. At this time, brokers have several capabilities in ACE to add, remove or edit certain information related to the license and permit. CBP agrees that the automation of the broker submission could be further enhanced, and CBP is continuing to work on technological advancements to streamline and facilitate the processing of broker submissions. However, it is important to note that the system is currently functional to receive employee information from brokers.

In addition, as mentioned above, CBP deployed a new portal for the electronic submission of and payment for the broker examination application, and the submission of the triennial report and payment of the triennial fee. In the case of the triennial reporting, if a broker files the status report and pays the required fee in the eCBP portal, CBP will send by email a receipt to the broker (if an email address is on file) evidencing the completion of the required reporting. A copy of the receipt and the filed report is maintained in the eCBP portal for the broker to access at any time. To provide all brokers the ability to receive an electronic receipt of the completion of the triennial reporting requirement, CBP added a broker's email address as a reporting requirement in § 111.30. Specifically, CBP added ''email address'' in the first sentence of paragraph (a) and added parentheses after ''address information'' in the third sentence to clarify that the office of record address, mailing address and email address are all required for purposes of reporting a change of address. CBP also added the email address requirement in paragraphs (d)(2)(i)(A) and (d)(2)(ii) for individual brokers, both actively engaged and not actively engaged. CBP further included the requirement of an email address for each licensed member or licensed officer in case of partnership, corporation, or association reporting in paragraph (d)(3)(i).

During the 2020/2021 triennial reporting period, approximately 90% of the licensed brokers filed the required report and paid the required fee through the new reporting tool. During that triennial reporting period, a broker had to choose to either pay online through the eCBP portal or at the port and had to submit both the report and the payment through one of the chosen options; a broker could not submit the report online and pay the fee at the port, or vice versa. For the next triennial reporting period in 2023/2024, CBP will continue with the same practice.

A broker who chooses to pay the fee at a processing Center, *i.e.,* at one of the

41 BMO locations, may either complete the status report in the eCBP portal and print the draft report or complete a paper copy of the report, and then submit the report to a processing Center, along with the payment of the fee. A BMO at a processing Center will accept the required report and payment and provide a cash receipt. The BMO will manually enter the information on the report in ACE for the triennial reporting to be completed.

Comment: One commenter stated that the 30-calendar day requirement in § 111.28(b)(2) to provide the social security number (SSN) for a new employee from a foreign country is difficult to comply with as it typically takes longer for the new employee to receive an SSN, and ACE does not accept any employee data without also providing the SSN. The commenters asked CBP to allow the submission of employee information in ACE without the SSN if it is not available at the time of the reporting.

Response: Pursuant to the proposed regulation in § 111.28(b)(2), a national permit holder must submit a list of new employees within thirty (30) calendar days of the start of employment to a CBP-authorized EDI system. In the rare instance, where an SSN is not available for a new employee at the time of reporting, the broker must submit the new employee information to the processing Center, indicating that the SSN is still missing and that it will be reported as soon as it is available.

Comment: Two commenters suggested to move paragraphs (b) through (e) of § 111.28, dealing with the reporting of employee information and change in broker ownership, to § 111.30. The commenters argued that while these paragraphs indirectly pertain to supervision and control, their placement in § 111.28 is confusing as they represent regulatory requirements regarding administrative issues more akin to those set forth in § 111.30.

Response: CBP disagrees with the two commenters and believes that paragraphs (b) through (e) fit appropriately in § 111.28. The aspect of employee reporting falls under the responsible supervision and control standard, as CBP will take into consideration a broker's proper employee reporting when looking at whether the broker exercises responsible supervision and control. In contrast, § 111.30 includes instructions for how and when to notify and report to CBP, and what information to include in the notification and report.

Comment: One commenter stated that the responsibilities in proposed § 111.19(f) and proposed § 111.28(a) are not consistent and it is not clear which individual broker has to comply with the responsible supervision and control standard. Proposed § 111.19(f) talks about ''the individual broker who qualifies for the national permit'', whereas proposed § 111.28(a) talks about ''every licensed officer''. In § 111.19, the primary responsibility rests with the individual broker designated as qualifying for a national permit, whereas in § 111.28, every licensed officer is included in the definition of responsibility. The commenter suggested to amend § 111.28 to conform with other sections and limit responsibility to the specifically designated person as being responsible.

Response: CBP does not agree with the commenter. A license holder and a national permit holder could be two different individuals conducting customs business, meaning that the license holder is bound by § 111.28(a), whereas a national permit holder is held to the responsibility stated in § 111.19(f). Both requirements are applicable to different designated individuals. If the license holder is the same individual as the national permit holder, then that individual is bound by the standard in § 111.19(f), which also refers to § 111.28(a) and includes the same standard. This cross-reference would not cause such an individual to have two types of responsibilities.

Comment: One commenter asked CBP to define the phrases ''physical proximity of subordinates'' and ''abilities and skills'' of employees and managers'' set forth in § 111.28(a). The commenter explained that the pandemic has resulted in many licensed brokers working from home, so the physical proximity of subordinates was not always feasible. Another commenter stated that there should be full alignment of the modernization efforts under the national permit framework, meaning that CBP should remove the requirement for a sole proprietorship, partnership, association, or corporation, to employ licensed brokers relative to the physical proximity of subordinates under the responsible supervision and control standard in § 111.28(a).

Response: CBP disagrees with the commenters. Both phrases, ''physical proximity of subordinates'' and ''abilities and skills of employees'', help a broker entity determine how many licensed brokers are needed to exercise responsible supervision and control. Physical proximity pertains to the aspect of an employee being physically located in the same or different office close to a broker entity to ensure proper supervision of a subordinate. The level of supervision and the number of supervising employees depends on the ability and skill level of each employee within a broker entity. To comply with the responsible supervision and control standard, a broker entity must take into consideration the experience, training, and skills of an employee to make the determination as to how many licensed brokers are needed. This determination is fact-specific and takes into account the various factors listed in paragraph (a) of § 111.28.

Comment: One commenter noted that § 111.28(e) does not set forth any time frames for CBP to make a decision as to whether CBP wishes to investigate a new principal or render a decision as to the acceptability of the new principal and notification of the transferring broker. Without set time frames, a legal transfer of ownership of a brokerage business could be voided. The commenter added that if the sale is to another broker or to an employee that CBP had previous notice of, there should not be an investigation.

Response: CBP will not add a time frame for completing a background investigation pursuant to § 111.28(e), just as there is no time frame for the background investigation for a license application pursuant to § 111.14(a). CBP reserves the right to conduct a background investigation on a new principal, if deemed necessary. That said, if the new principal is a current employee of the broker and CBP had recently completed a background investigation on that particular individual, then CBP may not complete another investigation, but it is in CBP's discretion to make that decision. It is important to note that the new principal does not have to wait to conduct customs business until CBP completes the background investigation and renders a decision as to whether the new principal is approved. The new principal may start conducting customs business as soon as the change of ownership is completed. If CBP finds a problem during the background investigation, CBP will address it with the new principal.

Comment: Several commenters asked that CBP change the deadline in § 111.30(a) for reporting of a broker's address to ten (10) business days, instead of only ten (10) calendar days, to provide flexibility with weekends and holidays, or simply unavailability of a party that provides such information. One commenter suggested that thirty (30) calendar days would be preferable to align with the requirement in § 111.28(b).

Response: CBP disagrees with the commenters and will keep the time frame for reporting an address change at

ten (10) calendar days. CBP believes that a broker would know at least ten (10) calendar days in advance when a business address is changing. Moreover, CBP already added flexibility by changing the requirement from an immediate written notice to ten (10) calendar days to inform CBP. CBP believes that this is a sufficient time frame.

Comment: One commenter stated that when a broker changes his or her name, pursuant to § 111.30(c), the notice of the name change can be provided to CBP after the fact, but a broker must notify CBP in advance when he or she proposes to use a trade name in one or more states. The commenter argued that providing this information in advance was helpful when there were port licenses and manual records maintained at individual ports because the port had no way of knowing that a trade name was the pseudonym for a licensed entity. However, today, the filer code in ACE represents the licensed entity, thus making this requirement unnecessary.

The commenter recommended that to the extent that CBP asserts that this documentation is still required, the regulation should be amended to be more consistent by requiring submission of both the name change and fictitious name authorization after the fact, rather than prior to use, and the requirement should apply only to the licensee's state of incorporation and office of record.

Response: It is CBP's practice to require proof of a broker's name change or proposed trade name change prior to issuing a new license reflecting the new name. While it is true that in many instances, an individual broker does not provide evidence of a name change (*e.g.,* due to marriage, divorce, etc.) prior to the actual name change, CBP believes that a broker entity who is planning on using a trade or fictitious name for conducting business in one or more states will know in advance what the new trade or fictitious name will be, thus, reporting to CBP in advance, along with documentation to be filed in those states, is not an unreasonable request. That said, in both instances (the broker's name change and the proposed trade name change), the broker will not be able to practice under the new name or trade name until the license reflecting the new name is issued to the broker. As mentioned in response to a comment above, CBP needs to know in what state(s) a broker is conducting customs business to be able to maintain oversight over the broker's business.

Comment: One commenter stated that the failure to file the triennial report and pay the status report fee pursuant to § 111.30(d)(4) should not result in forfeiture of the right to conduct customs business, absent an opportunity to cure the failure. The commenter argued that filing the triennial report is essentially a ministerial activity with limited impact on CBP operations or revenue, yet the failure to timely file the report and/or pay seems to have the same effect of terminating a broker's ability to conduct business, even if only temporarily. In the case of a violation of a more substantive regulatory provision, the broker is given an opportunity to address the violation before the imposition of a penalty, suspension or revocation, however, the same opportunity is not afforded to the broker who failed to complete the triennial reporting requirement.

Response: The suspension of a license by operation of law for failure to timely file the status report in the month of February of the reporting year pursuant to § 111.30(d)(4) is prescribed by statute. Section 1641 of 19 U.S.C. states that if a license holder fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked under certain circumstances. Therefore, CBP cannot modify the regulation to allow brokers an opportunity to address the failure to timely fulfill the status reporting requirements before a suspension is issued.

Comment: Some commenters stated that the proposed requirement in § 111.32 that a broker must not give, or solicit, or procure the giving of, any information or testimony that the broker knew or should have known was false or misleading in any matter pending before DHS is a very subjective standard and provides CBP with too much discretion. The commenters asked that CBP provide some criteria to determine what the broker should have known, what is considered misleading, and whether a misunderstanding qualifies.

Response: CBP cannot provide a comprehensive list of facts and circumstances that a broker should have known. What a broker should have known is based on a reasonable person standard. Based on a broker's customs business, and the information the broker has before him or her, the broker should be able to make the assessment whether certain information is false or misleading and whether the broker should have known. ''Misleading'' information is information that could be deceptive, confusing, misrepresentative or just false. Whether a misunderstanding qualifies as the broker's having filed, solicited, or procured the giving of false or misleading information depends on the facts and circumstances of a broker's knowledge, expertise, and actions.

Comment: One commenter asked whether a broker must report to CBP under § 111.32 the mere fact of a separation from or cancellation of representation of a client as a result of the determination that the client is intentionally attempting to defraud or otherwise commit any criminal act against the U.S. Government, or also provide details of the suspected or known wrongdoing by the client. The commenter argued that this proposed language goes against the goal of encouraging confidential communication and effective collaboration with the client, and improved compliance. Secondly, the commenter asked whether this notification would be confidential.

Response: CBP needs to not only know the fact that a separation from or cancellation of representation of the client occurred, but also the client name, date of separation or cancellation, and the reason(s) for the separation or cancellation, so CBP can exercise its due diligence and perform an investigation of the importer's dealings. Accordingly, CBP amended § 111.32 to require this information in the report. CBP proposed the change in § 111.32 to ensure that a broker not only advise a client after discovery that the client has not complied with the law or made errors or omissions in documents, but also document and report to CBP when a broker terminates the representation of the client who directs the broker to continue the noncompliance, error, or omission. In addition, pursuant to paragraph (f) of section 1641, CBP has the ability to fill in gaps in the regulations that CBP considers necessary to protect the revenue of the United States, specifically, regulations relating to documents and correspondence, and the furnishing by customs brokers of any other information relating to their customs business to CBP. As to the second question, information submitted to CBP is kept confidential within DHS, and all the components within DHS follow the same information-sharing rules. CBP will not put information received from brokers on its website or otherwise publicize it without lawful authority to do so. As mentioned above, the FOIA rules apply when it comes to disclosure of such information under certain circumstances.

Comment: A few commenters asked whether a broker's duty to report under § 111.32 would deprive an importer of the ability to file a prior disclosure pursuant to 19 U.S.C. 1592(d). One commenter stated that a broker already

has the responsibility to advise a client as to any errors and how they must be corrected, thus, this new requirement goes beyond 19 U.S.C. 1641.

Response: If an importer discloses the circumstances of a violation under 19 U.S.C. 1592(a) before, or without knowledge of, the commencement of a formal investigation of such violation (which could be triggered by a broker's report), then full benefits of prior disclosure treatment will be afforded. As to the second commenter, a broker has a general duty to disclose any information that he or she has learned while exercising customs business which indicates that a client is attempting to defraud the government. If a broker learns of any noncompliance or errors, then the broker must not keep this information to himself or herself but must report it to CBP, which will assist in combating fraud and other schemes against the government.

Comment: One commenter referred to section 3.5 ('Termination of Client Relationship') of the economic analysis in the NPRM, where CBP stated that it is expected that in many cases the report by the broker under § 111.32 would be drafted by an attorney. The commenter argued that CBP is recognizing that this process is characteristic of an *ad hoc* legal proceeding, evidencing that this reporting responsibility is more of a legal one and should not be enforced by a broker. Another commenter stated that the requirement would add a burden essentially requiring brokers to adjudicate an importer's actions, which is not the responsibility of a broker.

Response: CBP does not agree with the commenter's reasoning. Brokers should be knowledgeable enough to identify when a client is attempting to defraud the government or otherwise commit a criminal act against the government. CBP is not asking brokers to adjudicate a client's actions, but if brokers see any wrongdoing on the part of their clients, and they separate from or cancel representation of their clients as a result of having identified any wrongdoing, then brokers must alert CBP. As discussed in the economic analysis further below, the reporting requirement will cause a minor increase in the burden on brokers.

Comment: One commenter suggested that the e-Allegations portal on CBP.gov be used for reporting potential violations of law instead of imposing a requirement on the broker.

Response: Submitting an allegation online through the e-Allegations portal is one way of reporting a trade violation, but it is not the best reporting tool in the broker context. Also, the option to submit an allegation online does not relieve a broker of the responsibility to report any information or a client's actions if the broker determines that the client is attempting to violate the customs laws and regulations. Brokers should report any attempted violation of customs laws and regulations to a supervisory point of contact at the importer's/client's assigned Center as the assigned Center handles all processes associated with an assigned importer.

Comment: Another commenter stated that the proposed revisions to § 111.32 appear to exclude civil or non-criminal violations, and if that was CBP's intent, CBP should clarify the regulation. Also, CBP should include ''customs laws'' in the regulatory text of § 111.32 to make it clear that the documenting requirement does not include all Federal law (such as tax law, security laws etc.), but only those laws with which a broker can be expected to be familiar.

Response: The proposed language of § 111.32 includes civil actions, such as fraud, as well as criminal acts against the U.S. Government. To clarify CBP's intent, CBP modified the third sentence to state that the broker has the duty to document and report if the broker determines that the client intentionally attempted to use the broker ''to defraud the U.S. Government or commit any criminal act against the U.S. Government''.

CBP disagrees with the commenter's second request to limit a broker's responsibility to customs laws and exclude any other laws. A broker must be knowledgeable as to international trade laws, customs laws and regulations, and general customs practices that concern entry filings, admissibility, classification, valuation of merchandise, as well as duty rates for imported merchandise, and excise tax, among other areas of expertise. In conducting its business, the customs broker might become aware of the attempted importation of illegal merchandise or perhaps import/export schemes violating certain laws, that reach beyond what might traditionally be thought of as 'customs' laws.

Comment: Two commenters stated that the proposed change in § 111.36(c)(3) to require a power of attorney directly from the importer or drawback claimant, and not via a freight forwarder, is unreasonable. The commenters argued that a lot of brokers use their forwarding divisions to break down language barriers for non-resident importers or delivery duty paid shipments.

Response: CBP does not prohibit a broker from working with the forwarding division of a broker entity. The proposed regulation precludes a broker from obtaining a power of attorney from someone other than an importer or drawback claimant. The intent of this proposed provision is to clarify that a freight forwarder cannot serve as a barrier to communications between the broker and importer or drawback claimant, to address issues of identity theft, supply chain security, fee transparency, and to help ensure that an unlicensed person is not benefitting from the customs business conducted by the broker. However, a freight forwarder may be included as a third party in a power of attorney between the broker and the importer or drawback claimant. CBP does not regulate whether a broker uses foreign agents to perform work that is not customs business, but CBP does strictly ensure that persons not actually employed or supervised by a broker do not get paid a portion of the fee derived from customs business services; such persons may instead be paid by a flat fee.

Comment: One commenter supported the change to require a power of attorney directly from the importer but asked that the language in § 111.36(c)(2)(i) and (ii) align with the proposed language in (c)(3) for power of attorneys by including the drawback filer in (c)(2).

Response: CBP does not agree that the language in paragraph (c)(2) needs to be amended to include drawback claimants. Drawback claimants are included in the phrase ''or other party in interest''. The term ''drawback claimant'' was specifically included in the proposed sentence in (c)(3) to emphasize that a broker must execute and obtain a power of attorney directly from either the importer of record or drawback claimant, and not a freight forwarder or other third party that is not part of the broker-importer/drawback claimant relationship.

Comment: Another commenter, a surety association, stated that when an importer fails to file an entry summary or reconciliation entry or fails to re-deliver goods, the surety is held responsible; but, the surety is not authorized to take action to bring the defaulting bond principal into compliance. Thus, the regulation should allow for a surety to complete an action initiated by, but also abandoned by, its bond principal. The commenter recommended to identify sureties, along with importers and exporters, as parties authorized to file on their own account under § 111.2(a)(2)(i), and as one of the

parties from whom brokers may obtain powers of attorney (§ 111.36).

Response: CBP does not agree with the commenter's request to include sureties in § 111.2(a)(2)(i) as a party to file on their own account, or in § 111.36 as a party from whom brokers may obtain a power of attorney. It appears from the commenter's reference to § 111.1(a)(2)(i) that the commenter believes that a surety is acting on behalf of a principal (importer), akin to an importer's authorized employee/officer, but that is legally not the case. A surety and importer have rights against each other on a bond. Therefore, sureties may not be included in § 111.2(a)(2)(i) as a party to file on their own account.

Although CBP regulates the general requirements applicable to bonds, which must be met by either the bond principal or the surety, CBP does not regulate the terms of the relationship between the bond principal and the surety, and thus a surety is not included as a party from whom a broker may obtain a power of attorney under § 111.36. The function of the bond regulations is to protect the revenue and ensure compliance with the laws and relevant regulations. The contractual terms agreed upon by a surety and the bond principal, which relate to matters other than bond coverage, bond conditions etc., are beyond the purview of CBP. Information sharing between bond principals and sureties, and their rights against each other over a particular entry, are thus to be decided by contract, and not by the terms of customs regulations pertaining to bonds (part 113) or brokers (part 111).

Comment: One commenter stated that CBP should clarify that in a case where an importer directly provides a broker with a power of attorney, the broker would not be precluded, in turn, to assign that power of attorney to another broker in accordance with the original power of attorney. One of the commenters pointed to the ''Broker A-Broker B'' process described in the Broker Management Handbook.

Response: A power of attorney must be executed between the importer of record or drawback claimant and the broker. A power of attorney cannot be executed between the importer of record or drawback claimant and the freight forwarder who in turn assigns the power of attorney to a broker. The reason behind CBP's proposed language in § 111.36(c)(3) is the addition of paragraph (i) in section 1641, based on section 116 of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),[13] for CBP to promulgate regulations to require brokers to verify the identity of the client, and the notion that a broker should know his or her client. However, the proposed language does not exclude the assignment of a power of attorney from one broker to another broker. Assignments of powers of attorney are permissible as long as the original power of attorney is executed between the importer of record or drawback claimant and the broker, and Broker A designates Broker B to act on behalf of the client (importer or drawback claimant) in accordance with the terms of the original power of attorney. In other words, a designation by Broker A of Broker B is permitted so long as the client consented to this designation in the original power of attorney. Pursuant to § 141.46, a power of attorney must be in place before a broker acts on behalf of the client. Accordingly, to clarify CBP's intent, paragraph (c)(3) was slightly modified by removing the word ''obtain'' and replacing it with ''execute'' in the first sentence.

Comment: One commenter asked CBP to confirm that electronic signatures are permissible on powers of attorney.

Response: CBP recently issued Headquarters ruling H297978 (July 16, 2021), responding to a requester on this same question. CBP determined that whether an electronic signature is permitted for use on a customs broker power of attorney is determined by the applicable state's law governing the execution of powers of attorney. In addition, CBP stated in the Headquarters ruling that neither the applicable customs statute nor regulations prohibit the use of an electronic signature on a power of attorney, provided that it otherwise constitutes a valid power of attorney between the broker and client and may be produced upon CBP's request.

Comment: One commenter supported the changes in § 111.36(c)(3) but asked for additional changes in paragraphs (a), (b), and (c). The commenter asked CBP to add language in paragraph (a) that sets forth that the broker and importer or drawback claimant come to an agreement as to how documents will be transmitted to the importer or drawback claimant, and as to how payments will be made for services and other expenses, and to add a sentence at the end of paragraph (b) stating that nothing in the regulation would prohibit brokers from compensating sales representatives in a manner that is agreeable to both. The commenter further suggested to revise paragraph (c)(2) to state that the broker shall transmit directly to the importer or drawback claimant a copy of the power of attorney and terms and conditions to be signed and returned to the broker, and to revise paragraph (c)(3) to provide that the broker, freight forwarder, and importer or drawback claimant, shall make arrangements as to how documents and payments will be made for services and other expenses.

Response: CBP does not agree with the commenter's suggestion to change paragraph (a). This paragraph sets forth an affirmative obligation for the broker to provide a detailed statement to the importer of the services rendered. This obligation is in place to prevent misfeasance and fraud. CBP further does not agree with an additional sentence in paragraph (b) to allow for the compensation of sales representatives who are unlicensed in a manner that is agreeable to both. Such an arrangement would prevent transparency of the billing of services rendered and goes against the overarching principle that brokers must not share fees generated from customs business with unlicensed parties.

In addition, CBP does not agree with the suggested revisions to paragraph (c)(2). Existing paragraphs (c)(2)(i) and (ii) set forth minimum requirements for a broker to communicate certain information to an importer or other party in interest to allow for transparent billing. These requirements may be included in an agreement between the parties involved in a transaction, but also need to be spelled out in the regulation to emphasize that the conditions regarding the compensation of a freight forwarder for referring a brokerage business need to be made known and available to the importer. Lastly, CBP does not agree with the revision in paragraph (c)(3) for the reasons mentioned above. Brokers must fulfill the requirements in the regulations; the conditions as to document submission and payments to the broker may be spelled out in an agreement between the parties, but it is important to have regulatory requirements that bind parties.

Comment: One commenter stated that the fee-splitting requirements are antiquated, unclear and unrealistic. CBP should consider revoking the fee-splitting prohibitions in (b) and the conditions under (c), but at the very least create an additional carveout to (b) for ''unlicensed related business entities of the broker whether located in the United States or a foreign country''.

Response: CBP does not agree with the commenter. Brokers are prohibited from creating fee arrangements whereby

[13] Public Law 114–125, 130 Stat. 122 (February 24, 2016).

the fees or other benefits resulting from the customs business services rendered by a broker will directly benefit an unlicensed person or entity. Thus, agreements wherein unlicensed persons acting as independent agents receive a commission for marketing or selling customs services on behalf of a brokerage company are generally prohibited. However, in Headquarters ruling H302355 (January 29, 2019), CBP had carved out a distinction between a commission paid to unlicensed independent agents contracted by a broker, and the unlicensed employees of a broker. The function of this distinction is to preserve the regulation's underlying policy concern of preventing unlicensed persons from improperly benefitting from the transaction of customs business. Commission payments to an employee are permitted, but not to independent agents who may or may not be operating outside of the United States. Instead, a flat fee, not tied to a particular transaction, would be permissible to compensate third-party agents for selling customs services.

Comment: One commenter pointed out that according to language in the preamble of the NPRM, a broker is required to have direct communication with the importer. The commenter hoped that CBP understands that, at times, clients/importers designate third parties, *e.g.,* attorneys and consultants, to engage with the brokers. As such, brokers may communicate directly with third parties that represent the importer and such circumstances, controlled by the importer's preference, should be compliant and sufficient.

Response: CBP wants to clarify that there is no prohibition on the communication between the broker and third parties that the client has designated, but there is a prohibition on brokers executing a power of attorney with a third party acting as an intermediary instead of directly with the client. As mentioned above, CBP clarified the distinction between clients/brokers and third parties/brokers and replaced the word ''obtain'' with the word ''execute''. In addition, to provide more clarity, CBP added a reference to ''other third party'' after ''and not via a freight forwarder''.

Comment: One commenter stated that the proposed change in § 111.39(c) to require the broker to advise the client on a proper corrective action and retain a record of the communication with the client, in addition to the existing duty to advise the client if the broker knows that the client has not complied with the law or has made an error, is a shift of responsibility from the importer to the broker who does not possess the same information that the importer does. Another commenter stated that the proposed language in § 111.39(c) greatly increases a broker's responsibilities in an area that should be the domain of the importer and pointed to 19 U.S.C. 1484 and 19 CFR 141.1(b) that place the responsibility for corrective action and liability for duties and other debt on the importer. Accordingly, the commenter is of the opinion that the proposed regulation is in conflict with the cited law and regulation, and, thus, should be removed.

Response: CBP does not agree that the proposed regulation imposes an additional burden on brokers. Brokers have an existing duty pursuant to § 111.39(b) to advise a client promptly of noncompliance, an error or an omission of which the broker has knowledge. If a broker continues to engage in customs business which then repeats such noncompliance, error or omission, then a broker is violating § 111.32 because a broker is now filing documents with CBP that the broker knows contain false information. In addition, brokers should already have a good practice in place for documenting any communication with a client, and specifically any advice provided to a client on a corrective action. Adding this proposed language in the regulation is merely clarifying and codifying this responsibility.

Comment: Several commenters asked for clarification as to what type of record must be retained as evidence of a corrective action, what should be included in the ''communication'' with the client, and what constitutes ''corrective action.'' The commenters suggested to add a sentence to paragraph (c) to state that a copy of a corrected entry demonstrating and/or communication explaining specific corrective action(s) shall serve as an adequate record of such communication.

Response: CBP disagrees with the suggested sentence that a copy of a corrected entry or communication could be sufficient to show that the broker has advised its client of a corrective action. CBP does not want to limit the types of records that qualify as evidence that the broker advised the client of a corrective action. The record could be an email or letter sent by the broker, or a written note summarizing a phone call between the broker and client, to name a few. CBP is open to accepting any record that the broker thinks would be sufficient in evidencing the communication that took place between the broker and client. Corrective action is the action that the broker took to remediate the noncompliance or error; an action that the broker in his or her good judgment understands needs to be taken.

Comment: One commenter referenced a statement in the economic analysis in the NPRM (page 34848, 1st row in the table listing § 111.39), which stated that the change in § 111.39(c) is considered neutral as it reflects CBP's current practice. The commenter disagreed with that statement, noting that current part 111 does not explicitly require customs brokers to provide clients with corrective action measures reflective of the client's errors/violations.

Response: CBP believes that the statement in the economic analysis is correct. A broker has an existing responsibility to advise the client of any noncompliance and errors and suggest a corrective action, even though it has not been stated expressly in the regulation. Advising a client and documenting such advice should be a broker's good practice, to protect the client's as well as the broker's interests, in case of any litigation or complaint by the client. Further, a broker has the responsibility pursuant to § 111.21(a) to document any correspondence with the client, which includes the documentation of any corrective action(s) that the broker advised the client to take. CBP wishes to take the opportunity to make clear that this communication from the broker to the client is a record under § 111.21. Thus, CBP considers this responsibility a current practice, and determined that the proposed language in § 111.39(c) is deemed neutral in the economic analysis.

Comment: Two commenters stated that brokers frequently refer clients to consultants or attorneys for a proper course of action, and CBP should recognize that a referral to a more qualified expert may be the proper corrective action and should reflect that in the regulation.

Response: CBP understands that part of a broker's normal business practice, in some situations where corrective action is needed, could be a referral to a more qualified expert with regard to certain corrective actions. However, that does not mean that a referral is the only proper course of action. It is a reasonable person standard that the broker must employ to determine what type of corrective action is appropriate in a specific situation.

Comment: One commenter stated that the requirement that a broker document the advice to a client under § 111.39(c) serves no purpose to CBP. If CBP has a concern with a broker's performance, then CBP should conduct an audit. The commenter requested that CBP create a standard reporting requirement and advise the importing community of its

intention of collecting data and how the benefits of the data collection do not cause the broker or importer to act without conflict in its importing partnership with the importer of record.

Response: CBP disagrees with the commenter. The documentation requirement does serve a purpose, which is evidencing that the broker provided advice to the client, and that documentation is considered a record pursuant to § 111.21. The second sentence of § 111.21(a) states that a broker must keep and maintain on file copies of all of his or her correspondence and other records relating to the customs business. This is a recordkeeping requirement for all brokers; the requirement in proposed paragraph (c) of § 111.39 is merely reiterating that a broker must keep a record of communication with the client regarding the advice on a corrective action. To make this existing requirement clearer, CBP included a reference to § 111.21 in addition to the reference to § 111.23 in paragraph (c) of § 111.39. Since there are recordkeeping requirements in place, CBP believes that there is no need for an additional reporting requirement.

Comment: Several commenters stated that CBP should allow for an extension of time, extenuating circumstances, or an opportunity to mitigate pursuant to § 111.45 if the broker can show a good faith effort to prevent the revocation of the license and permit. The commenters argued that the effect of losing a single national permit is much more detrimental than losing a district permit. The commenters suggested language to add at the end of the first two sentences of paragraph (a), preventing a suspension or revocation if a broker demonstrates good cause or commits to corrective action, warranting an extension of time.

Response: The statutory requirements in paragraphs (b)(5) and (c)(3) of section 1641 set forth the reasons for a lapse of a broker's license and permit. If a broker entity that is licensed as a corporation, association or partnership fails to have, for any continuous period of 120 days, at least one licensed officer of the corporation or association, or at least one licensed member of the partnership, the entity's license will be revoked by operation of law under paragraph (b)(5). If a broker who was granted a permit fails to employ, for any continuous period of 180 days, at least one individual who is licensed, the permit will be revoked by operation of law under paragraph (c)(3). Neither paragraph in the statute provides for a good cause exception. Thus, the regulation, which mirrors the language in the statute and mandates a revocation by operation of law, cannot be changed to include such an exception. Moreover, CBP already provides for the possibility for reinstatement of a license once the triennial status report and associated fee are filed as required, as well as for reinstatement of a permit. Moreover, there is no prejudice to a broker if a license or permit is suspended or revoked by operation of law; brokers are not barred from reapplying.

Comment: Other commenters suggested that there be an administrative process prior to revoking a license and permit, such as providing prior notice in case of a failure to pay the annual broker permit fee in § 111.45(b). Such process would allow for a less burdensome resolution if the failure to pay was due to an administrative or clerical mistake.

Response: The broker permit user fee is an annual fee that brokers must pay for each permit they hold. CBP issues a **Federal Register** notice to announce the amount of the fee, as well as the deadline to pay the fee, on an annual basis. CBP also posts this information on its website. CBP believes that there is sufficient notice for a broker to timely pay the permit user fee. In addition, with the effectiveness of the final rule, there will be only one permit user fee to pay per year for a broker's national permit. Thus, CBP does not believe that the timely payment of the fee is burdensome.

Subpart D—Cancellation, Suspension, or Revocation of License or Permit, and Monetary Penalty in Lieu of Suspension or Revocation

CBP received supporting comments regarding the proposed changes to subpart D of part 111. Specifically, one commenter supported the proposal in § 111.53 to add a new paragraph (g) to provide an additional ground for the suspension or revocation of a license or permit to cover convictions of committing or conspiring to commit an act of terrorism as described in section 2332b of title 18 of the United States Code (*see* 19 U.S.C. 1641(d)(1)(G)). Another commenter supported the proposal in § 111.62(e) to remove the requirement for the broker to file his or her verified answer in duplicate prior to a suspension or revocation hearing as it better reflects the current electronic business environment. In addition, a commenter supported the proposal in § 111.76 to remove the requirement for a broker to file an application to CBP to reopen a case in writing and in duplicate, if an appeal is not filed, and instead to allow for electronic communication.

Subpart E—Monetary Penalty and Payment of Fees

Comment: One commenter voiced the concern that the increase of the license application fee will deter individuals from applying for a broker's license.

Response: CBP conducted a fee study on the costs associated with the broker license application, and CBP determined that the current fees are no longer sufficient to cover the costs of servicing brokers. The fee study showed that a fee of $463 for individuals and $815 for business entities would be necessary to recover the costs associated with the review of the license application and the necessary vetting for individuals and business entities. However, to minimize the financial burden on prospective brokers and not disincentivize those who are pursuing a career as a broker, while also recovering some of the increasing costs, CBP proposed to not increase the fees to the level of cost needed, but to increase the application fee to $300 for individuals and $500 for business entities. The economic analysis explains the reasons for the increase of the application fee and emphasizes the cost savings as a result of eliminating the district permit requirement and other changes to part 111. Once the final regulations are effective, a national permit applicant has to pay for only one permit application to be able to conduct customs business throughout the U.S. customs territory, in addition to the annual permit user fee for only one national permit.

Comment: One commenter expressed disagreement with the increase of the permit fee, pointing to CBP's ACE system and other electronic platforms used for receiving payments and submissions of information and argued that the use of those tools should reduce costs. In addition, the commenter noted that the automatic transition from district permits to national permits should not cause any additional cost.

Response: As mentioned above, CBP proposed to increase the license application fee to cover expenses related to the review of license applications and vetting of applicants. CBP did not propose to change the amount of the permit fee, and this final rule is not changing the fee of $100 for a broker to apply for a national permit. In response to the second comment, CBP is transitioning the district permits to national permits at no cost to brokers.

Comment: One commenter stated that CBP should consider automating the fee collection and management functions, and charge a set fee per port, not district. The commenter further noted

that ''district'' is a term used by CBP, which is not as relevant for brokers filing entries, thus, districts should be disregarded when charging fees.

Response: CBP did not propose to change the current fee structure for filing entries, moreover, the commenter's suggestion is not considered a natural outgrowth of the NPRM's proposals. Therefore, CBP is not adopting a new fee structure based on port activity.

Other General Comments

Comment: One commenter stated that CBP did not provide sufficient notice of the proposed amendments as they were not mentioned on CBP's website, but only announced in the **Federal Register**. The commenter further maintained that the NPRM did not mention whether CBP had reached out to the trade for input on specific issues. In addition, the commenter asked that CBP provide a fuller explanation of the proposed changes and provide further opportunities for public comment before finalizing the regulations. Another commenter suggested to issue a revised NPRM, or, at least, hold a public hearing to discuss the proposed changes.

Response: Pursuant to the APA, CBP published the NPRM to propose changes in an effort to modernize the customs broker regulations. The NPRM provided 60 days for public comment, in compliance with the APA. In addition, CBP announced the publication of the NPRM (as well as the concurrent NPRM proposing the elimination of broker district permit user fees) on CBP's website.[14] Moreover, CBP had been socializing the proposed changes to part 111 for numerous years at many public forums, including COAC meetings and various broker association meetings. As mentioned in the preamble of the NPRM, CBP had conducted outreach to the broker community through webinars, port meetings and broker association meetings to solicit feedback on various broker matters and the modern business environment. The trade community had many opportunities to share their opinions, throughout the outreach as well as during the 60-day public comment period. CBP does not believe that there is a need for a public hearing or a revised NPRM to provide a fuller explanation of the proposed changes, other than the explanations included in this final rule.

Comment: One commenter recommended a minimum percentage of U.S. ownership in a brokerage. The commenter explained that CBP Form 3124 does require the notation of all officers who are licensed, as well as other officers and principals with controlling interest who are not licensed.

Response: CBP thanks the commenter for its contribution but believes that this comment is outside of the scope of this final rule as there is no U.S. ownership requirement in 19 U.S.C. 1641 or the corresponding regulations in 19 CFR part 111.

Comment: One commenter strongly recommended that CBP establish a dedicated, independent ombudsman-type position with the Office of Trade Relations to ensure that customs brokers are treated the same as CBP employees would be treated for similar types of mistakes. The commenter argued that this would be especially important considering the increased level of responsibility continually being transferred from CBP to customs brokers.

Response: CBP does not believe that the creation of an ombudsman-type position is necessary. CBP disagrees that a broker's mistake should be treated in the same fashion as a CBP official's mistake. Brokers are not Federal employees, so different paths are available for brokers and CBP officials to take in case of mistakes. Brokers have the opportunity to appeal certain decisions by CBP if brokers are of the opinion that those decisions are erroneous, such as the rejection of a license or permit, the suspension/revocation of a license or permit, or the imposition of a penalty. Other applicable avenues are in place for Federal employees.

Comment: Three commenters urged CBP, especially in light of Executive Order 13924 (May 19, 2020), which instructed the government to provide regulatory relief and flexibility on a temporary, as well as, permanent basis, where appropriate, and due to the current challenges businesses are facing during the pandemic, to grant the brokerage industry at least one year, and upon showing of need, additional time beyond the one-year period to comply with the new regulations. The commenters argued that brokers will need time to adjust, and in some cases, restructure their businesses, to the new national permit framework and the new criteria for responsible supervision and control.

Response: CBP does not believe that one year is necessary to implement the final regulations to allow a broker to adjust, and maybe even restructure, its business. A lot of the changes that are being implemented with this final rule are simplifying processes or updating or clarifying regulations. For instance, the updated supervision framework is simply codifying what brokers should have already been doing, such as the employment of sufficient licensed brokers, broker's responsiveness to CBP's communications and notices, as well as to the partner's or member's communication and direction, and updated recordkeeping requirements. None of these changes is significant in the sense that it would require brokers to re-structure their businesses. A lot of the requirements that are being codified in the regulations should have been best practices already for brokers to provide high quality service to their clients.

However, CBP does agree that a 60-day delayed effective date is beneficial for both the brokers to make any needed changes to the business, and for CBP to transition all district permit holders to a national permit and to ensure that CBP personnel are aware of and ready to work with the new changes imposed by the final rule.

In the NPRM, CBP proposed to revise § 111.2(b) by removing the four exceptions to the district permit requirement in order to transition to a national permit system. As part of the proposed revision, CBP will remove the cross-reference in § 111.2(b)(2)(i)(C) to subpart B of part 143 of the CBP regulations, which sets forth the regulations regarding remote location filing (RLF). No comments were submitted by the public regarding these proposed changes, whereby the use of a national permit would obviate the need for standalone RLF regulations. It should be noted that the RLF requirements that are mandated by 19 U.S.C. 1414 are captured in the proposed transition to national permits for all licensed brokers, as the national permit framework includes the expansion of the scope of a national permit to all customs business within the United States and would allow filings to be made electronically from anywhere in the United States. Once the final rule becomes effective, customs brokers will not be subject to the RLF regulations and, in a future rulemaking, CBP will propose amending the standalone RLF regulations in subpart B of part 143 to remove those provisions which have become moot and make any other changes that may be needed.

[14] The announcement of the NPRMs, as well as COAC's recommendations regarding the modernization, may be found online on CBP's website at *https://www.cbp.gov/trade/programs-administration/customs-brokers* by clicking on the tab titled ''Modernization of the Customs Broker Regulations''.

III. Technical Changes and Clarifications to the Existing Regulations

In reviewing the proposed changes to the regulations, as well as existing regulations, CBP identified certain technical changes that would provide more flexibility to the brokers, clarify CBP's intent of certain regulatory language, and improve the electronic submission process, which are set forth below.

In § 111.12(a), CBP added the option for electronic submission of license applications. CBP is in the process of developing the capability for the submission of license applications to the eCBP portal and wants the regulatory language to accommodate this future change. In addition, CBP added the option for electronic submission of withdrawals of license applications in redesignated paragraph (b) as an alternative to the current method of submission to the processing Center. As soon as CBP deploys this additional capability, applicants will have two options for the submission of application withdrawals.

To reflect in the regulation the option of a remote exam, as explained above, CBP modified the language in the last sentence of § 111.13(b) to state that CBP will give notice of the exact time and place for the examination, including whether alternatives to on-site testing will be available. In § 111.14(a)(3), CBP corrected a minor error that occurred in the published NPRM in the phrase ''(including a member or a partnership or an officer of an association or corporation)''. With this final rule, CBP replaced the first instance of ''or'' in the above phrase with the word ''of'' to accurately reflect the meaning of the phrase.

In § 111.17(c), CBP slightly modified the language for clarity and replaced ''the date of entry of the Executive Assistant Commissioner's decision'' with ''the decision date by the Executive Assistant Commissioner''. This technical change does not change the meaning or substance of the sentence.

CBP slightly modified the language in the fifth sentence of § 111.19(b) to clarify that a broker has two options for submitting the permit application, by submitting a letter either to the processing Center or electronically through a CBP-approved EDI system.

In the first sentence of § 111.19(e)(1), CBP replaced the phrase ''in support of the denied application'' with the phrase ''in support of the application'', removing the word ''denied.'' This technical change does not change the meaning or substance of the sentence. Moreover, this change better aligns the regulatory language in § 111.19(e)(1) with (e)(2). The proposed term ''denied application'' is not used anywhere else in the regulation, thus, it is replaced for clarity purposes.

Further, in § 111.19(e)(2), CBP slightly modified the language for clarity at the end of the sentence and replaced ''the date of entry of the decision'' by the Executive Assistant Commissioner with ''the decision date'' by the Executive Assistant Commissioner. This technical change does not change the meaning or substance of the sentence.

In § 111.19(d), CBP added the phrase ''the application'' after ''will review'' to further clarify that the processing Center that receives the application will review the application to determine whether the applicant meets the eligibility requirements for a national permit to be issued. This clarification does not change the meaning or substance of the sentence.

In § 111.28 (responsible supervision and control), CBP revised the language in (a)(3) and (5) to provide more clarity. Factor (3) is revised to read as ''The volume and type of business conducted by the broker'', and factor (5) is revised to read as ''The level of access a broker's employees have to current editions of CBP regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances.'' There is no change to any of the substantive regulatory requirements for customs brokers. In addition, CBP replaced the word ''broker'' with ''brokerage'' at the end of the sentences in (a)(9) and (a)(10) to better reflect the meaning of the factors.

In § 111.28(b)(2) and (3), CBP replaced the word ''employees'' with ''employee(s)'', where appropriate, for consistency throughout the two paragraphs. This technical change does not change any of the substantive reporting requirements for customs brokers.

Further, in § 111.30(d)(1), CBP removed the proposed language ''accompanied by payment or valid proof of payment of the triennial status report fee prescribed in § 111.96(d).'' and replaced it with simpler language that reflects the current and future process of submissions of triennial status reports to CBP, *i.e.,* the status report must be filed through a CBP-authorized EDI system. There is no option for a broker to attach valid proof of payment in the eCBP portal, or when submitting the report at one of the 41 BMO locations. Further, CBP added clarifying language that the status report is not considered received by CBP until payment of the triennial status report fee prescribed in § 111.96(d) is received. This is not a new requirement; CBP always required the submission of both the triennial status report and the triennial status fee, as evidenced by the existing regulatory language ''the report must be accompanied by the fee.'' A similar message as the one in the final regulation is displayed in the eCBP portal when submitting the triennial report, alerting the broker that the filing is not completed until payment of the fee has been submitted.

In addition, CBP did not adopt the proposed language of ''submits payment or proof of payment of'' in the third sentence of § 111.30(d)(4) but kept the existing language of ''pays'' as it better reflects CBP's practice, as explained above. CBP added ''and pay the required fee'' in the fourth sentence of § 111.30(d)(4) to align the language with the language in the prior sentence that talks about filing the required report and paying the required fee for the license to be reinstated. The fourth sentence sets forth the consequence of revocation by operation of law if the broker does not file the required report and pay the required fee.

CBP also amended the first sentence of § 111.30(e) and added phone number and email address to the already required information of name and address for the individual who has legal custody of the records after the termination of the brokerage business. Adding the email address and telephone number to the methods for communicating with CBP will expedite communication and facilitate resolution of any questions. Communication in current times is typically conducted by phone or email, thus, adding these two options will benefit both CBP and the recordkeeping individual. Moreover, an email address and telephone number are often already included when brokers provide information to CBP, as those are preferred methods of communication.

In § 111.39(a), covering advice to a client, in the first sentence, CBP added the phrase ''it conducts on behalf of'' for clarification, but this change will not have an impact on the substantive regulatory requirement for customs brokers to not withhold any information relative to the customs business that the broker is conducting on behalf of a client.

In addition, CBP revised the last sentence of paragraph (a) of § 111.96 and removed references to a CBP fingerprint processing fee since this is not a fee that CBP collects. The only fee that is collected for the processing of fingerprints is one charged by the Federal Bureau of Investigation.

CBP simplified the proposed language in § 111.96(d) regarding the triennial

status report fee to state that a fee of $100 is required to defray the costs of administering the status reporting requirement prescribed in § 111.30(d)(1). The method of submission by a CBP-authorized EDI system is already mentioned in § 111.30(d)(1), thus, it is sufficient that paragraph (d) of § 111.96 simply deals with the fee payment.

Finally, while the general topic of this rulemaking covers customs revenue functions delegated to the Secretary of Homeland Security by the Secretary of the Treasury, this document also includes certain fees over which the Secretary of the Treasury retains authority, as provided for in 19 CFR 0.1(a) and paragraph 1(a)(i) of Treasury Department Order 100–16. Accordingly, this final rule is also being signed by the Secretary of the Treasury (or his or her delegate).

IV. The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for Licensed Customs Brokers

In addition to finalizing the proposed regulations, CBP announces in this final rule the deployment of a new payment and submission system, the eCBP portal. The development of the eCBP portal is part of CBP's Electronic Payment Options (ePO) effort that addresses the revenue collections capability gaps of limited payment options, inefficient manual processes, and disparate revenue systems. This effort's goal is to eliminate manual processes and standardize processes, reduce cash and check collections at ports of entry and provide more online payment options, integrate data with cargo systems, reduce wait times at ports of entry, and provide better and more accessible data, all of which aligns with recommendations by COAC and other trade stakeholders.

This new payment and submission system streamlines and validates data, which in turn reduces errors and provides data to support security-related decision making by CBP personnel. Using the eCBP portal means fewer cash transactions, which means lower risk of cash losses. Additionally, this technological advancement enhances CBP revenue collection capability and permits greater focus on law enforcement and trade facilitation.

The eCBP portal's electronic submission and payment options offer brokers the flexibility and convenience to easily and efficiently manage their reporting responsibilities. Currently, the eCBP portal is being used for the submission and payment of broker examination applications and triennial status reports. Additional enhancements, such as the electronic submission of and payment for broker license applications and permit applications, and the payment of annual user permit fees, will follow, and CBP will announce those additional eCBP functionalities in the **Federal Register**, as needed.

CBP deployed eCBP's functionality to receive broker examination applications on August 19, 2019. CBP announced this new payment system through CSMS messages, on CBP's website, through tweets, and in webinars offered to the broker community. This new payment portal was well received by the broker community, and by the end of fiscal year 2019, CBP had successfully processed more than 1,300 broker examination applications in the eCBP portal, resulting in a significant reduction of personnel hours in CBP Headquarters and at ports processing applications and withdrawals of applications.

After a successful testing phase between December 2017 and May 2018, on December 15, 2020, CBP deployed the capability to file the triennial status report in the eCBP portal by completing the online form and submitting the triennial fee. Approximately 90% of the status reports for the 2020/2021 reporting period were submitted electronically. It is important to note that with this new functionality, customs brokers now have two options to file the triennial report and fee: they may use the new portal or submit the report and fee at a location where their broker license was issued. An additional current functionality of the new eCBP portal is the automatic processing of license suspensions and revocations for unpaid triennial status reports, which was deployed to the portal in February 2021. However, even though this is an automatic process, the list of unpaid reports is manually validated by CBP personnel prior to suspension or revocation. As the eCBP portal is tied to ACE, this new interface also allows ACE to receive the triennial report data and apply any updates regarding the triennial report information and payment information to the broker account in ACE.

Customs brokers who want to use the eCBP portal, found on CBP's website, must create a *Login.gov* account as a first-time user.[15] Instructions and training resources, such as user and quick reference guides, for brokers on how to create a *Login.gov* account and use the eCBP portal can be found on CBP's website.[16]

V. Conclusion

Based on the analysis of the comments received and further consideration, CBP has decided to adopt as final the proposed regulations published in the **Federal Register** (85 FR 34836) on June 5, 2020, as modified by the changes noted in the discussion of the comments section above.

VI. Statutory and Regulatory Requirements

A. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation.

This rule will result in costs to licensed customs brokers in the form of additional fees and reporting requirements. CBP estimates that these costs total $88,850. This rule will also result in benefits to licensed customs brokers in the form of reduced fees and reduced time burdens. CBP will also benefit from time savings. CBP estimates that the monetized savings of the rule total $1,277,116. The five-year total monetized net benefit of the rule ranges from $973,616 discounted at 7 percent to $1,088,308 discounted at 3 percent. In addition, unmonetized benefits include increased professionalism of the broker industry, greater clarity for brokers in understanding the rules and regulations by which they must abide, better data security, and better reporting of potential fraud to CBP.

As mentioned above, CBP published the proposed rule titled, ''Modernization of the Customs Brokers Regulations,'' on June 5, 2020, and received 55 comments from the public.[17] CBP adopts the regulatory

[15] The link to the eCBP portal may be found online at *https://e.cbp.dhs.gov/brokers/#/home.*

[16] Resources for brokers on how to use the eCBP portal are available online at *https://www.cbp.gov/trade/ecbp.*

[17] Both the NPRM (85 FR 34836) and the public comments in response to the NPRM may be found online at *https://www.regulations.gov/document/USCBP-2020-0009-0001.*

amendments specified in the proposed rule with some changes, outlined below. With the adoption of the proposed regulatory amendments, CBP applies the 2020 NPRM's economic analysis approach to this rule, updating the data as necessary and making certain changes in accordance with the public comments.

CBP has prepared the following analysis to help inform stakeholders of the impacts of this rule.

TABLE 1—SUMMARY OF CHANGES AS A RESULT OF THE RULE

Provision	Section	Change	Cost/benefit
111.1	Subpart A	Update/eliminate definitions; change primary point of contact to processing Center.	Neutral—changes reflect current practice and statutory changes.
111.2	Subpart A	Eliminate district permits and require national permits.	$122,000 annualized net benefit. See section 3.11.
111.3	Subpart A	Requires customs business to be conducted within the customs territory of the US; brokers must maintain a point of contact.	Neutral—clarifies current regulations and reflects current practice.
111.11	Subpart A	Adds that the processing Center may reject an incomplete application.	Benefit—increases efficiency.
111.12(a)	Subpart B	Update the place of submission for applications and allows for electronic submission or withdrawal; removes requirement that applications are submitted under oath.	Benefit—increases efficiency and reduces the burden on applicants.
111.12(b)	Subpart B	Remove requirement to post notice of applications	Benefit—reduces the burden on CBP.
111.13	Subpart B	Revisions to reflect new national permit system; written and electronic notification of examination results; remote exam option.	Neutral—the costs of the new fee system are addressed in section 3.11.
111.14	Subpart B	Clarifies that CBP may use information from the interview in background investigation.	Neutral—reflects current practice.
111.16	Subpart B	Expansion of the grounds to justify the denial of a license.	Benefit—increases professionalism.
111.17	Subpart B	Adds new method to communicate further information to CBP for appeal of an application denial.	Benefit—greater flexibility.
111.18	Subpart B	Requires applicants to provide new or corrected information when re-applying.	Benefit—fewer application appeals will be rejected for lack of new information. Cost—applicants will need to expend time in collecting and submitting information.
111.19	Subpart B	Replacing district permits with national permits	$122,000 annualized net benefit. See section 3.11.
111.19(b)	Subpart B	Revision of the procedures to apply for a permit to account for the switch from district to national permits.	Neutral—the process is very similar, but with a national permit.
111.19(c)	Subpart B	Revision of permit fees	See ''Elimination of Customs Broker District Permit Fee'' RIN 1515–AE43.
111.19(d)	Subpart B	Elimination of the requirement to maintain a place of business in each port where a district permit is held.	Benefit—allows for greater flexibility and efficiency for brokers and CBP.
111.19(e)	Subpart B	Language updates to reflect the change to national permits and processing Centers.	See above.
111.19(g)	Subpart B	Clarifies applicants must provide additional information or arguments in support of a denied application; allows information to be provided through various communication methods.	Benefit—increases professionalism and decreases time spent by CBP acquiring information. Cost—requires applicants to expend time in providing additional information.
111.21	Subpart C	Requires brokers to notify CBP of any electronic records breach and to provide CBP a designated point of contact for recordkeeping in addition to the current contact provided for financial queries.	Benefit—enhances CBP's risk management approach. See section 3.3/section 3.7.2.
111.23	Subpart C	Requires that electronic records be stored within the U.S. customs territory [18].	Benefit—increases security. See section 3.3.
111.24	Subpart C	Clarifies disclosure rules	Benefit reduces confusion. See section 3.7.3.
111.25	Subpart C	Revises guidelines for CBP inspection of broker records with the elimination of broker districts.	Neutral—see section 3.4.
111.27	Subpart C	Update of language to reflect the transition of responsibilities from Treasury to DHS following the creation of DHS.	Neutral—reflects the current environment.
111.28	Subpart C	Clarifies requirements in relation to responsible supervision and control and allows for electronic submission of employee lists.	Benefit—increases flexibility. See section 3.7.4.
111.30	Subpart C	Modification to the timing requirement for when a broker notifies CBP of information changes, including a new requirement for inactive brokers to provide CBP with up-to-date contact information.	Benefit—increases professionalism, keeps CBP better informed, and allows greater efficiency for broker's changing status. Cost—inactive brokers will expend time to submit their information.

TABLE 1—SUMMARY OF CHANGES AS A RESULT OF THE RULE—Continued

Provision	Section	Change	Cost/benefit
111.32	Subpart C	Places an affirmative burden on the broker to report to CBP when a broker terminates a client relationship as a result of determining that the client is attempting to defraud the U.S. Government.	Cost—$8,185 annually. Benefit—improves CBP's awareness of potential illegal activity. See section 3.5.
111.36	Subpart C	Modifies the requirements for brokers when dealing with freight forwarders.	Neutral—time spent does not change. See section 3.6.
111.39	Subpart C	Guidelines for how brokers may behave with clients; requires brokers to advise clients of corrective actions and maintain communication records.	Neutral—reflects current practice. See section 3.7.4.
111.45	Subpart C	Updates to reflect the change to national permits ...	Neutral—specifies national permit.
111.53	Subpart D	Adds conviction of committing or conspiring to commit an act of terrorism to the grounds for suspension or revocation of a license or permit.	Benefit—increases professionalism.
111.55	Subpart D	Updates to reflect the current practice of not referring all complaints to a special agent.	Neutral—reflects current practice.
111.56	Subpart D	Updates to reflect current practice in the investigation of a complaint.	Neutral—reflects current practice.
111.62	Subpart D	Updates to requirements for notification of charges to reflect new electronic options.	Neutral—reflects improved technology.
111.63	Subpart D	Removes the requirement that a return card be signed solely by the addressee; permits CBP to rely upon the mailing address provided by the broker.	Benefit—increases efficiency.
111.67	Subpart D	Updates to reflect the current practice of Office of Chief Counsel representing the Government.	Neutral—reflects current practice.
111.74	Subpart D	Eliminates the requirement to publish suspension, revocation, or penalty notices in the Customs Bulletin.	Neutral—such announcements are published in the **Federal Register** and automatically included in the Customs Bulletin.
111.76	Subpart D	Allows for electronic communication when filing an appeal.	Benefit—increases efficiency.
111.77	Subpart D	Eliminates the requirement that CBP provide notice of a vacated or modified order in the Customs Bulletin.	Neutral—such announcements are published in the **Federal Register** and automatically included in the Customs Bulletin.
111.81	Subpart D	Updates to the signing requirement for a settlement to reflect delegation of authorities.	Neutral—reflects delegation of existing authority.
111.96	Subpart E	Updates to the user application fee	See above.

As stated above in Section II, *Discussion of Comments,* one commenter disagreed with CBP's assessment that the change to § 111.39(c) has a neutral effect on cost, as it reflects current practice. CBP believes that this assessment is correct. A broker has an existing responsibility to advise the client of any noncompliance and errors and suggest a corrective action, even though it has not been stated expressly in the regulation. Advising a client and documenting such advice should be a broker's good practice, to protect the client's as well as the broker's interests, in case of any litigation or complaint by the client.

1. Need and Purpose of Rule

The primary purpose of this final rule is to formalize recent changes in the permitting of licensed customs brokers. To take advantage of new technologies and reflect a changing trade environment, CBP is switching from a district permit system to a national permit system. Licensed brokers who have traditionally been required to apply for and operate under a permit for each district in which they do business may now work under a single, national permit.

The rule also finalizes changes in the license application fee charged by CBP, which CBP will increase to cover a greater portion of the costs CBP has always faced. Because these costs are being moved from CBP to brokers, they are considered a transfer. The rule contains several provisions meant to professionalize the broker industry, formalize current practices into regulations, and adapt regulations to reflect technological advancements. Finally, in this final rule, CBP announces the deployment of a new payment and submission system, the eCBP portal.[19] Testing initially began in 2017 and continued into 2020. The eCBP portal allows applicants and brokers to electronically submit the broker exam application, the triennial status report and associated fees, with additional enhancements to be announced in the **Federal Register** as needed. The majority of brokers already follow many of the practices described above, like storing records electronically within the customs territory of the United States and reporting clients the broker knows have attempted to commit fraud. Furthermore, 80 percent of applicants and 90 percent of brokers have already adopted the eCBP portal. This rule provides better and more concrete guidance in these matters, at little or no cost to CBP or customs brokers.

In this final rule, CBP is making several changes to address comments received from the public in response to the NPRM, as well as clarifying existing regulatory language. These include:

- Changing the definition of ''Designated Center'' by changing the name to ''Processing Center;'' and explaining that processing Center means the broker management operations of a Center;
- Removing references to a ''director,'' to reflect the fact that other

[18] Duplicate or backup records may be stored outside the U.S. customs territory so long as the recordkeeping requirements for the original records are met. *See* CBP's Headquarters ruling H292868.

[19] *See The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for Licensed Customs Brokers* above.

Center employees may process broker submissions;

- Updating § 111.12 to allow the electronic submission and withdrawal of the customs broker license application;
- Updating § 111.13 to account for a remote option for the customs broker exam;
- Updating § 111.21 to require brokers to report a breach as well as any known compromised importer identification numbers within 72 hours, in addition to requiring submission of any additional known compromised importer identification numbers within 10 business days;
- Consolidation of proposed responsible supervision and control factors 12 and 13 in § 111.28(a) into a single factor (12), and factors 14 and 15 into a single factor (13);
- Addition of an email address requirement to § 111.30.

Monetized costs for customs brokers will result from no longer receiving a first district permit concurrent with a broker's license, and the requirement for brokers to notify CBP when separating from a client relationship due to attempted fraud or criminal acts. Customs brokers who do not concurrently receive their first district permit with their broker's license will save the cost of district permit fees. Additionally, CBP and customs brokers will save time applying for and reviewing district permit applications and waivers. The five-year total monetized net benefit of the rule ranges from $973,616 discounted at seven percent to $1,088,308 discounted at three percent. The annualized cost is approximately $237,500 using both three and seven percent.

Customs brokers are private individuals and/or business entities (partnerships, associations, or corporations) licensed and regulated by CBP to assist importers in conducting customs business. Customs brokers have an enormous responsibility to their clients and to CBP, requiring them to properly prepare importation documentation, file documents accurately and on-time, correctly classify and value goods, pay duties, taxes, and fees, safeguard their clients' information, and protect their licenses from misuse.

In an effort to perform these duties efficiently, customs brokers have embraced recent technological advances such as making the programming and business process changes necessary to use ACE, thus providing a single, centralized access point to connect CBP and the trade community. Through ACE, manual processes are streamlined and automated, and the international trade community is able to more easily and efficiently comply with U.S. laws and regulations.

CBP has also endeavored to embrace these technological advances to not only more efficiently perform its duties of facilitating legitimate trade while making sure that proper revenue is collected, but also to provide more efficient tools for customs brokers to file and monitor the information submissions necessary for a timely and accurate entry filing. One of the central developments that will allow CBP to perform its operational trade functions more effectively is the transition to the Centers.

Beginning in 2012, CBP developed a test to incrementally transition the operational trade functions that traditionally reside with port directors to the Centers. The Centers were established in strategic locations around the country to focus CBP's trade expertise on industry-specific issues and provide tailored support for importers. CBP established these Centers to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for the identified industries. On December 20, 2016, CBP published an interim final rule in the **Federal Register** (81 FR 92978) ending the Centers test and establishing the Centers as a permanent organizational component of CBP.

Current broker regulations are based on a district system in which entry, entry summary, and post-summary activity are all handled by the ports within a permit district. With the transfer of trade functions to the Centers, a significant portion of these activities, including entry summary and post-summary, are now handled directly by the Centers. The Center structure is based on subject matter expertise, as opposed to geographic location, placing them outside of the district system as it currently exists. With this rule, CBP will modernize the regulations governing customs brokers to better reflect the current work environment and streamline the customs broker permitting process.

2. Background

It is the responsibility of CBP to ensure that only qualified individuals and business entities can perform customs business on behalf of others. CBP accomplishes this task by only issuing broker licenses to individuals and business entities that meet the below criteria: [20]

- Must submit a customs broker license application within three years of taking and passing the customs broker license examination;
- Must be a U.S. citizen and attain the age of 21 prior to submitting the license application;
- Must possess good moral character; and
- Must pay the requisite fee.

Business entity customs broker license eligibility:

Partnerships

- Must have at least one member of the partnership who is a licensed customs broker; and
- Must pay the requisite fee.

Associations and Corporations

- Must have at least one officer who is a licensed customs broker;
- Must be empowered under its articles of association or articles of incorporation to transact customs business as a broker; and
- Must pay the requisite fee.

Currently, CBP requires all prospective brokers, both individuals and business entities, to submit CBP Form 3124: *Application for Customs Broker License* to the port of entry at which they intend to conduct customs business. CBP Form 3124 is used to verify that prospective customs brokers satisfy the requirements for receiving a customs broker's license.

The customs territory of the United States is divided into seven customs regions. Within each region, the customs territory of the United States is further divided into districts; there are currently approximately 40 customs districts.[21] Currently, a district permit is required for each district in which a customs broker intends to conduct customs business. Each district permit requires a one-time permit fee of $100 and an annual user fee.[22] A customs

[20] *See* 19 CFR part 111.

[21] Customs districts are not evenly divided amongst the seven customs regions (one region may have more or fewer customs districts than another). In addition to the 40 geographically defined customs districts, there are three special districts that are responsible for specific types of imported merchandise. According to the Broker Management Branch, these special districts include districts 60, 70 and 80. District 60 refers to entries made by vessels under their own power. District 70 refers to shipments with a value under $800. District 80 refers to mail shipments. These three special districts do not require the use of a licensed broker with a specific district permit and as a result are not affected by this provision.

[22] The annual user fee payable for calendar year 2022 is $153.19 (86 FR 66573). Information on the fee can be found in 19 CFR 24.22(h). The user fee is subject to adjustment based on inflation. Amendments to the regulatory provisions regarding

Continued

broker has the option of receiving his/her first district permit concurrently with the receipt of the customs broker license, in which case the $100 permit fee is waived. Even if this option is used, the customs broker is still responsible for the annual user fee. However, this option is not exercised often for individual customs broker license holders. Currently, according to a CBP Broker Management Branch estimate, approximately two percent of individual customs broker license holders get their first district permit concurrently issued with the receipt of their broker's license. The majority of individuals do not take advantage of this benefit. Most licensed brokers file exclusively under a corporate permit and do not need to get an individual permit, saving them the annual user fee. On the other hand, according to CBP's Broker Management Branch, 100 percent of current corporate license holders get their first district permit concurrently issued with their customs broker license.

A broker who intends to conduct customs business at a port within a district for which the broker does not have a permit must submit an application for a district permit in a letter to the director of the port at which the broker intends to conduct customs business. Each application for a district permit must set forth or attach the following:

- The applicant's broker license number and date of issuance;
- The address where the applicant's office will be located within the district and the email address and telephone number of that office;
- A copy of a document which reserves the applicant's business name with the State or local government;
- The name, broker license number, office address(es), telephone number, and email address of the individual broker who will exercise responsible supervision and control over the customs business transacted in the district;
- A list of all other districts for which the applicant has a permit to transact customs business;
- The place where the applicant's brokerage records will be retained and the name of the applicant's designated recordkeeping contact; and
- A list of all persons who the applicant knows will be employed in the district with all the required employee information.

The applicant for the district permit must have a place of business at the port where the application is filed or must have made firm arrangements satisfactory to the port director to establish a place of business and must exercise responsible supervision and control of that place of business once the permit is granted. Instead of a customs broker getting multiple district permits, he or she could also apply for a national permit for the purpose of transacting customs business in all districts within the customs territory of the United States as defined in 19 CFR 101.1. The national permit application may be submitted concurrently with or after the submission of an application for a broker's license.

CBP first introduced national permits in 2000 to allow a broker to conduct a limited set of activities in districts for which the broker does not have a district permit. When it was first introduced, a national permit allowed licensed brokers to place an employee in the facility of a client for whom the broker is conducting customs business; file electronic drawback claims; participate in remote location filing; and make representations after the entry summary has been accepted. In the years since the national permit was introduced, and with the full implementation of ACE, almost every activity performed under a district permit was added to the national permit. Only those activities, such as the filing of paper entries and certain payment submissions that require physical presence at a port, currently require a district permit instead of a national permit. With the national permit system, these restrictions will no longer apply. This rule will allow a national permit holder to conduct any type of customs business in all districts within the customs territory of the United States. This represents a full expansion of the activities allowed under a national permit. CBP has determined that in the increasingly automated environment brokers may need to make contact with CBP personnel across the customs territory and there is no longer a reason to restrict national permit holders.

Currently, an applicant for a national permit must submit payment of the application fee and user fee to the port where the license was issued, and then submit the national permit application in the form of a letter, including evidence of payment, to the Broker Management Branch.[23] An applicant has to further include the following:

- The applicant's broker license number and date of issuance;
- If the applicant is a partnership, association, or corporation, the name and title of the national permit qualifier;
- The address, telephone number, and email address of the office designated by the applicant as the broker's office of record; that office will be noted in the national permit when issued;
- A copy of a document which reserves the applicant's business name with the State or local government;
- The name, telephone number, and email address of the licensed broker or knowledgeable employee to be available to CBP to respond to issues related to the transaction of customs business;
- The name, broker license number (if designated), office address, telephone number, and email address of each individual broker who will exercise responsible supervision and control over the customs business of the applicant under the national permit;
- A supervision plan describing how the broker will exercise responsible supervision and control, including compliance with § 111.28 (*see* 19 CFR 111.28);
- The place where the applicant's brokerage records relating to customs business conducted under the national permit will be retained and the name of the applicant's designated recordkeeping contact (*see* 19 CFR 111.22 and 111.23);
- The name, telephone number, and email address of the knowledgeable employee responsible for broker-wide records maintenance and financial recordkeeping requirements;
- A list of all employees of the broker, together with the specific employee information prescribed in § 111.28(b) for each of those employees (19 CFR 111.28(b)); and
- A receipt or other evidence showing that the fees specified in § 111.96(b) and (c) have been paid (19 CFR 111.96(b) and (c)).

In an effort to modernize the permitting process for customs brokers, this rule eliminates the district permitting process and automatically grants each current district permit holder a national permit.[24] Upon adoption of this final rule, the transition for a district permit holder to become a national permit will be a one-time, automatic process, without any actions

the district permit user fee are found in the companion Department of the Treasury final rule entitled, ''Elimination of Customs Broker District Permit Fee.'' RIN 1515–AE43.

[23] In the published NPRM, CBP incorrectly stated the current submission process of a national permit application (submission to the director of the designated Center), but this technical error did not have an impact on the outcome of the economic analysis. *See* the published NPRM (85 FR 34836), at page 34850.

[24] For more information, *see* the clarification above in *Subpart A. General Provisions.*

to be taken by the permit holders. Using data from ACE, CBP will automatically create a national permit for each broker currently holding a district permit and not yet holding a national permit, though CBP will not cancel active district permits until all national permits are issued. Permit holders will be notified via email, or mail, that a new national permit will be issued. These notifications will be part of the day-to-day work of the Broker Management Branch and will not add to the cost of the rule.

Currently, customs brokers who do not have a national permit must maintain an office and have a separate district permit for each district in which the broker wants to conduct customs business. For some brokers, this means having many small offices across the country. This rule removes the requirement to have a separate local office in each district in which customs brokers do business. Since, under a national permitting structure, customs brokers are no longer required to have a representative in each district in which they conduct customs business, brokers could organize themselves to better suit their specific business needs. While some brokers may consolidate their office locations and save on overhead costs, which may also involve laying off local staff, others may expand their business operations or staffing needs as they will now be able to serve more ports without needing a local office. CBP cannot predict whether customs brokers as whole would experience net savings as a result of these changes. For the purposes of this analysis, CBP does not believe that brokers will greatly expand or contract their holdings as a result of the rule. In the case that some brokers do ultimately close offices, they will likely experience cost savings and the net benefit estimated in this analysis would increase. Since national permits were first issued, there has not been a noticeable change in the number of brokers hired as a result of national permits, so CBP does not believe there will be a significant change due to this rule.

In response to the NPRM, one commenter predicted that a national permit system would lead to reduced competition and lost revenue at ports. However, because this rule will not reduce the volume of trade, and goods must still physically arrive at various ports, CBP does not believe this to be the case. Another commenter noted that a national permit system would devalue the broker license and force small businesses to close. CBP disagrees with this assertion. In fact, small businesses may benefit more from a national permit, allowing them to work in ports across the country and in which they could not previously afford to maintain a physical presence. Brokers who find they are more competitive with a physical presence at a given port may still maintain a local office.

Projection of Customs Broker Licenses and Permits

CBP's Broker Management Branch provided historical data from 2015–2021. As of January 2022, there are 15,226 active, licensed customs brokers. CBP also issued new broker licenses each year to both individuals and corporations.[25] From 2015 to 2019, the annual number of licenses issued has declined by one percent for corporate licenses while from 2017 to 2021, the annual number of licenses declined by four percent for individual licenses (see Table 2).[26]

TABLE 2—HISTORICAL LICENSING

Year	Total licenses issued	Corporate licenses	Individual licenses
2015	770	16	754
2016	653	21	632
2017	580	16	564
2018	558	27	531
2019	464	15	449
2020	187	7	180
2021	496	31	465

As of January 2022, there are 2,365 permitted brokers holding a combined total of 3,345 active district permits. These 2,365 brokers represent about 15.5 percent of all brokers, as the majority of brokers never apply for their own permit and work under the auspices of a corporate permit. Approximately two percent of brokers hold a corporate permit, meaning 13.5 percent of brokers hold individual permits. The brokers who do hold permits average approximately 1.4 district permits per permit holder. Using these figures and historic rates of decline, we can project how many licenses and district permits licensed brokers will be issued over the period of the analysis, under the baseline condition (*i.e.,* if this rule is not promulgated). This is shown in Table 3 below.

TABLE 3—PROJECTION OF NEW INDIVIDUAL AND CORPORATE PERMITS

Year	New corporate licenses issued (1% annual decline)	New corporate permits (100% of new corporate licenses * 1.4)	New individual licenses (4% decline)	Individual permits (13.5% of individual licenses * 1.4)
2022	15	21	447	86

[25] A partnership or association may also hold a corporate permit. At least one member of the licensed organization must hold an individual broker license.

[26] The closures and delays related to the COVID–19 pandemic resulted in anomalous data for corporate licenses in 2020 and 2021. The number of licenses issued in 2020 was significantly smaller than previous trends, while 2021 represented a catch-up year and saw an inordinately high number of corporate licenses issued. Therefore, to calculate the corporate license growth rate, CBP used data from 2015–2019, which we believe more accurately reflects future growth. Individual licenses, while also affected by the COVID–19 pandemic, returned to previous trends in 2021, allowing CBP to use a standard 5-year period from 2017–2021.

TABLE 3—PROJECTION OF NEW INDIVIDUAL AND CORPORATE PERMITS—Continued

Year	New corporate licenses issued (1% annual decline)	New corporate permits (100% of new corporate licenses * 1.4)	New individual licenses (4% decline)	Individual permits (13.5% of individual licenses * 1.4)
2023	15	21	430	82
2024	15	21	414	79
2025	15	21	398	76
2026	15	21	383	73
Total	75	105	2,072	396

Note: Values may not sum to total due to rounding.

3. Rule Amendments: Costs, Benefits, and Transfer Payments

In this rule, CBP is finalizing regulatory changes that include: increasing fees for the customs broker license application; eliminating district permits so each customs broker only needs one national permit to conduct customs business; mandating that each broker must provide notification to CBP of any known breach of records within 72 hours of discovery; [27] requiring that upon request by CBP to examine records, brokers make all records available to CBP within thirty (30) calendar days at the location specified by CBP; requiring that customs brokers obtain a customs power of attorney directly from the importer of record or drawback claimant—not a freight forwarder or other third party—to transact customs business for that importer or drawback claimant; and requiring that a broker document and report to CBP when the broker separates from or cancels a client as a result of the broker's determination that the client is intentionally attempting to use the services of the broker to defraud or otherwise commit any criminal act against the U.S. Government. Finally, this rule allows CBP to make numerous non-substantive changes and conforming edits in an effort to modernize the regulations governing customs brokers and to clarify existing language in the regulations to better reflect what is already occurring.

3.1 Broker License Fee

CBP currently charges $200 fees per individual or business entity for the broker license application. These fees are used to offset the costs associated with servicing the brokers. Based on a fee study, entitled ''Customs Broker License Application Fee Study,'' CBP has determined that these fees are no longer sufficient to cover its costs.[28]

The study found that fees of $463 and $815 are necessary to recover the costs associated with reviewing the customs broker license application for individuals and business entities, respectively. These fees, however, are significantly higher than the current fees of $200 for both individuals and business entities and, if implemented, these fee rates could become an economic disincentive to those pursuing a career as a customs broker. Therefore, in an effort to minimize the financial burden to prospective customs brokers while also recovering a larger portion of the costs associated with reviewing and vetting the license application, CBP has decided to limit the license application fee to $300 for individuals and $500 for business entities; the remainder of the costs would continue to be covered by appropriated funds. In response to the NPRM, one commenter expressed concern that raising application fees would reduce the number of qualified candidates applying for broker licenses. CBP has considered this factor in deciding to limit the amount by which the fee will increase in order to cover more of CBP's costs and account for inflation without adding too much to the cost burden for brokers. CBP considers this increase in the fee to be a reasonable compromise position between not raising the fee at all and raising it to a level necessary to recover the full costs.

In response to the NPRM, one commenter noted that automation and improved technology should obviate the need for a fee increase. The fee increase is necessary, however, because CBP has not been covering costs for many years. Technology improvements and automation also require initial investments and ongoing maintenance costs for computer systems and databases, which were included in CBP's estimation of appropriate fees. Another commenter suggested that fees should be charged on port activity, not district. As discussed above in Section II, *Discussion of Comments,* CBP disagrees with the commenter's suggestion, as the fees as currently outlined are independent of broker size or location. Although these fee increases represent an increased expense for prospective customs brokers, these fee increases do not increase overall costs to society as these costs are already being paid by CBP's appropriated funds.

When assessing costs of final rules, agencies must take care to not include transfer payments in their cost analysis. As described in OMB Circular A–4, transfer payments occur when ''. . . monetary payments from one group [are made] to another [group] that do not affect total resources available to society.'' Examples of transfer payments include payments for insurance and fees paid to a government agency for services that an agency already provides. CBP's processing of the customs broker license application is an established service that already requires a fee payment. As such, adjustments to the fee associated with providing each service is considered a transfer payment. Currently, any costs not covered by fees are paid via funds appropriated to and expended by CBP. The increased fees paid by brokers would replace appropriated funds. CBP recognizes that the fee changes may have a distributional impact on prospective customs brokers. In order to inform stakeholders of all potential effects of the final rule, CBP has analyzed the distributional effects of the rule in section ''3.12 Distributional Impacts.''

3.2 Permit Application Fee

Currently, brokers are required to pay a $100 permit application fee in connection with each permit application by either an individual or corporation. The applicant has the option of concurrently receiving its first

[27] Additionally, within ten (10) business days, a broker must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery.

[28] The fee study is included in the docket of this rulemaking (docket number USCBP–2020–0009).

district permit with its customs broker's license and therefore forgoing the $100 permit application fee for its first district permit. However, some brokers do not request an initial district permit at the time they get their license. When this is the case and the broker later applies for a district permit, or if brokers make a request to obtain a permit for additional districts, then they must submit the following information to CBP as set forth in § 111.19(b):

(1) The applicant's broker license number and date of issuance;

(2) The address where the applicant's office will be located within the district and the telephone number of that office;

(3) A copy of a document which reserves the applicant's business name with the State or local government;

(4) The name of the individual broker who will exercise responsible supervision and control over the customs business transacted in the district;

(5) A list of all other districts for which the applicant has a permit to transact customs business;

(6) The place where the applicant's brokerage records will be retained and the name of the applicant's designated recordkeeping contact; and

(7) A list of all persons who the applicant knows will be employed in the district, together with the specific employee information for each of those prospective employees.

As a result of this rule, the options above pertaining to district permits will no longer exist and all permitted brokers will have to get a single national permit to conduct customs business. That means that brokers will pay the $100 permit application fee and receive a single national permit; brokers who, absent this rule, paid to hold multiple district permits will save the $100 district permit fee for each additional permit. This is considered a cost savings, and not the elimination of a transfer payment, because the $100 district permit fee reflects the economic activity undertaken by CBP to issue those permits. The elimination of the fee represents a savings both to the individual brokers as well as to society as a whole as the underlying work to process the additional district permits is eliminated.

As shown in Table 3 above, absent this rule, there would be 2,147 total new broker licenses (75 corporate + 2,072 individual) issued over the period of analysis from 2022 through 2026. Of these 2,147 licenses, 75 would be issued to corporations which would result in 105 corporate district permits (as mentioned above, each customs broker permit holder currently has 1.4 district permits on average). Additionally, as mentioned above, 100 percent of corporations exercise the option of concurrently receiving their first district permit with their customs broker's license, therefore saving the $100 permit application fee for their first district permit. This means that, absent this rule, corporations would get 75 permits for free and would then have to pay for the remaining 30 permits for a cost of $3,000 ($100 permit application fee * 30 corporate permits). As a result of this rule, these 75 corporate brokers will each have to get a single national permit and pay the $100 permit application fee for each national permit for a total cost of $7,500 (75 national permits * $100 permit application fee). This results in an additional cost to these corporate brokers of $4,500 ($7,500 − $3,000) over the period of the analysis from 2022 through 2026. Please see Table 4 below for a breakdown of these costs.

TABLE 4—COSTS FOR CORPORATE PERMIT HOLDERS

[2022 U.S. dollars]

Year	New corporate licenses	Permits	Costs absent the rule	Costs with the rule	Cost of the rule
2022	15	21	$600	$1,500	$900
2023	15	21	600	1,500	900
2024	15	21	600	1,500	900
2025	15	21	600	1,500	900
2026	15	21	600	1,500	$900
Total	75	105	3,000	7,500	4,500

Note: Values may not sum to total due to rounding.

As shown above in Table 3, if this rule were not in effect there would be 2,072 new individual broker licenses resulting in 396 new individual permits over the period of analysis. According to CBP's Broker Management Branch, individual brokers do not get their first district permit issued concurrently with their customs broker's licenses nearly as often as corporations. Approximately two percent of individual customs broker license holders, or 42 of the estimated 2,072 new brokers, get their first district permit issued concurrently with their broker's license, saving the $100 permit application fee charged for the first district permit. Using the average of 1.4 district permits per customs broker permit holder, we estimate that these 42 individual customs brokers would get 59 district permits over the period of the analysis if this rule did not go into effect. Since, under the baseline, the brokers would get 42 out of the 59 permits for free, brokers would have to pay for the remaining 17 permits for a cost of $1,700 ($100 permit application fee * 17 permits). Under this rule, these 42 individual brokers would each need a single national permit for a total of 42 permits resulting in a total cost of $4,200 ($100 national permit application fee * 42 national permits). As a result of this rule, two percent of individual brokers will bear an additional total cost of $2,500 ($4,200 − $1,700) over the period of analysis. Please see Table 5 below for a breakdown of these costs.

TABLE 5—COSTS FOR TWO PERCENT OF INDIVIDUAL PERMIT HOLDERS

[2022 U.S. dollars]

Year	Individual licenses for 2% of permit holders	Number of permits issued	Costs for 2% without rule	Costs for 2% with rule	Rule's costs for 2%
2022	9	13	$400	$900	$500
2023	9	13	400	900	500
2024	8	11	300	800	500
2025	8	11	300	800	500
2026	8	11	300	800	500
Total	42	59	1,700	4,200	2,500

Note: Values may not sum to total due to rounding.

The remaining 98 percent of individual customs broker license holders do not get their first district permit concurrently with their broker's license, if they get any permits at all. Of the 15,226 active licensed brokers, approximately 15.5 percent hold at least one permit. Because only 15.5 percent of license holders hold a permit, and two percent of those are corporate license holders and only two percent are individuals who get a permit concurrently with their license, the remaining 11.5 percent are individual licensed brokers who apply for and receive a permit after their license is issued. Accordingly, under the current permit system, using an average of 1.4 permits per broker, 238 individual customs broker permit holders pay $33,600 for 336 permits because they pay the $100 fee for every permit.[29] With the national permit system, these brokers would pay $23,800 for 238 national permits, resulting in a savings of $9,800. Please see Table 6 below for an itemization of these costs.

TABLE 6—SAVINGS FOR 11.5 PERCENT OF INDIVIDUAL PERMIT HOLDERS

[2022 U.S. dollars]

Year	Number of licenses for 11.5% of permit holders	Number of permits issued	Costs for 11.5% without rule	Costs for 11.5% with rule	Rule's savings for 11.5%
2022	51	72	$7,200	$5,100	$2,100
2023	49	69	6,900	4,900	2,000
2024	48	68	6,800	4,800	2,000
2025	46	65	6,500	4,600	1,900
2026	44	62	6,200	4,400	1,800
Total	238	336	33,600	23,800	9,800

Note: Values may not sum to total due to rounding.

Any brokers who apply for more than one permit will experience a time savings as a result of this rule because they will only need to apply for a single permit. According to CBP's Broker Management Branch, currently, brokers spend approximately three hours to collect and submit the appropriate documentation to CBP.[30] The rule's elimination of these applications will result in time savings for the brokers as well as for CBP. The estimated number of permits requested separately from individual licenses for the entire period of the analysis is taken from Tables 5 and 6. Table 5 implies there are 17 permits for which two percent of individual customs brokers currently pay $100 ($1,700 permit costs without rule/$100 per permit). Table 6 shows that 11.5 percent of individual customs brokers currently pay $100 for 336 permits. Summing these two figures, we find that all individual customs brokers will pay $100 for 353 permits. Table 7 shows the removal of the application for these permits will result in a monetized time savings worth $36,864. This benefit is based on CBP's estimated fully loaded hourly time value for customs brokers of $34.81.[31]

[29] About 15.5 percent of all brokers, corporate and individual, hold a permit. Of those, 2 percent are corporate brokers and 2 percent are individual brokers who get their permit concurrently with their license. Therefore, about 11.5 percent of brokers are individuals who will get a permit at some point in their careers after receiving a license. Based on the projections described above, CBP estimates that 2,072 indiviudal licenses will be issued from 2022–2026. Approximately 11.5 percent of those individuals results in 238.

[30] Source: CBP's Broker Management Branch on May 16, 2019.

[31] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2021 median hourly wage rate for Cargo and Freight Agents ($22.55), occupation code 43–5011, which CBP assumes best represents the wage for brokers, by the ratio of BLS' average 2021 total compensation to wages and salaries for Office and Administrative Support occupations (1.4819), the assumed occupational group for brokers, to account for non-salary employee benefits. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, ''May 2021 National Occupational Employment and Wage Estimates United States.'' Updated March 31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm#43-0000.* Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. ''ECEC Civilian Workers—2004 to Present.'' March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis.

TABLE 7—APPLICATION TIME SAVINGS FOR INDIVIDUAL BROKERS

[2022 U.S. dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application	Rule's savings for individual brokers
2022	76	3	$7,937
2023	73	3	7,623
2024	71	3	7,415
2025	68	3	7,101
2026	65	3	6,788
Total	353	3	36,864

Note: Values may not sum to total due to rounding.

Corporate brokers would also see time savings resulting from fewer permit applications prepared and submitted. Table 4 shows that corporate brokers currently apply for, receive, and pay $100 for 30 permits after their licenses have been issued. Table 8 shows the removal of the application for these permits will result in a monetized time savings worth $3,133, based on CBP's estimated fully loaded hourly time value for customs brokers of $34.81.

TABLE 8—APPLICATION TIME SAVINGS FOR CORPORATE BROKERS

[2022 U.S. Dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application	Rule's savings for corporate brokers
2022	6	3	$627
2023	6	3	627
2024	6	3	627
2025	6	3	627
2026	6	3	627
Total	30	3	3,133

Note: Values may not sum to total due to rounding.

Relatedly, CBP would see benefits due to the elimination of the district permit application review process. CBP estimates that it takes two hours of CBP processing, including time to review and approve an application and create and deliver the permit to the applicant.[32] Given the wage rate, CBP estimates that processing costs approximately $164 per permit. The applicant pays a $100 fee, which compensates CBP for a portion of the economic activity undertaken to process the application. CBP currently funds the remaining portion from appropriated funds. Therefore, with the rule in place, CBP will experience a cost savings of approximately $64 per permit no longer applied for, as the remaining $100 is saved by the broker applicant and accounted for in Tables 5 and 6 above. Going forward, CBP believes that a $100 fee recovers a reasonable portion of its costs for the national permit application. Table 9 shows CBP's total estimated benefits of $24,573 over the period of analysis. This is based on a CBP fully loaded wage rate of $82.08 for CBP staff reviewing applications.[33]

TABLE 9—TIME SAVINGS FOR CBP

[2022 U.S. Dollars]

Year	Number of permits issued separate from license	Hourly time burden for permit application review	Rule's savings for CBP
2022	82	2	$5,261
2023	79	2	5,069
2024	77	2	4,940
2025	74	2	4,748
2026	71	2	4,555
Total	383	2	24,573

[32] Source: CBP's Broker Management Branch on May 16, 2019.

[33] CBP bases this wage on the FY 2022 salary and benefits of the national average of CBP Trade and Revenue positions, which is equal to a GS–12, Step 10. Source: Email correspondence with CBP's Office of Finance on June 27, 2022.

Lastly, the district permit waiver described in current § 111.19(d)(2) would be eliminated with the rule. Currently, requests for a waiver of the requirement for an individual broker in the district must be submitted to the port director and include a description of responsible supervision and control procedures and information on the volume and type of customs business conducted. The port director reviews the request and makes a recommendation to headquarters. Headquarters reviews and issues the decision.[34] According to the CBP Broker Management Branch, this process takes two hours for brokers, including application processing and mailing paper documents to CBP. It takes an hour and a half for CBP to review the waiver analysis, prepare the recommendation memorandum, and for headquarters to make the final decision.[35] As shown in Tables 11 and 12 there is a total benefit of $3,579 ($1,293 + $2,286), as this entire process is eliminated under the national permit framework. Waiver estimates for calendar years 2022 to 2026 are based on compound annual growth rate from calendar years 2017–2021, found in Table 10 below.

TABLE 10—PERMIT WAIVERS 2017–2021

Year	Broker district permit waivers
2017	14
2018	13
2019	7
2020	10
2021	6
Total	50

TABLE 11—TIME SAVINGS FOR BROKERS SEEKING WAIVERS

[2022 U.S. dollars]

Year	Broker district permit waivers	Hourly time burden for waiver application	Rule's savings for brokers seeking waivers
2022	5	2	353
2023	4	2	298
2024	4	2	251
2025	3	2	212
2026	3	2	179
Total	19		1,293

TABLE 12—TIME SAVINGS FOR CBP REVIEWING WAIVERS

[2022 U.S. dollars]

Year	Broker district permit waivers	Hourly time burden for waiver application review	Rule's savings for CBP
2022	5	1.5	$624
2023	4	1.5	526
2024	4	1.5	444
2025	3	1.5	375
2026	3	1.5	317
Total	19	1.5	2,286

Table 13 provides a summary of the costs and savings resulting from the removal of the district permit application and $100 fee over the period of analysis.

TABLE 13—SUMMARY OF COSTS AND SAVINGS TO ALL PARTIES

[2022 U.S. dollars]

	Savings for 11.5%	Costs/savings for individuals		Costs/savings for corporations			Savings for CBP	
		Costs for the 2%	Time savings	Costs for corporation	Waivers applications time savings	Time savings	Review of permits	Review waivers
2022	$2,100	$500	$7,937	$900	$353	$627	$5,261	$624
2023	2,000	500	7,623	900	298	627	5,069	526
2024	2,000	500	7,415	900	251	627	4,940	444
2025	1,900	500	7,101	900	212	627	4,748	375
2026	1,800	500	6,788	900	179	627	4,555	317
Total	9,800	2,500	36,864	4,500	1,293	3,133	24,573	2,286

[34] *See* 19 CFR 111.19(d)(2).

[35] Source: CBP's Broker Management Branch on May 16, 2019.

3.3 Record of Transactions

Each broker must keep current, in a correct and itemized manner, records of accounts reflecting all of his or her financial transactions as a broker. The broker must keep and maintain on file copies of all correspondence and other records relating to customs business. With this rule, each broker must provide notification to the processing Center of any known breach of electronic or physical records relating to customs business. Notification to CBP must be provided within 72 hours of the discovery of the breach with a list of all known compromised importer identification numbers. CBP received several comments on the potential difficulty of reporting a breach and compromised importer numbers within this time frame. As explained above in Section II, *Discussion of Comments,* in response, CBP has revised the requirement such that brokers must report the breach within 72 hours, and, within ten (10) business days, must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery. Brokers already compile this information through their normal course of business, and they can report the information to CBP in any format they choose. CBP assumes data breaches are rare but includes this requirement as a preventive measure. CBP assumes this provision has virtually no cost to the brokers due to the infrequency of data breaches. CBP will use this information in its targeting of imports for inspection, which will help make imports safer.

3.4 Records Availability

Currently, during the period of retention (five years after the date of entry), the broker must maintain its records in such a manner that they can be readily examined by CBP when necessary. Records required to be maintained under this provision must be made available upon reasonable notice for inspection, copying, reproduction or other official use by representatives of the Department of Homeland Security. Additionally, customs brokers currently have the option to store records offsite. Under the rule, upon request by CBP to examine records, the designated recordkeeping contact must make all records available to CBP within thirty (30) calendar days, or any longer timeframe as specified by CBP, at the location specified by CBP. This change in the regulations is necessary to ensure brokers continue to give CBP the requested information and to specifically state for clarity that brokers need to keep records in the customs territory of the United States. As this is an existing requirement newly stated for the sake of clarity, this will result in no additional burden for customs brokers.

CBP received comments regarding the requirement to maintain records within the customs territory of the United States. As further discussed above in Section II, *Discussion of Comments,* CBP has clarified that while primary records must be stored within the customs territory of the United States, duplicates or backups may be stored outside it.

3.5 Termination of Client Relationship

The rule requires that a broker document and report to CBP when it separates from a client relationship as a result of the broker's determination that the client is intentionally attempting to use the broker's services to defraud or otherwise commit any criminal act against the U.S. Government. This is an entirely new provision, so CBP does not have data on how often clients may use a broker's services to defraud or otherwise commit criminal acts against the U.S. Government. However, based on stakeholder feedback during the development of the NPRM, CBP subject matter experts do not expect this to happen often. CBP's Broker Management Branch estimates this to occur approximately five times per year and each resulting report will take brokers approximately four hours to draft. CBP requested public comment on this assumption and did not receive any comments. CBP did receive some comments regarding this provision and the responsibility of the broker, which are discussed in greater detail in the comment responses above.

CBP expects that, in most cases, the necessary information will be submitted by customs brokers employing in-house or external attorneys to draft the report. CBP received one comment in response to the attorney wage rate used in the NPRM stating that while attorney compensations may be accurately reported by the Bureau of Labor Statistics, actual costs of employing an attorney are significantly higher than estimated by CBP. CBP agrees and has updated the cost estimates to reflect a higher wage. The loaded wage rate for an attorney is $94.15, which accounts for regional differences as well as differences in experience and specialty.[36] CBP assumes this wage reflects the average wage of an in-house attorney. Using data and estimates compiled by the American Intellectual Property Law Association (AIPLA), CBP estimates the hourly wage for an external attorney to be $466.38.[37] CBP assumes that, generally, large companies employing licensed customs brokers will also employ in-house attorneys, while small companies employ attorneys outside the business. Approximately 6 percent of brokerages are considered large (see the Regulatory Flexibility Act section, below), while 94 percent are considered small. A weighted average wage, therefore, is $443.85 per hour. Five reports represent an additional burden to the broker and will result in a total annual cost of $8,877 or a total cost of $44,385 over the five-year period of analysis.

3.6 Customs Power of Attorney

A customs broker is required to have a customs power of attorney prior to transacting any customs business on behalf of the importer of record.[38] Currently, an agent of the importer of record, who could be a freight forwarder that is properly designated by the importer of record, may issue a power of attorney on behalf of the importer of record to a customs broker. In such instances, the customs broker may never have any contact with the importer of record, only its agent (the forwarder). With this rule, the broker must secure a customs power of attorney directly from the importer of record or drawback

[36] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2021 median hourly wage rate for Lawyers, occupation code 23–1011 ($61.54), which CBP assumes best represents the wage for attorneys, by the ratio of BLS' average 2021 total compensation to wages and salaries for Professional and related occupations (1.4689), the assumed occupational group for brokers, to account for non-salary employee benefits. Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, ''May 2021 National Occupational Employment and Wage Estimates United States.'' Updated March 31, 2022. Available at *https://www.bls.gov/oes/2021/may/oes_nat.htm#23-0000.* Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. ''ECEC Civilian Workers—2004 to Present.'' March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis.

[37] AIPLA's study surveyed intellectual property (IP) lawyers that were used in the 2017 Report of the Economic Survey. The median hourly billing rate for these lawyers was $400 in 2016 dollars, which is the most recent data available, and ($447.78) after adjustment to 2021 dollars. CBP assumes an annual growth rate of 4.15% based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis. Source: American Intellectual Property Law Association. *2017 Report of the Economic Survey.* ''Billable Hours, Billing Rate, Dollars Billed (Q29, Q30, Q27).'' June 2017.

[38] *See* 19 CFR 141.46

claimant and not via the freight forwarder or any other third-party agent. This gives the broker direct access to the importer of record when entering into the power of attorney, which increases transparency in the verification process. Since brokers are currently required to execute a customs power of attorney, and importers already provide a power of attorney, this provision would not result in any additional burden to brokers. The new provision only requires direct contact between the broker and the importer of record. CBP received several comments on this provision, which are discussed in greater detail in the *Discussion of Comments* section above. In reviewing the concerns raised in these comments, CBP has decided to retain its proposed new policy requiring contact directly between the importer of record and the broker.

According to CBP's Broker Management Branch, it takes approximately 1.75 hours, on average, for the broker to obtain a customs power of attorney from the freight forwarder, a time estimate CBP believes will also apply to securing a power of attorney from the importer of record or drawback claimant. CBP received two comments disputing this estimation in response to the NPRM, both noting that it may take substantially longer to acquire a power of attorney under the rule, though neither commenter provided an estimated time burden. However, this estimation is an average across all clients and over time. While it may initially take slightly longer to secure a power of attorney directly from certain clients, for others it will be faster than dealing with the freight forwarder. Additionally, as brokers regularly work directly with importers of record and drawback claimants, the process will likely move faster. Furthermore, CBP based this average on subject matter expertise and information from discussions between the Broker Management Branch and representatives of trade associations and individual brokers. CBP therefore believes the average time to procure a power of attorney will not change once the intermediary is removed and the broker must obtain the customs power of attorney directly from the importer of record or drawback claimant instead of allowing a freight forwarder or other third party to do so on their behalf.

3.7 Professionalism

A number of the changes contained in this rule are meant to increase professionalism and clarify what brokers should already be doing. CBP recognized this need given the volume of routinely fielded questions about these topics. The next several sections describe the current process, and what is changing as a result of this rule, for new requirements related to Customs Business, Records Confidentiality, Responsible Supervision and Control, and Advice to Client.

3.7.1 Customs Business

Currently, customs business must be conducted within the customs territory of the United States as it is defined in 19 CFR 101.1. Furthermore, each brokerage or company employing brokers must designate a licensed broker or knowledgeable employee to be available to CBP to respond to issues related to the transacting of customs business. CBP received several comments regarding this requirement. As discussed above in Section II, *Discussion of Comments,* CBP is not requiring 24-hour on-call coverage by brokers. Instead, CBP requires that a broker provide a knowledgeable point of contact covering all ports where the broker does business, which could encompass ports with business hours extending beyond a regular business day. Each broker must maintain accurate and current point of contact information for that employee with CBP and may update that information in a CBP-authorized EDI system, instead of submitting on paper. Under this rule, the requirements related to contact information are not changing; the regulations now recognize that use of the EDI satisfies the requirement and mandates that brokers use an EDI, unless one is unavailable. CBP fields questions on this provision from the public, so adding this additional language to the regulation will clarify the provision for the public. There are no costs to this provision because it does not change the requirement. The public will benefit as the public now has more clarity regarding the requirement without needing to contact CBP.

3.7.2 Records Confidentiality

Currently, records pertaining to the clients of the broker are to be considered confidential and the broker must not disclose their contents, or any information connected with the records to any other persons except the relevant surety, other than specifically described Government representatives with regard to a particular entry or due to a subpoena. This is not changing under the rule. However, this description is clarified to state that these records may not be disclosed to any persons other than the ones mentioned above and to the representatives of the Department of Homeland Security except by court order, subpoena (as mentioned above), or when authorized in writing by the client. This has been the practice but has been the subject of confusion. Finally, the revised language clarifies that the confidentiality provision does not apply to information that is in the public domain, which has been a point of confusion for some brokers. CBP received several comments on this provision, discussed in greater detail in the comment responses above, but is not revising the requirements for this final rule or the analysis of costs and benefits.

3.7.3 Responsible Supervision and Control

Brokers often have employees working for them who are not licensed brokers. These employees help with information collection and submission of entry documentation to CBP. Each broker is responsible for exercising responsible supervision and control over the transaction of the customs business done under his or her broker license. This requirement currently exists and is not changing as a result of this rule. However, this rule moves the list of factors CBP considers when determining whether a customs broker is exercising responsible supervision and control from the definition of ''responsible supervision and control'' in § 111.1 to § 111.28. This list is of a substantive nature and is more appropriately located in the section on responsible supervision and control as opposed to the definitions section. CBP has always maintained that the current factors are not exhaustive, and in the rule, CBP is simply clarifying existing requirements that brokers, for the most part, are already complying with in practice.[39] This is not a change of practice as these factors for responsible supervision already exist and are just being moved and formally stated in the regulations to clarify what already should be occurring.

In this final rule, CBP has also made some clarifying changes. In § 111.28(a), CBP combined factors (12) and (13) into one new factor (12), which deals with the broker-CBP relationship, and combined factors (14) and (15) into one new factor (13), relating to the broker-officer/member relationship. In

[39] Brokers looking for more information beyond what is stated in CBP regulations can consult the CBP website at *https://www.cbp.gov/trade/programs-administration/customs-brokers*. The website is updated more frequently than the regulations themselves. CBP provides guides on how to become a broker, broker exam information, validating the power of attorney, broker compliance, employing convicted felons, fees, national permits, and triennial reports, as well as webinars and informed compliance publications.

addition, CBP added a reference to ''member(s)'' in the new factor (13) to account for partnerships, in addition to associations and corporations as a type of broker entity. The factors themselves are not new; only their position in the list has been changed.

CBP received many comments regarding the responsible supervision and control factors and their use in evaluating broker performance. These comments are discussed in greater detail above in Section II, *Discussion of Comments.* CBP did not revise the analysis of costs and benefits based on these comments.

Additionally, CBP is clarifying some of the requirements on the reporting of employee information by brokers, for consistency. This rule removes the requirement for the broker to report each employee's last home address, email address, the name and address of each former employer, and, if the employee had been employed by the broker for less than three years, the dates of employment for the three-year period preceding current employment with the broker. This rule retains the requirement that brokers report other information, including employee names, social security numbers, dates and places of birth, dates of hire, and current home addresses. An updated list must be submitted to the processing Center and updated in ACE if any of the information required changes, including notation of new or terminated employees. This update must be submitted within thirty (30) calendar days of the change. However, brokers already have an up-to-date list of their employees' contact information. This new requirement amounts to a routine submission each month in ACE with data that the brokers already routinely keep. They are likely to do this at the same time as making their other filings or routine reports so submitting one more existing document is not an additional measurable burden on customs brokers.

3.7.4 Advice to Client

Currently, if a broker knows that a client has not complied with the law or has made an error in, or omission from, any document, affidavit, or other record which the law requires the client to execute, the broker must advise the client promptly of that noncompliance, error, or omission. This rule also requires the broker to advise the client on the proper corrective actions and retain a record of the broker's communication with the client for potential review by CBP on a routine visit to the broker. Brokers will not have to report errors, omissions or noncompliance discovered by the broker each time one is discovered, and the client is counseled. However, if CBP identifies the error, omission or noncompliance and brings it to the broker's attention, the broker should provide the documentation of the communication with the client. These additions clarify the level of professionalism that is expected in the broker/importer relationship. Most brokers are already in compliance with this requirement, so this provision will not add a significant burden to customs brokers. CBP received a few comments on this provision, which are further discussed above in Section II, *Discussion of Comments.* However, CBP maintains the requirement that brokers provide and document advice given to clients on corrective actions and has not revised the analysis of costs and benefits as a result. The discussion of comments above clarifies how a broker can achieve proper documentation.

3.8 CBP's New Payment Platform, the eCBP Portal

In this final rule, CBP is also announcing the deployment of the eCBP portal, a new payment and submission system. The eCBP portal is part of an ongoing effort by CBP to eliminate manual processes, reduce cash and check collections at ports of entry, standardize processes, integrate data with cargo systems, reduce wait times at ports of entry, provide more online payment options, and provide better and more accessible data. As described above in *The Benefits of CBP's New Payment and Submission System, the eCBP Portal, for Licensed Customs Brokers* under Section IV, the eCBP portal streamlines and validates data, which in turn reduces errors and provides data to support security-related decision making by CBP personnel. Additionally, the eCBP portal allows for fewer cash transactions, lowering the risk of cash losses, and allows CBP to shift resources from revenue collection to law enforcement and trade facilitation.

As further discussed above, CBP tested the eCBP portal for use in filing the triennial status report between December of 2017 and May 2018. The new portal was then deployed for the following filing period of the triennial report beginning in December of 2020 and will be used for the next filing in December 2023 into early 2024. The portal was also deployed to accept license exam application fees in August of 2019. As a part of regular announcements, CBP announced the new payment system through CSMS messages, a message on CBP's website, tweets, and in webinars for the broker community. Finally, CBP added the automatic suspension and revocation processing of licenses for unsubmitted triennial status reports as a portal functionality in February 2021, though a CBP employee still reviews all license records with unsubmitted reports prior to suspension or revocation.

CBP saw significant savings resulting from reduced processing and personnel hours, discussed further below, with the deployment of the eCBP portal. The portal also required some initial investment in programming and technical development. However, those costs are part of a long-term project within CBP called Revenue Modernization, which touches on several different areas of CBP's payment processing systems. The Revenue Modernization team is not able to easily identify an exact allocation of its development costs for the eCBP-specific initiatives at this time. The development costs are intertwined with back-end development shared with another Revenue Modification project's solution, as well as development that serves as a front-end platform for numerous other fee collection efforts. The eCBP portal will eventually encompass a variety of different fees, so full development costs are not limited to broker-related projects. The program plans to allocate the costs once it is closer to the solutions being complete. CBP estimates that, as of FY 2021, development costs have amounted to less than $3 million for the broker fees deployed in the eCBP portal to date.

The eCBP portal currently allows brokers and broker exam applicants to submit paperwork and fees for the broker exam and the triennial status report electronically. According to CBP data, between 80 and 90 percent of the brokers required to submit applications and fees did so via the portal following the introduction of both functionalities, resulting in significant time savings for applicants, brokers, and CBP personnel. To access the portal, users must first create a *login.gov* account, which takes about three-five minutes. However, an account must only be created once.

In 2019, the first year that broker exam applicants were able to use the portal, 1,327 applicants successfully paid their fees for the fall exam via the eCBP portal, saving an average of 43 minutes relative to a paper form.[40] CBP

[40] CBP estimates a time burden of approximately 60 minutes for a paper submission, while an electronic submission takes an average of 17 minutes. Without access to live timings from the public, CBP's Revenue Modernization team relied on a testing team to set up two common scenarios

Continued

offers the exam twice per year; once in April and again in October. Applicants were again able to use the portal for two exams each in 2020 and 2021.[41] An average of 1,291.4 applicants used the portal for each exam. *See* Table 14. CBP estimates an average time burden of 60 minutes for a paper form, which includes the time needed to print, fill-in, and submit the form and pay either in-person at the port or by mail.[42]

In 2021, brokers were able to use the portal to file their triennial status reports and related fees. Approximately 91 percent of brokers, or 13,772 filers, did so, with 1,406 brokers preferring to file a paper report. The electronic filers saved an average of 19 minutes relative to paper filers.[43]

With information and payments submitted electronically in 2019, CBP subject matter experts estimate that CBP saved approximately 280 hours of exam fee processing time, in addition to about 430 hours of time processing withdrawals and mailing out results, for a total savings of 710 hours in 2019, implying a time savings of 32 minutes per applicant.[44] CBP also saved approximately 1,836 hours of processing of triennial status reports and fees in 2021.[45]

TABLE 14—CBP TIME SAVINGS FROM EXAM APPLICANTS USING THE eCBP PORTAL

Year	Applicants	CBP hours saved	CBP minutes saved/applicant
2019	1,327	710	32
2020 (1)	1,372	734	32
2020 (2)	1,421	760	32
2021 (1)	1,312	702	32
2021 (2)	1,025	548	32
Total	6,457	3,455	

Applicants, brokers, and CBP will save time with the eCBP portal over the period of analysis from 2022–2026. CBP will offer the broker exam twice per year, meaning approximately 1,292 applicants will use the portal at each exam, for a total of 2,583 applicants per year.[46] As Table 15 shows, those broker exam applicants will save about $284,728 over the course of five years, accounting for time spent creating a *login.gov* account as well as time saved in using the portal relative to a paper submission.[47] CBP assumes the number of applicants will stay largely the same over the period of analysis, and that the wage rate for brokers most closely approximates the wage earned by applicants.[48] Over the period of analysis, there will only be one triennial reporting year (2024). In that year, brokers using the eCBP portal can expect to save approximately $160,909, as shown in Table 16. CBP assumes that about 91 percent of newly licensed applicants will elect to file their triennial status reports via the portal, in line with the 91 percent of already licensed brokers who chose to do so in 2021. Therefore, accounting for the new licenses issued each year, as described above in Table 3, about 14,597 brokers will use the portal to submit their report fees. Those brokers will have already created a *login.gov* account, either to submit the exam application fees, participate in the testing or original deployment of the portal, or in the course of their customs business.

Savings for CBP over the period of analysis amount to $716,066, incorporating savings from the processing of payments, paper forms, exam withdrawals, results, and suspensions. CBP will also require less data entry, resulting in fewer mistakes, reduced time fixing errors, and more time on tasks other than administration. The automation of payments also allows for greater efficiency and speed in payment processing, and reduced cash losses. CBP did incur some unquantified IT and development costs. As stated above, these costs are part of a larger modernization effort by CBP and cannot be separated out by program. Table 17 summarizes these savings.

for applicants making their customs broker license examination (CBLE) registration. The basic elements of the registration process include establishing a *login.gov* ID for first time users, login in, filling in the form and making payment.

[41] The spring exam in 2020 was cancelled due to the COVID–19 pandemic. The exam was offered twice in October to make up for the cancellation.

[42] *See https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202010-1651-013* for more information on the time burden to submit a paper form. Before electronic submission options were available, filers needed to obtain and fill in a paper form, and mail the form and their payment to the appropriate port. Alternatively, filers could submit in person at the port, sometimes compelling them to wait in line to submit the form and payment and receive their receipt. Beginning in 2015, filers could use a fillable PDF form on *pay.gov* to submit their form along with their payment. Using *pay.gov* required typing in all the information, providing an electronic signature, and submitting the form and payment. The one-hour time burden is an average accounting for both paper submission by mail or in person, or electronic submission.

[43] CBP estimates a 30-minute time burden for the filing of a paper triennial report and fee payment. After testing using the same methodology as described above, the Revenue Modernization team estimates an electronic filing to take an average of 11 minutes. Before the eCBP portal was available, brokers filed their triennial reports in paper form by mailing them along with payment to the port, or by submitting the report and payment in person. For the 2015 and 2018 reporting cycles, brokers could use a fillable PDF on *pay.gov* to submit their triennial reports. In 2015, 15 percent of brokers did so. In 2018, 85 percent used *pay.gov*. The 30-minute time burden is an average accounting for those brokers filing in person or by mail on paper.

[44] Time savings compiled and provided by CBP's Broker Management Branch and CBP's Revenue Modernization team based on a comparison of the time spent on paper submissions vs electronic submissions. Much of the time savings resulted from reduced administrative burden, like filling envelopes, payment data entry, and cross-checking paper forms with electronic databases.

[45] As discussed below, CBP saved 1,500 hours of processing time over 11,254 brokers in the 2018 reporting cycle, implying a savings on 8 minutes per payment. In 2021, CBP processed 13,772 payments. A savings of 8 minutes over 13,772 payments results in 1,836 hours in 2021.

[46] The eCBP portal is a relatively new tool and is only now becoming required in certain instances. Because we do not have very many years worth of data, an average is a more accurate estimate of the number of future applicants.

[47] For the purposes of calculating a time burden, CBP assumes that all exam applicants will need to create a *login.gov* account. Although some applicants will take the test multiple times, CBP does not have data on the frequency.

[48] Many applicants for the broker exam already work in the brokerage industry. However, because CBP does not have specific wage data for non-licensed brokerage employees, nor can we estimate the average wage for those working outside the brokerage industry, we have approximated using the broker wage rate.

TABLE 15—TIME SAVINGS FOR EXAM APPLICANTS

[Undiscounted 2022 U.S. dollars]

Year	Applicants	Time savings per submission (minutes)	*Login.gov* account creation (minutes)	Wage rate	Total net savings
2022	2583	43	5	34.81	$56,946
2023	2583	43	5	34.81	56,946
2024	2583	43	5	34.81	56,946
2025	2583	43	5	34.81	56,946
2026	2583	43	5	34.81	56,946
Total	12,914				284,728

TABLE 16—TIME SAVINGS FOR BROKERS

[Undiscounted 2022 U.S. dollars]

Year	Broker filers	Time savings per submission (minutes)	Wage rate	Total savings
2022				0
2023				0
2024	14,597	19	$34.81	$160,909
2025				0
2026				0
Total	14,597			160,909

TABLE 17—COST SAVINGS FOR CBP

[Undiscounted 2022 U.S. dollars]

Year	Applications	Total time savings (hours)	Wage rate	Total savings
2022	2,583	1,378	82.08	$113,073
2023	2,583	1,378	82.08	113,073
2024	17,180	3,214	82.08	263,772
2025	2,583	1,378	82.08	113,073
2026	2,583	1,378	82.08	113,073
Total	27,512	8,724		716,066

In the course of the eCBP portal test, both CBP and brokers/applicants experienced significant time savings. CBP's time savings throughout the test resulted primarily from greater efficiency in electronic processing of payments, an increase in the number of on-time payments, reduction in time spent on administrative tasks in processing withdrawals and results, and the introduction of automatic suspension. CBP personnel saved 1,500 hours across the 2017/2018 reporting cycle—savings from which are reported in 2018 in Table 18. CBP saved 710 hours across a single exam in 2019, as well as 1,494 hours across two exams in 2020, as shown in Table 14 above. CBP also saved 1,836 hours across the 2020/2021 reporting cycle, reported in 2021 in Table 18, and 1,250.4 hours across two exams.[49] CBP also incurred some non-quantified IT and development costs, as described earlier.

Brokers and applicants also saved time if they chose to participate. In the 2017/2018 reporting cycle, 11,254 participating brokers saved 19 minutes per submission. Those savings are reported in 2018 in Table 18 below. In 2019, 1,327 exam applicants saved 43 minutes each, while in 2020, 2,793 exam applicants saved the same. In 2021, 2,337 exam applicants saved 43 minutes each. In the 2020/2021 reporting cycle, 13,772 brokers saved 19 minutes each, the savings from which are reported in 2021 in Table 18.

Brokers did experience a time cost in creating their *Login.gov* account. About 80 percent of brokers filing that year, or 11,254 people, chose to use the portal in the 2017/2018 reporting cycle, and in doing so, spent about three-five minutes creating a *Login.gov* account, the costs of which are reported in 2018 in Table 18 below. For the 2020/2021 reporting cycle, 13,772 brokers, or about 90 percent used the electronic option, costs for which are reported in 2021 in Table 18. This represents 2,518 more brokers than in the previous reporting cycle. Those 2,518 brokers also faced the three-five-minute cost of creating a *Login.gov* account. In 2019, 2020, and 2021, exam applicants also spent three-five minutes creating an account. As stated above, there were 1,327 applicants in 2019, 2,793 applicants

[49] The triennial status report is due on the 28th of February, every three years. To allow adequate time for brokers submitting the reports, CBP begins accepting reports and payments at the end of the year prior to the due date. For ease of presentation, and because the majority of submissions occur in January and February, CBP presents these costs in a single year.

across two exams in 2020, and 2,337 applicants across two exams in 2021. Although the costs and benefits of the test deployment of the eCBP portal are not recoverable, they are reported here for transparency and excluded from the total costs and benefits of the rule. See Table 18 for a description of these costs and benefits.

TABLE 18—COSTS AND BENEFITS OF THE eCBP PORTAL TEST

[Undiscounted 2022 U.S. dollars]

Year	Activity	CBP costs	CBP savings	Broker/applicant savings	*Login.gov* costs	Total savings
2018	Triennial Report	IT Costs	$123,120	$124,055	$32,646	$214,529
2019	License Exam	IT Costs	58,277	33,105	3,849	87,532
2020	2 License Exams	IT Costs	122,658	69,677	8,102	184,233
2021	Triennial Report; 2 License Exams	IT Costs	253,331	$210,113	14,084	449,360
Total			557,386	436,950	58,681	935,654

* Totals may not sum due to rounding.

3.9 Total Costs

The total monetized costs for customs brokers include a $100 fee that two percent of individual customs brokers who receive their first district permit concurrently with their broker's license will need to pay for their permit and the costs resulting from the new requirement that a broker document and report to CBP when it separates from a client relationship as a result of attempted fraud or criminal acts. The costs also include the 5 minute time costs broker license exam applicants will experience in creating their *Login.gov* accounts. Table 18 shows the total annual cost of the rule. Over the five-year period of analysis, this rule will cost brokers about $88,850.

TABLE 19—TOTAL ANNUAL COSTS FOR BROKERS

[2022 U.S. dollars]

Year	Total costs
2022	$17,770
2023	17,770
2024	17,770
2025	17,770
2026	17,770
Total	88,850

Note: Values may not sum to total due to rounding.

Table 20 shows the present value and annualized costs of the rule over the period of analysis at a three and seven percent discount rate. Total costs range from $72,860 to $81,381, depending on the discount rate used. Annualized costs are $17,770.

TABLE 20—TOTAL PRESENT VALUE AND ANNUALIZED COSTS

[2022 U.S. dollars]

Total present value costs		Annualized costs	
3%	7%	3%	7%
$81,381	$72,860	$17,770	$17,770

3.10 Total Benefits

The total annual monetized savings for customs brokers are the result of monetary savings from switching from a district permitting system to a national permitting system. Namely, there is a time savings and fee savings of $100 per permit application for individual customs brokers who do not concurrently receive their first district permit with their broker license. There is also a time savings to CBP due to the removal of the district permit waiver application reviews. Brokers, potential brokers applying to take the broker exam, and CBP also experience time savings resulting from use of the eCBP portal. As shown in Table 21, total undiscounted savings over the period of analysis are $1,277,116.

In addition to these quantified benefits, there are unquantified benefits resulting from this rule's updates. These benefits include increased professionalism of the broker industry, greater clarity for brokers in understanding the rules and regulations by which they must abide, greater data security, and better reporting of potential fraud to CBP. The eCBP portal also increases the efficiency of payment processing, reduces errors, and allows a shift of resources from paperwork and administration to other CBP priorities.

TABLE 21—TOTAL ANNUAL UNDISCOUNTED SAVINGS FOR BROKERS AND CBP

[2022 U.S. dollars]

Year	Total benefits
2022	$194,412
2023	193,655
2024	504,797
2025	192,475
2026	191,777
Total	1,277,116

Note: Values may not sum to total due to rounding.

Table 22 shows the present value and annualized savings of the rule over the period of analysis at a three and seven percent discount rate. Total savings range from $1,046,477 to $1,169,689, depending on the discount rate used. Annualized savings total approximately $255,000.

TABLE 22—TOTAL PRESENT VALUE AND ANNUALIZED BENEFITS
[2022 U.S. dollars]

Total present value benefits		Annualized Benefits	
3%	7%	3%	7%
$1,169,689	$1,046,477	$255,407	$255,226

3.11 Net Benefits

Table 23 summarizes the monetized costs and benefits of this rule to individual and business entity customs brokers. As shown, the total monetized present value net benefits of this rule over a five-year period of analysis ranges from $973,616 to 1,088,308 and the annualized net benefit is approximately $237,500.

TABLE 23—PRESENT VALUE AND ANNUALIZED NET BENEFIT OF RULE
[2022 U.S. dollars]

	3% Discount rate		7% discount rate	
	Present value	Annualized	Present value	Annualized
Total Cost	$81,381	$17,770	$72,860	$17,770
Total Benefit	1,169,689	255,407	1,046,477	255,226
Total Net Benefit	1,088,308	237,637	973,616	237,456

3.12 Distributional Impact

Under the rule, the customs broker license application will change from $200 for both individuals and business entities to $300 for individuals and $500 for business entities. Consequently, CBP's fee would increase by $100 for individuals and $300 for business entities. As discussed in section 2, CBP estimates that over the next five years, 2,072 individuals and 75 business entities will be issued a new customs broker license (See Table 3). Using these estimates and the fee increases, CBP estimates that the rule will result in increased transfer payments from brokers to the government of approximately $229,700 over the next five years (2,072 individual applications * $100 fee increase = $207,200; 75 business entity applications * $300 fee increase = $22,500; $207,200 + $22,500 = $229,700).

Although the fee changes will increase costs for individuals and business entities, CBP has determined that these increases are necessary in order to recover some of the costs to provide the services necessary to facilitate the customs broker license application process.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small organization (defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (defined as a locality with fewer than 50,000 people).

In an effort to modernize the regulations governing customs brokers, CBP is finalizing regulatory changes that include: eliminating district permits so each customs broker only needs one national permit, which reduces the time submitting permit applications and the fees owed; mandating that each broker provide notification to CBP of any known breach of its records within 72 hours of discovery; [50] requiring brokers to make all records available to CBP, upon request within thirty (30) calendar days at the location specified by CBP; mandating that customs brokers now obtain a customs power of attorney directly from the importer of record or drawback claimant, not a freight forwarder or other third party, to transact customs business for that importer or drawback claimant; and requiring that a broker must document and report to CBP when it separates from or terminates representation of a client as a result of the broker's determination that the client is intentionally attempting to use the services of a broker to defraud or otherwise commit any criminal act against the U.S. Government. Furthermore, CBP is also making various non-substantive changes and conforming edits to clarify the existing language in the regulations to better reflect what is already occurring.

The rule would apply to all customs brokers, regardless of size. Accordingly, the rule would affect a substantial number of small entities, as a small business within the Freight Transportation Arrangement industry (NAICS code 448510), the industry in which brokers are employed, is defined as one whose annual receipts are less than $17.5 million.[51] The rule would result in an average annualized cost per customs broker of $0.08 ($36 annualized costs/429 average brokers per year), excluding savings resulting from the use of the eCBP portal.[52] The time savings resulting from the eCBP portal's introduction accrue to both broker license exam applicants who may or may not be in the Freight Transportation Arrangement industry as well as to all

[50] Additionally, within ten (10) business days, a broker must provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is discovered, a broker must provide that information within 72 hours of discovery.

[51] Small business size standards are defined in 13 CFR 121.

[52] A large part of the savings in this rule accrue to CBP. Therefore, to calculate the impact on small businesses, CBP considered only the costs and savings of the rule for customs brokers. This includes the savings for 11.5% of brokers reported in Table 6, application time savings for individuals reported in Table 7, application time savings reported for coprorations in Table 8, waiver request time savings as reported in Table 11, costs for corporate brokers reported in Table 4, costs for the 2 percent of brokers reported in Table 5, and the costs of an attorney as described above. Over the period of analysis, the net costs total $296, or about $36 annualized at a discount rate of three percent.

existing, active licensed brokers. Those two groups will only experience the net cost savings provided by the eCBP portal.

Additionally, as discussed above, the customs broker license application fee increase for the 2,147 new customs brokers over the period of analysis would result in a distributional impact of $229,700, with 2,072 individual applicants paying an additional $100 and 75 corporate applicants paying an additional $300 over a 5-year period. Including distributional impacts, the rule costs individual brokers $100 or costs corporate brokers $300 per year, or less than one percent of annual revenue for brokers of any size. Please see Table 23 for a breakdown of brokerages by size. Because the distributional impact and saving are relatively small on a per broker basis, this rule will not have a significant economic impact on customs brokers. Accordingly, CBP certifies that this rule does not have a significant economic impact on a substantial number of small entities.

TABLE 24—ANNUAL REVENUE BY FIRM SIZE [53]

Enterprise size (number of employees)	Number of firms	Receipts ($1,000s)	Receipts per firm (in millions)	Small business?
01: Total	15,104	64,643,370	$243,761	
02: <100	1,856	95,206	51,296	Yes.
03: 100–499	4,655	1,247,577	268,008	Yes.
04: 500–999	2,459	1,769,394	719,558	Yes.
05: 1,000–2,499	2,706	4,244,215	1,568,446	Yes.
06: 2,500–4,999	1,327	4,572,835	3,445,995	Yes.
07: 5,000–7,499	589	3,454,385	5,864,830	Yes.
08: 7,500–9,999	317	2,627,240	8,287,823	Yes.
09: 10,000–14,999	281	3,180,898	11,319,922	Yes.
10: 15,000–19,999	176	2,698,956	15,334,977	Yes.
11: 20,000–24,999	105	2,068,177	19,696,924	No.
12: 25,000–29,999	67	1,582,086	23,613,224	No.
13: 30,000–34,999	49	1,313,422	26,804,531	No.
14: 35,000–39,999	45	1,282,808	28,506,844	No.
15: 40,000–49,999	49	1,536,283	31,352,714	No.
16: 50,000–74,999	85	3,198,608	37,630,682	No.
17: 75,000–99,999	54	2,825,197	52,318,463	No.
18: 100,000+	284	26,946,083	94,880,574	No.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information contained in these regulations are provided for by OMB control number 1651–0034 (CBP Regulations Pertaining to Customs Brokers) and by OMB control number 1651–0076 (Recordkeeping Requirements).

The final rule formalizes the use of the eCBP portal as an option for applicants and brokers to submit the Application for Broker License Exam and payment and the Triennial Status Report and payment. The eCBP portal reduces the time burden to submit these forms and fees. CBP would submit to OMB for review the following adjustments to the previously approved Information Collection under OMB control number 1651–0034 to account for this rule's changes.

CBP Regulations Pertaining to Customs Brokers

Application for Broker License Exam

Estimated Number of Respondents: 2,583.

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,583.

Estimated Time per Response: 17 minutes (0.283 hours).

Triennial Status Report

Estimated Number of Respondents: 4,866 (14,597 every 3-years).

Estimated Number of Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 4,866.

Estimated Time per Response: 11 minutes (0.183 hours).

Estimated Total Annual Burden Hours: 1,621.47 hours.

VII. Signing Authority

This document is being issued in accordance with 19 CFR 0.1(b)(1), which provides that the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority to prescribe and approve regulations relating to customs revenue functions on behalf of the Secretary of the Treasury for when the subject matter is not listed as provided by Treasury Department Order No. 100–16. Accordingly, this final rule amending such regulations may be signed by the Secretary of Homeland Security (or his or her delegate). Additionally, while the general topic of this rulemaking covers customs revenue functions delegated to the Secretary of Homeland Security by the Secretary of the Treasury, this document also includes certain fees over which the Secretary of the Treasury retains authority, as provided for in 19 CFR 0.1(a)(1) and paragraph 1(a)(i) of Treasury Department Order 100–16. Accordingly, this final rule is also being signed by the Secretary of the Treasury (or his or her delegate).

List of Subjects

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Harbors, Reporting and recordkeeping requirements, Taxes.

19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements.

[53] U.S. Census Bureau, 2017 SUSB Annual Data Tables by Establishment Industry, ''The Number of Firms and Establishments, Employment, Annual Payroll, and Receipts by Industry and Enterprise Receipts Size: 2017, NAICS 4885 Freight Transportation Arrangement. *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.* Accessed June 7, 2021.

Regulatory Amendments to the CBP Regulations

For the reasons given above, parts 24 and 111 of title 19 of the Code of Federal Regulations (19 CFR parts 24 and 111) are amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ 1. The general authority citation for part 24 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1505, 1520, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 3717, 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*).

* * * * *

§ 24.1 [Amended]

■ 2. In § 24.1, paragraph (a)(3)(i) is amended by removing the phrases ''who does not have a permit for the district (see the definition of ''district'' at § 111.1 of this chapter) where the entry is filed,'' and ''which is unconditioned geographically'' from the third sentence.

PART 111—CUSTOMS BROKERS

■ 3. The authority citation for part 111 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624; 1641.

Section 111.2 also issued under 19 U.S.C. 1484, 1498;

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

■ 4. In § 111.1:
■ a. Add a definition for ''Appropriate Executive Director, Office of Trade'' in alphabetical order;
■ b. Remove the definition of ''Assistant Commissioner'';
■ c. Add a definition for ''Broker's office of record'' in alphabetical order;
■ d. Remove the definition of ''District'';
■ e. Add a definition for ''Executive Assistant Commissioner'' in alphabetical order;
■ f. Amend the definition of ''Permit'' by removing the word ''any'' and adding in its place the word ''a'';
■ g. Add a definition for ''Processing Center'' in alphabetical order;
■ h. Remove the definition of ''Region''; and
■ i. Revise the definition of ''Responsible supervision and control''.

The additions and revisions read as follows:

§ 111.1 Definitions.

* * * * *

Appropriate Executive Director, Office of Trade. ''Appropriate Executive Director, Office of Trade'' means the Executive Director responsible for broker management.

* * * * *

Broker's office of record. ''Broker's office of record'' means the office designated by a customs broker as the broker's primary location that oversees the administration of the provisions of this part regarding all activities conducted under a national permit.

* * * * *

Executive Assistant Commissioner. ''Executive Assistant Commissioner'' means the Executive Assistant Commissioner of the Office of Trade at the Headquarters of U.S. Customs and Border Protection.

* * * * *

Processing Center. ''Processing Center'' means the broker management operations of a Center of Excellence and Expertise (Center) that process applications for a broker's license under § 111.12(a), applications for a national permit under § 111.19(b) for an individual, partnership, association, or corporation, as well as submissions required in this part for an already-licensed broker.

* * * * *

Responsible supervision and control. ''Responsible supervision and control'' means that degree of supervision and control necessary to ensure the proper transaction of the customs business of a broker, including actions necessary to ensure that an employee of a broker provides substantially the same quality of service in handling customs transactions that the broker is required to provide. *See* § 111.28 for a list of factors which CBP may consider when evaluating responsible supervision and control.

* * * * *

■ 5. In § 111.2:
■ a. Amend the section heading by removing the word ''district'';
■ b. Amend paragraph (a)(2)(ii)(A)(*1*) by removing ''the port director'' and ''Customs'' and adding in their place the term ''CBP'';
■ c. Amend paragraph (a)(2)(ii)(A)(*2*) by removing the words ''port director'' and adding the words ''processing Center'' in their place and by removing the last sentence.
■ d. Amend paragraph (a)(2)(ii)(B) by removing the words ''port director'' wherever they appear and adding in their place the words ''processing Center''; and
■ e. Revise paragraph (b).

The revision reads as follows:

§ 111.2 License and permit required.

* * * * *

(b) *National permit.* A national permit issued to a broker under § 111.19 will constitute sufficient permit authority for the broker to conduct customs business within the customs territory of the United States as defined in § 101.1 of this chapter.

■ 6. Add § 111.3 to read as follows:

§ 111.3 Customs business.

(a) *Location.* Customs business must be conducted within the customs territory of the United States as defined in § 101.1 of this chapter.

(b) *Point of contact.* A licensed customs broker, or partnership, association, or corporation, conducting customs business under a national permit must designate a knowledgeable point of contact to be available to CBP during and outside of normal operating hours to respond to customs business issues. The licensed customs broker, or partnership, association, or corporation, must maintain accurate and current point of contact information in a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

■ 7. Revise § 111.12 to read as follows:

§ 111.12 Application for license.

(a) *Submission of application and fee.* An application for a broker's license must be timely submitted to the processing Center after the applicant attains a passing grade on the examination. The application must be executed on CBP Form 3124. The application must be accompanied by the application fee prescribed in § 111.96(a) and one copy of the appropriate attachment required by the application form (Articles of Agreement or an affidavit signed by all partners, Articles of Agreement of the association, or the Articles of Incorporation). If the applicant proposes to operate under a trade or fictitious name in one or more States, evidence of the applicant's authority to use the name in each of those States must accompany the application. The application, application fee and any additional documentation as required above may be submitted to a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be submitted in writing to the processing Center. An application for an individual license must be submitted within the 3-year period after the applicant took and passed the examination referred to in §§ 111.11(a)(4) and 111.13. The

processing Center may require an individual applicant to provide a copy of the notification that the applicant passed the examination (*see* § 111.13(e)) and will require the applicant to submit fingerprints at the time of the interview. The processing Center may reject an application as improperly filed if the application is incomplete or, if on its face, the application demonstrates that one or more of the basic requirements set forth in § 111.11 has not been met at the time of filing; in either case the application and fee will be returned to the filer without further action.

(b) *Withdrawal of application.* An applicant for a broker's license may withdraw the application at any time prior to issuance of the license by providing written notice of the withdrawal to the processing Center or through a CBP-authorized EDI system, if available. However, withdrawal of the application does not entitle the applicant to a refund of the application fee set forth in § 111.96(a).

■ 8. In § 111.13:

■ a. Amend paragraph (b) by removing ''$390'' and revising the last sentence;

■ b. Amend paragraph (c) by:

■ i. Removing the words ''an office in another district (*see* § 111.19(d)) and the permit for that additional district would be revoked by operation of law under the provisions of 19 U.S.C. 1641(c)(3) and § 111.45(b)'' and adding in their place the words ''the transaction of customs business''; and

■ ii. Removing ''$390'' in the last sentence;

■ c. Amend paragraph (d) by removing ''$390'';

■ d. Amend paragraph (e) in the first sentence by adding the words ''or electronic'' after the word ''written''; and

■ e. Revise paragraph (f).

The revisions read as follows:

§ 111.13 Examination for individual license.

* * * * *

(b) * * * CBP will give notice of the time and place for the examination, including whether alternatives to on-site testing will be available, which is at CBP's sole discretion.

* * * * *

(f) *Appeal of failing grade on examination.* If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written or electronic appeal with the Office of Trade at the Headquarters of U.S. Customs and Border Protection, Attn: Broker Management Branch, within 60 calendar days after the date of the written or electronic notice provided for in paragraph (e) of this section. CBP will provide to the examinee written or electronic notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by submitting a written or electronic request to the appropriate Executive Director, Office of Trade, U.S. Customs and Border Protection, within 60 calendar days after the date of the notice on that decision.

■ 9. Revise § 111.14 to read as follows:

§ 111.14 Background investigation of the license applicant.

(a) *Scope of background investigation.* A background investigation under this section will ascertain facts relevant to the question of whether the applicant is qualified and will cover, but need not be limited to:

(1) The accuracy of the statements made in the application and interview;

(2) The business integrity and financial responsibility of the applicant; and

(3) When the applicant is an individual (including a member of a partnership or an officer of an association or corporation), the character and reputation of the applicant, including any association with any individuals or groups that may present a risk to the security or to the revenue collection of the United States.

(b) *Referral to Headquarters.* The processing Center will forward the application and supporting documentation to the appropriate Executive Director, Office of Trade. The processing Center will also submit the recommendation for action on the application.

(c) *Additional inquiry.* The appropriate Executive Director, Office of Trade, may require further inquiry if additional facts are deemed necessary to evaluate the application. The appropriate Executive Director, Office of Trade, may also require the applicant (or in the case of a partnership, association, or corporation, one or more of its members or officers) to appear in person or by another approved method before the appropriate Executive Director, Office of Trade, or his or her representatives, for the purpose of undergoing further written or oral inquiry.

■ 10. Revise § 111.15 to read as follows:

§ 111.15 Issuance of license.

If the appropriate Executive Director, Office of Trade, finds that the applicant is qualified and has paid all applicable fees prescribed in § 111.96(a), the Executive Assistant Commissioner will issue a license. A license for an individual who is a member of a partnership, or an officer of an association or corporation will be issued in the name of the individual licensee and not in his or her capacity as a member or officer of the organization with which he or she is connected. The license will be forwarded to the processing Center, which will deliver it to the licensee.

■ 11. Revise § 111.16 to read as follows:

§ 111.16 Denial of a license.

(a) *Notice of denial.* If the appropriate Executive Director, Office of Trade, determines that the application for a license should be denied for any reason, notice of denial will be given by him or her to the applicant and to the processing Center. The notice of denial will state the reasons why the license was not issued.

(b) *Grounds for denial.* The grounds sufficient to justify denial of an application for a license include, but need not be limited to:

(1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of § 111.53;

(2) The failure to meet any requirement set forth in § 111.11;

(3) A failure to establish the business integrity and financial responsibility of the applicant;

(4) A failure to establish the good character and reputation of the applicant;

(5) Any willful misstatement or omission of pertinent facts in the application or interview for the license;

(6) Any conduct which would be deemed unfair or detrimental in commercial transactions by accepted standards;

(7) A reputation imputing to the applicant criminal, dishonest, or unethical conduct, or a record of that conduct; or

(8) Any other relevant information uncovered over the course of the background investigation.

■ 12. Revise § 111.17 to read as follows:

§ 111.17 Review of the denial of a license.

(a) *By the appropriate Executive Director, Office of Trade.* Upon the denial of an application for a license, the applicant may file with the appropriate Executive Director, Office of Trade, in writing, additional information or arguments in support of the application and may request to appear in person, by telephone, or by

other acceptable means of communication. This filing and request must be received by the appropriate Executive Director, Office of Trade within sixty (60) calendar days of the denial.

(b) *By the Executive Assistant Commissioner.* Upon the decision of the appropriate Executive Director, Office of Trade, affirming the denial of an application for a license, the applicant may file with the Executive Assistant Commissioner, in writing, a request for any additional review that the Executive Assistant Commissioner, deems appropriate. This request must be received by the Executive Assistant Commissioner within sixty (60) calendar days of the affirmation by the appropriate Executive Director, Office of Trade, of the denial of the application for a license.

(c) *By the Court of International Trade.* Upon a decision of the Executive Assistant Commissioner affirming the denial of an application for a license, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within sixty (60) calendar days after the decision date by the Executive Assistant Commissioner.

§ 111.18 [Amended]

■ 13. Amend § 111.18 by adding the phrase ''and addressing how deficiencies have been remedied'' after the term ''§ 111.12''.

■ 14. In § 111.19:
■ a. Revise the section heading;
■ b. Revise paragraphs (a) and (b);
■ c. Remove paragraph (d);
■ d. Redesignate paragraph (e) as paragraph (d) and revise it;
■ e. Revise paragraph (f); and
■ f. Redesignate paragraph (g) as paragraph (e) and revise it.

The revisions read as follows:

§ 111.19 National permit.

(a) *General.* A national permit is required for the purpose of transacting customs business throughout the customs territory of the United States as defined in § 101.1 of this chapter.

(b) *Application for a national permit.* An applicant who obtains a passing grade on the examination for an individual broker's license may apply for a national permit. The applicant will exercise responsible supervision and control (as described in § 111.28) over the activities conducted under that national permit. The national permit application may be submitted concurrently with or after the submission of an application for a broker's license. An applicant applying for a national permit on behalf of a partnership, association, or corporation must be a licensed broker employed by the partnership, association, or corporation. An application for a national permit under this paragraph must be submitted in the form of a letter to the processing Center or to a CBP-authorized electronic data interchange (EDI) system. The application must set forth or attach the following:

(1) The applicant's broker license number and date of issuance if available;

(2) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: the name of the partnership, association, or corporation and the title held by the applicant within the partnership, association, or corporation;

(3) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: a copy of the documentation issued by a State, or local government that establishes the legal status and reserves the business name of the partnership, association, or corporation;

(4) The address, telephone number, and email address of the office designated by the applicant as the office of record as defined in § 111.1. The office will be noted in the national permit when issued;

(5) The name, telephone number, and email address of the point of contact described in § 111.3(b) to be available to CBP to respond to issues related to the transaction of customs business;

(6) If the applicant is applying for a national permit on behalf of a partnership, association, or corporation: the name, broker license number, office address, telephone number, and email address of each individual broker employed by the partnership, association, or corporation;

(7) A list of all employees together with the specific employee information prescribed in § 111.28 for each employee;

(8) A supervision plan describing how responsible supervision and control will be exercised over the customs business conducted under the national permit, including compliance with § 111.28;

(9) The location where records will be retained (*see* § 111.23);

(10) The name, telephone number, and email address of the knowledgeable employee responsible for broker-wide records maintenance and financial recordkeeping requirements (*see* § 111.21(d)); and

(11) A receipt or other evidence showing that the fees specified in § 111.96(b) and (c) have been paid in accordance with paragraph (b) of this section.

* * * * *

(d) *Action on application; list of permitted brokers.* The processing Center that receives the application will review the application to determine whether the applicant meets the requirements of paragraphs (a) and (b) of this section. If the processing Center is of the opinion that the national permit should not be issued, the processing Center will submit written reasons for that opinion to the appropriate Executive Director, Office of Trade, CBP Headquarters, for appropriate instructions on whether to grant or deny the national permit. The appropriate Executive Director, Office of Trade, CBP Headquarters, will notify the applicant if his or her application is denied. CBP will issue a national permit to an applicant who meets the requirements of paragraphs (a) and (b) of this section. CBP will maintain and make available to the public an alphabetical list of permitted brokers.

(e) *Review of the denial of a national permit*—(1) *By the Executive Assistant Commissioner.* Upon the denial of an application for a national permit under this section, the applicant may file with the Executive Assistant Commissioner, in writing, additional information or arguments in support of the application and may request to appear in person, by telephone, or by other acceptable means of communication. This filing and request must be received by the Executive Assistant Commissioner within sixty (60) calendar days of the denial.

(2) *By the Court of International Trade.* Upon a decision of the Executive Assistant Commissioner affirming the denial of an application for a national permit under this section, the applicant may appeal the decision to the Court of International Trade, provided that the appeal action is commenced within sixty (60) calendar days after the decision date by the Executive Assistant Commissioner.

(f) *Responsible supervision and control.* The individual broker who qualifies for the national permit will exercise responsible supervision and control (as described in § 111.28) over the activities conducted under that national permit.

■ 15. In § 111.21:
■ a. Redesignate paragraphs (b) and (c) as paragraphs (c) and (d);
■ b. Add a new paragraph (b); and
■ c. Revise newly redesignated paragraph (d).

The addition and revision read as follows:

§ 111.21 Record of transactions.

* * * * *

(b) Each broker must provide notification to the CBP Office of Information Technology Security Operations Center (CBP SOC) of any known breach of electronic or physical records relating to the broker's customs business. Notification must be electronically provided (*cbpsoc@cbp.dhs.gov*) within 72 hours of the discovery of the breach, including any known compromised importer identification numbers (*see* 19 CFR 24.5). Within ten (10) business days of the notification, a broker must electronically provide an updated list of any additional known compromised importer identification numbers. To the extent that additional information is subsequently discovered, the broker must electronically provide that information within 72 hours of discovery. Brokers may also call CBP SOC at a telephone number posted on CBP.gov with questions as to the reporting of the breach, if any guidance is needed.

* * * * *

(d) Each broker must designate a knowledgeable employee as the party responsible for brokerage-wide recordkeeping requirements. Each broker must maintain accurate and current point of contact information in a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

■ 16. In § 111.23, revise paragraph (a) to read as follows:

§ 111.23 Retention of records.

(a) *Place of retention.* A licensed customs broker must maintain originals of the records referred to in this part, including any records stored in electronic formats, within the customs territory of the United States and in accordance with the provisions of this part and part 163 of this chapter.

* * * * *

■ 17. Revise § 111.24 to read as follows:

§ 111.24 Records confidential.

The records referred to in this part and pertaining to the business of the clients serviced by the broker are to be considered confidential, and the broker must not disclose their contents or any information connected with the records to any persons other than those clients, their surety on a particular entry, and representatives of the Department of Homeland Security (DHS), or other duly accredited officers or agents of the United States, except on subpoena or court order by a court of competent jurisdiction, or when authorized in writing by the client. This confidentiality provision does not apply to information that properly is available from a source open to the public.

■ 18. Revise § 111.25 to read as follows:

§ 111.25 Records must be available.

(a) *General.* During the period of retention, the broker must maintain the records referred to in this part in such a manner that they may readily be examined. Records required to be maintained under the provisions of this part must be made available upon reasonable notice for inspection, copying, reproduction or other official use by representatives of the Department of Homeland Security (DHS) within the prescribed period of retention or within any longer period of time during which they remain in the possession of the broker.

(b) *Examination request.* Upon request by DHS to examine records, the designated recordkeeping contact (*see* § 111.21(d)), must make all records available to DHS within thirty (30) calendar days, or such longer time as specified by DHS, at the location specified by DHS.

(c) *Recordkeeping requirements.* Records subject to the requirements of part 163 of this chapter must be made available to DHS in accordance with the provisions of that part.

§ 111.27 [Amended]

■ 19. Amend § 111.27 by removing the phrase ''the port director and other proper officials of the Treasury Department'' and adding in its place the phrase ''DHS, or other duly accredited officers or agents of the United States,''.

■ 20. In § 111.28:

■ a. Revise the section heading;

■ b. Revise paragraphs (a) and (b);

■ c. Redesignate paragraphs (c) and (d) as paragraphs (d) and (e);

■ d. Add a new paragraph (c);

■ e. Amend newly redesignated paragraph (d) by:

■ i. Removing the words ''Assistant Commissioner'' and adding in their place the words ''appropriate Executive Director, Office of Trade,''; and

■ ii. Removing the phrase ''director of each port through which a permit has been granted to the partnership, association, or corporation'' and adding in its place the words ''processing Center''; and

■ f. Revise newly redesignated paragraph (e).

The addition and revisions read as follows:

§ 111.28 Responsible supervision and control.

(a) *General.* Every individual broker operating as a sole proprietor, every licensed member of a partnership that is a broker, and every licensed officer of an association or corporation that is a broker must exercise responsible supervision and control (see § 111.1) over the transaction of the customs business of the sole proprietorship, partnership, association, or corporation. A sole proprietorship, partnership, association, or corporation must employ a sufficient number of licensed brokers relative to the job complexity, similarity of subordinate tasks, physical proximity of subordinates, abilities and skills of employees, and abilities and skills of the managers. While the determination of what is necessary to perform and maintain responsible supervision and control will vary depending upon the circumstances in each instance, factors which CBP may consider in its discretion and to the extent any are relevant include, but are not limited to, the following:

(1) The training provided to broker employees;

(2) The issuance of instructions and guidelines to broker employees;

(3) The volume and type of business conducted by the broker;

(4) The reject rate for the various customs transactions relative to overall volume;

(5) The level of access broker employees have to current editions of CBP regulations, the Harmonized Tariff Schedule of the United States, and CBP issuances;

(6) The availability of a sufficient number of individually licensed brokers for necessary consultation with employees of the broker;

(7) The frequency of supervisory visits of an individually licensed broker to another office of the broker that does not have an individually licensed broker;

(8) The frequency of audits and reviews by an individually licensed broker of the customs transactions handled by employees of the broker;

(9) The extent to which the individually licensed broker who qualifies the permit is involved in the operation of the brokerage and communications between CBP and the brokerage;

(10) Any circumstances which indicate that an individually licensed broker has a real interest in the operations of a brokerage;

(11) The timeliness of processing entries and payment of duty, tax, or other debt or obligation owing to the Government for which the broker is

responsible, or for which the broker has received payment from a client;

(12) Communications between CBP and the broker, and the broker's responsiveness and action to communications, direction, and notices from CBP;

(13) Communications between the broker and its officer(s) or member(s), and the broker's responsiveness and action to communications and direction from its officer(s) or member(s).

(b) *Employee information*—(1) *Current employees.* Each national permit holder must submit to the processing Center a list of the names of persons currently employed by the broker. The list of employees must be submitted prior to issuance of a national permit under § 111.19 and before the broker begins to transact customs business. For each employee, the broker must provide the name, social security number, date and place of birth, date of hire, and current home address. After the initial submission, an updated list must be submitted to a CBP-authorized electronic data interchange (EDI) system if any of the information required by this paragraph changes. If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center. The update must be submitted within thirty (30) calendar days of the change.

(2) *New employees.* Within thirty (30) calendar days of the start of employment of a new employee(s), the broker must submit a list of new employee(s) with the information required under paragraph (b)(1) of this section to a CBP-authorized EDI system. The broker may submit a list of the new employee(s) or an updated list of all employees, specifically noting the new employee(s). If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

(3) *Terminated employees.* Within thirty (30) calendar days after the termination of employment of an employee, the broker must submit a list of terminated employee(s) to a CBP-authorized EDI system. The broker may submit a list of the terminated employee(s) or an updated list of all employees, specifically noting the terminated employee(s). If a CBP-authorized EDI system is not available, then the information must be provided in writing to the processing Center.

(c) *Broker's responsibility.* Notwithstanding a broker's responsibility for providing the information required in paragraph (b) of this section, in the absence of culpability by the broker, CBP will not hold the broker responsible for the accuracy of any information that is provided to the broker by the employee.

* * * * *

(e) *Change in ownership.* If the ownership of a broker changes and ownership shares in the broker are not publicly traded, the broker must immediately provide written notice of that fact to the appropriate Executive Director, Office of Trade, and must send a copy of the written notice to the processing Center. When a change in ownership results in the addition of a new principal to the organization, and whether or not ownership shares in the broker are publicly traded, CBP reserves the right to conduct a background investigation on the new principal. The processing Center will notify the broker if CBP objects to the new principal, and the broker will be given a reasonable period of time to remedy the situation. If the background investigation uncovers information which would have been the basis for a denial of an application for a broker's license and the principal's interest in the broker is not terminated to the satisfaction of the processing Center, suspension or revocation proceedings may be initiated under subpart D of this part. For purposes of this paragraph, a ''principal'' means any person having at least a five (5) percent capital, beneficiary or other direct or indirect interest in the business of a broker.

■ 21. In § 111.30:

■ a. Paragraphs (a) and (b) are revised;

■ b. The first sentence of paragraph (c) is revised;

■ c. Paragraph (d) is revised; and

■ d. The first sentence of paragraph (e) introductory text is revised.

The revisions read as follows:

§ 111.30 Notification of change in address, organization, name, or location of business records; status report; termination of brokerage business.

(a) *Change of address.* A broker is responsible for providing CBP with the broker's current addresses, which include the broker's office of record address as defined in § 111.1, an email address, and, if the broker is not actively engaged in transacting business as a broker, the broker's non-business address. If a broker does not receive mail at the broker's office of record or non-business address, the broker must also provide CBP with a valid address at which he or she receives mail. When address information (the broker's office of record address, mailing address, email address) changes, or the broker is no longer actively engaged in transacting business as a broker, he or she must update his or her address information within ten (10) calendar days through a CBP-authorized electronic data interchange (EDI) system. If a CBP-authorized EDI system is not available, then address updates must be provided in writing within ten (10) calendar days to the processing Center.

(b) *Change in organization.* A partnership, association, or corporation broker must update within ten (10) calendar days in writing to the processing Center any of the following:

(1) The date on which a licensed member or officer ceases to be the qualifying member or officer for purposes of § 111.11(b) or (c)(2), and the name of the licensed member or officer who will succeed as the license qualifier;

(2) The date on which a licensed employee ceases to be the national permit qualifier for purposes of § 111.19(a), and the name of the licensed employee who will succeed as the national permit qualifier; and

(3) Any change in the Articles of Agreement, Charter, Articles of Association, or Articles of Incorporation relating to the transaction of customs business, or any other change in the legal nature of the organization (for example, conversion of a general partnership to a limited partnership, merger with another organization, divestiture of a part of the organization, or entry into bankruptcy protection).

(c) * * * A broker who changes his or her name, or who proposes to operate under a trade or fictitious name in one or more States and is authorized by State law to do so, must submit to the appropriate Executive Director, Office of Trade, at the Headquarters of U.S. Customs and Border Protection, evidence of his or her authority to use that name. * * *

(d) *Triennial status report*—(1) *General.* Each broker must file a triennial status report with CBP on February 1 of each third year after 1985. The report must be filed through a CBP-authorized EDI system and will not be considered received by CBP until payment of the triennial status report fee prescribed in § 111.96(d) is received. If a CBP-authorized EDI system is not available, the triennial status report must be filed with the processing Center. A report received during the month of February will be considered filed timely. No form or particular format is required.

(2) *Individual*—(i) Each individual broker must state in the report required under paragraph (d)(1) of this section whether he or she is actively engaged in transacting business as a broker. If he or she is so actively engaged, the broker must also:

(A) State the name under which, and the address at which, the broker's business is conducted if he or she is a sole proprietor, and an email address;

(B) State the name and address of his or her employer if he or she is employed by another broker, unless his or her employer is a partnership, association or corporation broker for which he or she is a qualifying member or officer for purposes of § 111.11(b) or (c)(2); and

(C) State whether or not he or she still meets the applicable requirements of § 111.11 and § 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(ii) An individual broker not actively engaged in transacting business as a broker must provide CBP with the broker's current mailing address and email address, and state whether or not he or she still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(3) *Partnership, association, or corporation*—(i) Each partnership, association, or corporation broker must state in the report required under paragraph (d)(1) of this section the name under which its business as a broker is being transacted, the broker's office of record (*see* § 111.1), the name, address and email address of each licensed member of the partnership or licensed officer of the association or corporation, including the license qualifier under § 111.11(b) or (c)(2) and the name of the licensed employee who is the national permit qualifier under § 111.19(a), and whether the partnership, association, or corporation is actively engaged in transacting business as a broker. The report must be signed by a licensed member or officer.

(ii) A partnership, association, or corporation broker must state whether or not the partnership, association, or corporation broker still meets the applicable requirements of §§ 111.11 and 111.19 and has not engaged in any conduct that could constitute grounds for suspension or revocation under § 111.53.

(4) *Failure to file timely.* If a broker fails to file the report required under paragraph (d)(1) of this section by March 1 of the reporting year, the broker's license is suspended by operation of law on that date. By March 31 of the reporting year, CBP will transmit written notice of the suspension to the broker by certified mail, return receipt requested, at the address reflected in CBP records. If the broker files the required report and pays the required fee within 60 calendar days of the date of the notice of suspension, the license will be reinstated. If the broker does not file the required report and pay the required fee within that 60-day period, the broker's license is revoked by operation of law without prejudice to the filing of an application for a new license. Notice of the revocation will be published in the **Federal Register**.

(e) * * * Upon permanent termination of brokerage business, written notification of the name, address, email address and telephone number of the party having legal custody of the brokerage business records must be provided to the processing Center. * * *

* * * * *

■ 22. Section 111.32 is revised to read as follows:

§ 111.32 False information.

A broker must not file or procure or assist in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false. In addition, a broker must not give, or solicit or procure the giving of, any information or testimony that the broker knew or should have known was false or misleading in any matter pending before the Department of Homeland Security or to any representative of the Department of Homeland Security. A broker also must document and report to CBP when the broker separates from or cancels representation of a client as a result of determining the client is intentionally attempting to use the broker to defraud the U.S. Government or commit any criminal act against the U.S. Government. The report to CBP must include the client name, date of separation or cancellation, and reason for the separation or cancellation.

■ 23. In § 111.36, revise paragraph (c)(3) to read as follows:

§ 111.36 Relations with unlicensed persons.

* * * * *

(c) * * *

(3) The broker must execute a customs power of attorney directly with the importer of record or drawback claimant, and not via a freight forwarder or other third party, to transact customs business for that importer of record or drawback claimant. No part of the agreement of compensation between the broker and the forwarder, nor any action taken pursuant to the agreement, can forbid or prevent direct communication between the importer of record, drawback claimant, or other party in interest and the broker; and

* * * * *

■ 24. In § 111.39:

■ a. Paragraph (a) is revised;

■ b. Paragraphs (b) and (c) are redesignated as paragraphs (c) and (d);

■ c. A new paragraph (b) is added; and

■ d. Newly redesignated paragraph (c) is amended by:

■ i. Removing the word ''paper'' and adding in its place the word ''record''; and

■ ii. Adding a sentence to the end of the paragraph.

The additions and revisions read as follows:

§ 111.39 Advice to client.

(a) *Withheld or false information.* A broker must not withhold information from a client relative to any customs business it conducts on behalf of a client who is entitled to the information. The broker must not knowingly impart to a client false information relative to any customs business.

(b) *Due diligence.* A broker must exercise due diligence to ascertain the correctness of any information which the broker imparts to a client, including advice to the client on the proper payment of any duty, tax, or other debt or obligation owing to the U.S. Government.

(c) * * * The broker must advise the client on the proper corrective actions required and retain a record of the broker's communication with the client in accordance with §§ 111.21 and 111.23.

* * * * *

§ 111.42 [Amended]

■ 25. In § 111.42:

■ a. Paragraph (a)(1) is amended by removing the word ''Customs'' and adding in its place the word ''customs''; and

■ b. Paragraph (a)(3) is amended by adding the word ''Executive'' before the word ''Assistant'' and adding the phrase '', or his or her designee,'' after the words ''Assistant Commissioner''.

■ 26. In § 111.45:

■ a. Paragraphs (a), (b), and (c) are revised; and

■ b. In paragraph (d), remove the cross-reference ''or (b)'' in the second sentence.

The revisions read as follows:

§ 111.45 Revocation by operation of law.

(a) *License and permit.* If a broker that is a partnership, association, or corporation fails to have, during any continuous period of 120 days, at least one member of the partnership or at

least one officer of the association or corporation who holds a valid individual broker's license, that failure will, in addition to any other sanction that may be imposed under this part, result in the revocation by operation of law of the license and the national permit issued to the partnership, association, or corporation. If a broker that is a partnership, association, or corporation fails to employ, during any continuous period of 180 days, a licensed customs broker who is the national permit qualifier for the broker, that failure will, in addition to any other sanction that may be imposed under this part, result in the revocation by operation of law of the national permit issued to the partnership, association, or corporation. CBP will notify the broker in writing of an impending revocation by operation of law under this section thirty (30) calendar days before the revocation is due to occur, if the broker has provided advance notice to CBP of the underlying events that could cause a revocation by operation of law under this section. If the license or permit of a partnership, association, or corporation is revoked by operation of law, CBP will notify the organization of the revocation.

(b) *Annual broker permit fee.* If a broker fails to pay the annual permit user fee pursuant to § 111.96(c), the permit is revoked by operation of law. The processing Center will notify the broker in writing of the failure to pay and the revocation of the permit.

(c) *Publication.* Notice of any revocation under this section will be published in the **Federal Register**.

* * * * *

■ 27. In § 111.51:

■ a. Paragraph (a) is revised;

■ b. Paragraph (b) is amended by:

■ i. Removing the words ''Assistant Commissioner'' and adding in their place the words ''appropriate Executive Director, Office of Trade,''; and

■ ii. Removing the word ''Secretary'' and adding in its place the words ''Executive Assistant Commissioner''.

The revision reads as follows:

§ 111.51 Cancellation of license or permit.

(a) *Without prejudice.* The appropriate Executive Director, Office of Trade, may cancel a broker's license or permit ''without prejudice'' upon written application by the broker if the appropriate Executive Director, Office of Trade, determines that the application for cancellation was not made in order to avoid proceedings for the suspension or revocation of the license or permit. If the appropriate Executive Director, Office of Trade, determines that the application for cancellation was made in order to avoid those proceedings, he or she may cancel the license or permit ''without prejudice'' only with authorization from the Executive Assistant Commissioner.

* * * * *

§ 111.52 [Amended]

■ 28. Amend § 111.52 by removing the words ''Assistant Commissioner'' and adding in their place the words ''appropriate Executive Director, Office of Trade,''.

■ 29. In § 111.53:

■ a. Remove the word ''Customs'' wherever it appears and add in its place the term ''CBP'';

■ b. Amend paragraph (e) by removing the words ''Assistant Commissioner'' and adding in their place the words ''appropriate Executive Director, Office of Trade,'';

■ c. Amend paragraph (f) by removing the word ''or'' following the semicolon;

■ d. Redesignate paragraph (g) as paragraph (h); and

■ e. Add a new paragraph (g).

The addition reads as follows:

§ 111.53 Grounds for suspension or revocation of license or permit.

* * * * *

(g) The broker has been convicted of committing or conspiring to commit an act of terrorism as described in section 2332b of title 18, United States Code; or

* * * * *

■ 30. Revise § 111.55 to read as follows:

§ 111.55 Investigation of complaints.

Every complaint or charge against a broker which may be the basis for disciplinary action may be forwarded for investigation to the appropriate investigative authority within the Department of Homeland Security. The investigative authority will submit a final report on the investigation of complaints to the processing Center and send a copy of the report to the appropriate Executive Director, Office of Trade.

■ 31. Revise § 111.56 to read as follows:

§ 111.56 Review of report on the investigation of complaints.

The processing Center will review the report on the investigation of complaints, or if there is no report on the investigation of complaints, other documentary evidence, to determine if there is sufficient basis to recommend that charges be preferred against the broker. The processing Center will then submit the recommendation with supporting reasons to the appropriate Executive Director, Office of Trade, for final determination together with a proposed statement of charges when recommending that charges be preferred.

■ 32. Revise § 111.57 to read as follows:

§ 111.57 Determination by appropriate Executive Director, Office of Trade.

The appropriate Executive Director, Office of Trade, will make a determination on whether or not charges should be preferred, and will notify the processing Center of the decision.

§ 111.59 [Amended]

■ 33. In § 111.59, paragraph (a) and paragrapb (b) introductory text are amended by removing the words ''port director'' and adding in their place the words ''processing Center''.

§ 111.60 [Amended]

■ 34. In § 111.60, remove the words ''port director'' in the last sentence and add in their place the words ''processing Center''.

■ 35. Revise § 111.61 to read as follows:

§ 111.61 Decision on preliminary proceedings.

The processing Center will prepare a summary of any oral presentations made by the broker or the broker's attorney and forward it to the appropriate Executive Director, Office of Trade, together with a copy of each paper filed by the broker. The processing Center will also give to the appropriate Executive Director, Office of Trade, a recommendation on action to be taken as a result of the preliminary proceedings. If the appropriate Executive Director, Office of Trade, determines that the broker has satisfactorily responded to the proposed charges and that further proceedings are not warranted, he or she will so inform the processing Center, who will notify the broker. If no response is filed by the broker or if the appropriate Executive Director, Office of Trade, determines that the broker has not satisfactorily responded to all of the proposed charges, he or she will advise the processing Center of that fact and instruct the processing Center to prepare, sign, and serve a notice of charges and the statement of charges. If one or more of the charges in the proposed statement of charges was satisfactorily answered by the broker in the preliminary proceedings, the appropriate Executive Director, Office of Trade, will instruct the processing Center to omit those charges from the statement of charges.

■ 36. In § 111.62:

■ a. Revise paragraph (d); and

■ b. Amend paragraph (e) by:
■ i. Removing the phrase ‘‘, in duplicate’’; and
■ ii. Removing the words ‘‘port director’’ and adding in their place the words ‘‘processing Center’’.

The revision reads as follows:

§ 111.62 Contents of notice of charges.

* * * * *

(d) The broker will be notified of the time and place of a hearing on the charges; and

* * * * *

■ 37. In § 111.63:
■ a. Remove the words ‘‘port director’’ wherever they appear and add in their place the words ‘‘processing Center’’; and
■ b. Revise paragraphs (a)(2) and (c).

The revisions read as follows:

§ 111.63 Service of notice and statement of charges.

* * * * *

(a) * * *

(2) By certified mail, return receipt requested, addressed to the broker's office of record (or other address as provided pursuant to § 111.30).

* * * * *

(c) *Certified mail; evidence of service.* When service under this section is by certified mail to the broker's office of record (or other address as provided pursuant to § 111.30), the receipt of the return card signed or marked will be satisfactory evidence of service.

§ 111.64 [Amended]

■ 38. In § 111.64, paragraph (a) is amended by removing the words ‘‘port director’’ and adding in their place the words ‘‘processing Center’’.

§ 111.66 [Amended]

■ 39. Section 111.66 is amended by removing the words ‘‘Secretary of Homeland Security, or his designee,’’ and adding in their place the words ‘‘Executive Assistant Commissioner’’.

§ 111.67 [Amended]

■ 40. In § 111.67:
■ a. Paragraph (d) is amended by removing the words ‘‘port director’’ wherever they appear and adding in their place the words ‘‘processing Center’’; and
■ b. Paragraph (e) is removed.

§ 111.69 [Amended]

■ 41. Section 111.69 is amended by removing the words ‘‘Secretary of Homeland Security, or his designee’’ and adding in their place the words ‘‘Executive Assistant Commissioner’’.

§ 111.70 [Amended]

■ 42. Section 111.70 is amended by removing the words ‘‘Secretary of Homeland Security, or his designee’’ and adding in their place the words ‘‘Executive Assistant Commissioner’’.

§ 111.71 [Amended]

■ 43. Section 111.71 is amended by removing the words ‘‘Secretary of Homeland Security, or his designee’’ and adding in their place the words ‘‘Executive Assistant Commissioner’’.
■ 44. Revise § 111.72 to read as follows:

§ 111.72 Dismissal subject to new proceedings.

If the Executive Assistant Commissioner finds that the evidence produced at the hearing indicates that a proper disposition of the case cannot be made on the basis of the charges preferred, he or she may instruct the processing Center to serve appropriate charges as a basis for new proceedings to be conducted in accordance with the procedures set forth in this subpart.

■ 45. Revise § 111.74 to read as follows:

§ 111.74 Decision and notice of suspension or revocation or monetary penalty.

If the Executive Assistant Commissioner finds that one or more of the charges in the statement of charges is not sufficiently proved, the suspension, revocation, or monetary penalty action may be based on any remaining charges if the facts alleged in the charges are established by the evidence. If the Executive Assistant Commissioner in the exercise of discretion and based solely on the record, issues an order suspending a broker's license or permit for a specified period of time or revoking a broker's license or permit or, except in a case described in § 111.53(b)(3), assessing a monetary penalty in lieu of suspension or revocation, the appropriate Executive Director, Office of Trade, will promptly provide written notification of the order to the broker and, unless an appeal from the order of the Executive Assistant Commissioner is filed by the broker (*see* § 111.75), the appropriate Executive Director, Office of Trade, will publish a notice of the suspension or revocation, or the assessment of a monetary penalty, in the **Federal Register**. If no appeal from the order of the Executive Assistant Commissioner is filed, an order of suspension or revocation or assessment of a monetary penalty will become effective sixty (60) calendar days after issuance of written notification of the order unless the Executive Assistant Commissioner finds that a more immediate effective date is in the national or public interest. If a monetary penalty is assessed and no appeal from the order of the Executive Assistant Commissioner is filed, payment of the penalty must be tendered within sixty (60) calendar days after the effective date of the order, and, if payment is not tendered within that sixty (60)-day period, the license or permit of the broker will immediately be suspended until payment is made.

§ 111.75 [Amended]

■ 46. In § 111.75:
■ a. In the section heading, remove the word ‘‘Secretary's’’ and add in its place the words ‘‘Executive Assistant Commissioner's’’;
■ b. Remove the words ‘‘Secretary of Homeland Security, or his designee’’ and add in their place the words ‘‘Executive Assistant Commissioner’’; and
■ c. Remove the word ‘‘Secretary's’’ and add in its place the words ‘‘Executive Assistant Commissioner's’’.
■ 47. In § 111.76:
■ a. In paragraph (a), remove the word ‘‘written’’ and the words ‘‘in duplicate’’ in the first sentence and remove the words ‘‘Assistant Commissioner’’ and add in their place the words ‘‘appropriate Executive Director, Office of Trade,’’; and
■ b. Revise paragraph (b).

The revision reads as follows:

§ 111.76 Reopening the case.

* * * * *

(b) *Procedure.* The appropriate Executive Director, Office of Trade, will forward the application, together with a recommendation for action thereon, to the Executive Assistant Commissioner. The Executive Assistant Commissioner may grant or deny the application to reopen the case and may order the taking of additional testimony before the appropriate Executive Director, Office of Trade. The appropriate Executive Director, Office of Trade, will notify the applicant of the decision by the Executive Assistant Commissioner. If the Executive Assistant Commissioner grants the application and orders a hearing, the appropriate Executive Director, Office of Trade, will set a time and place for the hearing and give due written notice of the hearing to the applicant. The procedures governing the new hearing and recommended decision of the hearing officer will be the same as those governing the original proceeding. The original order of the Executive Assistant Commissioner will remain in effect pending conclusion of the new proceedings and issuance of a new order under § 111.77.

■ 48. Revise § 111.77 to read as follows:

§ 111.77 Notice of vacated or modified order.

If, pursuant to § 111.76 or for any other reason, the Executive Assistant Commissioner issues an order vacating or modifying an earlier order under § 111.74 suspending or revoking a broker's license or permit, or assessing a monetary penalty, the appropriate Executive Director, Office of Trade, will notify the broker in writing and will publish a notice of the new order in the **Federal Register**.

§ 111.78 [Amended]

■ 49. Section 111.78 is amended by removing the words ''port director'' and adding in their place the words ''processing Center''.

§ 111.79 [Amended]

■ 50. Section 111.79 is amended by removing the words ''Assistant Commissioner'' and adding in their place the words ''appropriate Executive Director, Office of Trade,'' wherever they appear.

■ 51. Revise § 111.81 to read as follows:

§ 111.81 Settlement and compromise.

The Executive Assistant Commissioner may settle and compromise any disciplinary proceeding which has been instituted under this subpart according to the terms and conditions agreed to by the parties including, but not limited to, the assessment of a monetary penalty in lieu of any proposed suspension or revocation of a broker's license or permit.

§ 111.91 [Amended]

■ 52. In § 111.91:

■ a. The introductory text is amended by removing the word ''Customs'' and adding in its place the term ''CBP''; and

■ b. Paragraph (a) is amended by removing the phrase ''§§ 111.53(a) through (f)'' and adding in its place the phrase ''§ 111.53(a) through (g)''.

§ 111.92 [Amended]

■ 53. In § 111.92, amend paragraph (a) by removing the word ''Customs'' and adding in its place the term ''CBP''.

§ 111.94 [Amended]

■ 54. Section 111.94 is amended by removing the word ''Customs'' wherever it appears and adding in its place the term ''CBP''.

■ 55. In § 111.96, revise paragraphs (a), (b), and (d) to read as follows:

§ 111.96 Fees.

(a) *License fee; examination fee; fingerprint fee.* Each applicant for a broker's license pursuant to § 111.12 must pay a fee of $300 for an individual license application and $500 for a partnership, association, or corporation license application to defray the costs to CBP in processing the application. Each individual who intends to take the examination provided for in § 111.13 must pay a $390 examination fee before taking the examination. An individual who submits an application for a license must also pay a fingerprint processing fee; the processing Center will inform the applicant of the current Federal Bureau of Investigation fee for conducting fingerprint checks, which must be paid to CBP before further processing of the application will occur.

(b) *Permit application fee.* An application fee of $100 must be paid in connection with a national permit issued under § 111.19 to defray the processing costs, including costs associated with an application for reinstatement of a permit that was revoked by operation of law or otherwise.

* * * * *

(d) *Triennial status report fee.* A fee of $100 is required to defray the costs of administering the triennial status reporting requirement prescribed in § 111.30(d)(1).

* * * * *

Helen Mary B. McGovern,

Assistant Secretary for Trade and Economic Security, Department of Homeland Security.

Thomas C. West, Jr.,

Deputy Assistant Secretary of the Treasury for Tax Policy.

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Part V

Department of Energy

10 CFR Parts 429 and 430
Energy Conservation Program: Test Procedure for Air Cleaners; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2021–BT–TP–0036]

RIN 1904–AF26

Energy Conservation Program: Test Procedure for Air Cleaners

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

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (''DOE'') proposes to establish definitions, a test procedure, and sampling and representation requirements for air cleaners. Currently, air cleaners are not subject to DOE test procedures or energy conservation standards. DOE proposes a test procedure for measuring the integrated energy factor for air cleaners. The proposed test method references the relevant industry standard, with certain proposed modifications. DOE is seeking comment from interested parties on the proposal.

DATES: DOE will accept comments, data, and information regarding this proposal no later than December 19, 2022. See section V, ''Public Participation,'' for details. DOE will hold a webinar on Wednesday, November 9, 2022, from 1:00 p.m. to 4:00 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2021–BT–TP–0036. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2021–BT–TP–0036, by any of the following methods:

Email: AirCleaners2021TP0036@ee.doe.gov. Include the docket number EERE–2021–BT–TP–0036 in the subject line of the message.

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

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

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

The docket web page can be found at *www.regulations.gov/docket/EERE-2021-BT-TP-0036.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Dr. Stephanie Johnson, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1943. Email *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–2588. Email: *Amelia.Whiting@hq.doe.gov.*

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

SUPPLEMENTARY INFORMATION: DOE proposes to incorporate by reference the following draft industry standards into 10 CFR part 430:

AHAM AC–7–2022 Draft, ''Energy Test Method for Consumer Room Air Cleaners''.

AHAM AC–7–2022 Draft is in draft form and its text was provided to DOE for the purposes of review only during the drafting of this notice of proposed rulemaking (''NOPR''). DOE intends to update the reference to the final published version of AHAM AC–7–2022 Draft in the test procedure final rule, should it publish prior to the final rule, unless there are substantive changes between the draft and published versions, in which case DOE may adopt the substance of the AHAM AC–7–2022 Draft or provide additional opportunity for comment on the changes to the industry consensus test procedure.

A copy of AHAM AC–7–2022 Draft is included in the docket for this proposed rulemaking.

AHAM AC–7–2022 Draft additionally references ANSI/AHAM AC–1–2020, ''Method for Measuring Performance of Portable Household Electric Room Air Cleaners'' in several sections (''AHAM AC–1–2020'').

A copy of AHAM AC–1–2020 can be obtained from the Association of Home Appliance Manufacturers (AHAM) at 1111 19th Street NW, Suite 402, Washington, DC 20036; or *www.aham.org/AHAM/AuxStore.*

ASTM E741–11(2017), ''Standard Test Method for Determining Air Change in a Single Zone Means of a Tracer Gas Dilution'' Reapproved Sept. 1, 2017.

A copy of ASTM E741–11(2017) can be obtained from ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959, or *www.astm.org.*

IEC 62301, ''Household electrical appliances—Measurement of standby power;'' Edition 2.0, 2011–01, (''IEC 62301 Ed. 2.0'').

A copy of IEC 62301 Ed. 2.0 can be obtained from the International Electrotechnical Commission (IEC), available from the American National Standards Institute (ANSI), 25 W 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, or *webstore.ansi.org.*

See section IV.M of this document for a further discussion of these standards.

Table of Contents

I. Authority and Background

On July 15, 2022, DOE published a final determination (''July 2022 Final Determination'') in which it determined that air cleaners qualify as a ''covered product'' under the Energy Policy and Conservation Act, as amended (''EPCA'').[1] 87 FR 42297. DOE determined in the July 2022 Final Determination that coverage of air cleaners is necessary or appropriate to carry out the purposes of EPCA, and that the average U.S. household energy use for air cleaners is likely to exceed 100 kilowatt-hours (''kWh'') per year. *Id.* Currently, no energy conservation standards or test procedures are prescribed by DOE for air cleaners. The following sections discuss DOE's authority to establish test procedures for air cleaners and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

EPCA, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain products, referred to as ''covered products.'' [3] In addition to specifying a list of consumer products that are covered products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products. To classify a consumer product as a covered product, the Secretary must determine that classifying the product as a covered product is necessary or appropriate to carry out the purposes of EPCA and the average annual per household [4] energy use by products of such type is likely to exceed 100 kWh (or British thermal unit (''Btu'') equivalent) per year. (42 U.S.C. 6292(b)(1))

As stated, DOE has determined that air cleaners are covered products. 87 FR 42297.

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

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making other representations about the efficiency of those consumer products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

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

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to

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

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

[3] The enumerated list of covered products is at 42 U.S.C. 6292(a)(1)–(19).

[4] DOE has defined ''household'' to mean an entity consisting of either an individual, a family, or a group of unrelated individuals, who reside in a particular housing unit. For the purpose of this definition: *Group quarters* means living quarters that are occupied by an institutional group of 10 or more unrelated persons, such as a nursing home, military barracks, halfway house, college dormitory, fraternity or sorority house, convent, shelter, jail or correctional institution. *Housing unit* means a house, an apartment, a group of rooms, or a single room occupied as separate living quarters, but does not include group quarters.

Separate living quarters means living quarters: to which the occupants have access either: directly from outside of the building, or through a common hall that is accessible to other living quarters and that does not go through someone else's living quarters, and occupied by one or more persons who live and eat separately from occupant(s) of other living quarters, if any, in the same building. 10 CFR 430.2.

present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)). If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedures. (42 U.S.C. 6293(b)(1)(A)(ii))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already account for and incorporate standby and off mode energy consumption or such integration is technically infeasible. If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii)) Any such amendment must consider the most current versions of the IEC Standard 62301 [5] and IEC Standard 62087 [6] as applicable. (42 U.S.C. 6295(gg)(2)(A))

DOE is publishing this NOPR consistent with its authority and these obligations.

B. Background

DOE has not previously conducted a test procedure rulemaking for air cleaners. As stated, DOE determined in the July 2022 Final Determination that: coverage of air cleaners is necessary or appropriate to carry out the purposes of EPCA; the average U.S. household energy use for air cleaners is likely to exceed 100 kWh per year; and thus, air cleaners qualify as a ''covered product'' under EPCA. 87 FR 42297.

On January 25, 2022, DOE published a request for information (''January 2022 RFI''), seeking comments on potential test procedure and energy conservation standards for air cleaners. 87 FR 3702. In the January 2022 RFI, DOE requested comments, data, and information regarding development and evaluation of a new air cleaners test procedure that would be reasonably designed to produce test results, which reflect energy use during a representative average use cycle for the product without being unduly burdensome to conduct.[7] *Id.* This NOPR addresses the comments received in response to the January 2022 RFI that pertain to the test procedure for air cleaners. DOE will address comments pertaining to the energy conservation standards for air cleaners in a separate standards rulemaking.

DOE received comments in response to the January 2022 RFI from the interested parties listed in Table I.1.

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS IN RESPONSE TO THE JANUARY 2022 RFI

Commenter(s)	Reference in this NOPR	Comment No. in the docket	Commenter type
American Council for an Energy-Efficient Economy, Appliance Standards Awareness Project, Association of Home Appliance Manufacturers, Consumer Federation of America, and Natural Resources Defense Council.	Joint Commenters ..	8	Efficiency Organizations and Trade Association.
Air-Conditioning, Heating, & Refrigeration Institute	AHRI	15	Trade Association.
Blueair IAQ	Blueair	11	Manufacturer.
Daikin U.S. Corporation	Daikin	13	Manufacturer.
Electrolux Home Products Inc. North America	Electrolux	6	Manufacturer.
Lennox International Inc	Lennox	7	Manufacturer.
Madison Indoor Air Quality	MIAQ	5	Manufacturer.
Molekule, Inc	Molekule	12	Manufacturer.
Northwest Energy Efficiency Alliance	NEEA	14	Efficiency Organization.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison; collectively, the California Investor Owned Utilities.	CA IOUs	10	Utility Association.
Synexis LLC	Synexis	9	Manufacturer.
Trane Technologies	Trane	3	Manufacturer.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[8]

On August 23, 2022, the Joint Commenters, New York State Energy Research and Development Authority, and Pacific Gas and Electric Company (hereafter referred to as ''Joint Stakeholders''), submitted a joint proposal recommending a test procedure and energy conservation standards for consumer room air cleaners. (Joint Stakeholders, No. 16 at p. 1)

C. Deviation From Appendix A

In accordance with section 3(a) of 10 CFR part 430, subpart C, appendix A (''appendix A''), DOE notes that it is deviating from the provision in appendix A that DOE will finalize coverage for a product/equipment at least 180 days prior to publication of a proposed rule to establish a test procedure. 10 CFR part 430, subpart C, appendix A, section 5(c). DOE is opting to deviate from this provision because of

[5] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[6] IEC 62087, *Audio, video and related equipment—Methods of measurement for power consumption* (Edition 1.0, Parts 1–6: 2015, Part 7: 2018).

[7] The January 2022 RFI also solicited information regarding the development and evaluation of potential new energy conservation standards for air cleaners, and whether such standards would result in significant energy savings, be technologically feasible and economically justified. 87 FR 3702.

[8] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop test procedures for air cleaners. (Docket No. EERE–2021–BT–TP–0036, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

broad support for the development of test procedures and energy conservation standards, which is further evidenced by the Joint Proposal outlining negotiated energy conservation standards and related test procedures for consumer room air cleaners. The Joint Stakeholders urged DOE to publish final rules adopting consumer room air cleaner test procedure and standards as soon as possible but not later than December 31, 2022. (Joint Stakeholders, No. 16 at p.1) DOE is working to conduct this rulemaking in accordance with that timeline which would require DOE to publish this test procedure NOPR less than 180 days after publication of the July 2022 Final Determination.

II. Synopsis of the Notice of Proposed Rulemaking

In this NOPR, DOE proposes to establish a new test procedure at 10 CFR part 430, subpart B, appendix FF (''appendix FF'') for air cleaners that would include methods to (1) measure the performance of the covered product and (2) use the measured results to calculate an integrated energy factor (''IEF'') to represent the energy efficiency of an air cleaner.

DOE's proposed test procedure for air cleaners includes measurements of smoke clean air delivery rate (''CADR'') and dust CADR, which are used to calculate $PM_{2.5}$ [9] CADR, and active mode and standby mode power consumption, which are used to calculate annual energy consumption (''AEC''). $PM_{2.5}$ CADR and AEC are required to calculate IEF. DOE also proposes to include measurements of pollen CADR and calculation of effective room size for representation purposes. For consistent and uniform measurement of these values, DOE proposes to incorporate by reference the industry standards AHAM AC–7–2022 Draft, AHAM AC–1–2020, and IEC 62301 Ed. 2.0. Specifically, DOE proposes to specify the following provisions from within the referenced industry standards:

(1) From AHAM AC–7–2022 Draft, the following items:

(a) Definition of ''conventional room air cleaners'' in 10 CFR 430.2, which would be used to specify the scope of the air cleaners test procedure in the proposed new appendix FF;

(b) Definitions of terms that are relevant to the test procedure;

(c) Test setup requirements for electrical supply and test chamber, which additionally include a reference to AHAM AC–1–2020;

(d) Instrumentation requirements for power measuring instruments and temperature and relative humidity measuring devices;

(e) Active mode and standby mode power measurements; the standby mode power measurement method additionally includes a reference to IEC 62301 Ed. 2.0 for the test conduct; and

(f) Calculations for PM2.5 CADR, AEC, and IEF.

(2) From AHAM AC–1–2020, test methods for determining the pollen CADR, smoke CADR, and dust CADR, calculation of effective room size, and test chamber construction and equipment.

This NOPR also proposes requirements regarding the sampling plan and representations for air cleaners at 10 CFR 429.67. DOE also proposes rounding requirements for the measured and calculated values of the air cleaners test procedure.

If the proposed test procedure and associated provisions are final, manufacturers would not be required to test according to the DOE test procedure until such time as compliance is required with energy conservation standards for air cleaners, should DOE establish such standards. Were DOE to establish test procedures as proposed, manufacturers choosing to make voluntary representations would be required to test the subject air cleaner according to the established test procedure, and any such representations would have to fairly disclose the results of such testing.

While discussion of DOE's proposed actions are addressed in detail in section III of this NOPR, DOE also received comments regarding the rulemaking process and timeline. These comments are summarized underneath.

AHRI and MIAQ commented that unresolved issues regarding scope and applicability from the September 2021 NOPD, made it difficult for stakeholders to participate meaningfully in providing substantive technical comments necessary to determine whether a particular test procedure is feasible and the impact of energy conservation standards on these products. (AHRI, No. 15 at p. 2; MIAQ, No. 5 at p. 2) AHRI and MIAQ additionally commented that the shortened comment period of 30 days from 75 days for the January 2022 RFI inhibited AHRI and MIAQ from investigating test laboratory capacity or capabilities. (AHRI, No. 15 at pp. 2–3; MIAQ, No. 5 at p. 2) Electrolux inquired about whether DOE's timeframe for the air cleaners rulemakings was long-term (*i.e.,* 5–6 years) or near-term (*i.e.,* 2–3 years). (Electrolux, No. 6 at p. 1) Electrolux further inquired if information from the air cleaner rulemakings would be incorporated into ongoing international standards discussions. (*Id.*)

In the September 2021 NOPD, DOE proposed a definition for the term ''air cleaner''. 86 FR 51629, 51632. At the time of the January 2022 RFI, DOE had not made a final determination about whether to cover air cleaners as a covered product nor had it finalized a definition of the term. 87 FR 3702, 3707. As such, the focus of the test procedure portion of the January 2022 RFI was to seek feedback primarily on the AHAM AC–1–2020 test procedure, which is an industry-accepted standard for testing portable household electric room air cleaners, as well as on other industry, investigative, and international test methods, including those under development. 87 FR 3702, 3707–3708. Further, as it pertains to the timeline for this rulemaking and as discussed in section I.C of this document, the timeline of this rulemaking is accelerated compared to DOE's typical timeline in order to follow as closely as possible the schedule outlined in the negotiated agreement.

III. Discussion

A. Scope of Applicability

In the September 2021 NOPD, DOE proposed the following definition for air cleaners:

An air cleaner is a consumer product that:

(1) Is a self-contained, mechanically encased assembly;

(2) Is powered by single-phase electric current;

(3) Removes, destroys, or deactivates particulates and microorganisms from the air;

(4) Excludes products that destroy or deactivate particulates and microorganisms solely by means of ultraviolet light without a fan for air circulation; and

(5) Excludes central air conditioners, room air conditioners, portable air conditioners, dehumidifiers, and furnaces as defined in 10 CFR 430.2. 86 FR 51629, 51632.

After considering the comments received in response to the September 2021 NOPD and January 2022 RFI, in the July 2022 Final Determination, DOE defined an air cleaner at 10 CFR 430.2 as ''a product for improving indoor air quality, other than a central air conditioner, room air conditioner, portable air conditioner, dehumidifier, or furnace, that is an electrically-powered, self-contained, mechanically

[9] $PM_{2.5}$ refers to particulate matter that are nominally 2.5 micrometers in width or smaller.

encased assembly that contains means to remove, destroy, or deactivate particulates, VOCs, and/or microorganisms from the air. It excludes products that operate solely by means of ultraviolet light without a fan for air circulation.'' 87 FR 42297, 42304 and 42308.

In the July 2022 Final Determination, DOE addressed comments it received in response to the September 2021 NOPD as well as some of the comments it received in response to the January 2022 RFI [10] that pertained to the scope of the rulemaking and definition of an air cleaner.

In this NOPR, DOE is proposing to establish test procedures for a subset of products that meet the definition of ''air cleaner'' as established by the July 2022 Final Determination. Specifically, DOE is proposing to define the scope of the proposed test procedure as covering products defined as ''conventional room air cleaners'' in the AHAM AC–7–2022 Draft standard. The proposed scope of the test procedure aligns with the available industry standard and encompasses a majority of the air cleaner market. Further, this scope is consistent with the scope in the Joint Proposal. (Joint Stakeholders, No. 16 at p. 5) DOE may consider test procedures for other types of air cleaners in a future rulemaking.

Section 2.1.1 of AHAM AC–7–2022 Draft defines a ''conventional room air cleaner'' as a consumer room air cleaner that is a portable or wall mounted (fixed) unit that plugs in to an electrical outlet; operates with a fan for air circulation; and contains means to remove, destroy, and/or deactivate particulates.

Sections 2.1.3.1 and 2.1.3.2 of AHAM AC–7–2022 Draft further define ''portable'' and ''fixed'', respectively, as follows:

Portable: can be easily moved from one place to another for use; and has no provision for permanent mounting. Tools are not required for the product installation or removal.

Fixed: permanently connected to the electrical supply source; permanently mounted, such that tools are required for the product installation or removal; or, sized so that it is not easily moved from one place to another.

[10] (Joint Commenters, No. 8 at pp. 2, 3; Daikin, No. 12 at p. 2; AHRI, No. 15 at pp. 3–4, 4, 4–5, 5, 5–6; MIAQ, No. 5, at pp. 3, 3–4, 4–5; Synexis, No. 14, at pp. 1, 1–2; Blueair, No. 11 at p. 2; Lennox, No. 7 at pp. 1–2, 2; NEEA, No. 13 at p. 3; CA IOUs, No. 9 at pp. 9–10, 11; Trane Technologies, No. 3 at p, 3).

DOE proposes to specify in section 1 of the proposed new appendix FF that the test procedure applies to ''conventional room air cleaners'' and to define that term in 10 CFR 430.2 through reference to Section 2.1.1 of AHAM AC–7–2022 Draft. DOE further proposes to add references to Sections 2.1.3.1 and 2.1.3.2 of AHAM AC–7–2022 Draft to the proposed definition of conventional room air cleaners to reference the definitions of portable and fixed conventional room air cleaners.

DOE requests comment on its proposal to define the scope of the proposed air cleaner test procedure as those air cleaners that meet the definition of a conventional room air cleaner as defined in Section 2.1.1 of AHAM AC–7–2022 Draft.

DOE requests comment on its proposal to reference Sections 2.1.1, 2.1.3.1, and 2.1.3.2 of AHAM AC–7–2022 Draft in 10 CFR 430.2 for the definitions of conventional room air cleaner, portable conventional room air cleaner, and fixed conventional room air cleaner, respectively.

In addition to defining the scope of the proposed air cleaner test procedure to conventional room air cleaners, DOE notes that Section 2 of AHAM AC–1–2020 indicates that the precision of the test method is as follows: ± 25 cubic feet per minute (''cfm'') for pollen CADR; ± 10 cfm for dust CADR; and ± 10 cfm for cigarette smoke CADR. Additionally, Section 2 of AHAM AC–1–2020 indicates that the theoretical maximum limits for CADR are determined by the maximum number of initial available particles, the acceptable minimum number of available particles, an average background natural decay rate (from statistical study), the size of the test chamber, and the available minimum experiment time. Given these levels of precision, Section 2 of AHAM AC–1–2020 specifies the test procedure being applicable only to air cleaners within rated CADR ranges of 10 to 600 cfm for dust and cigarette smoke and 25 to 450 cfm for pollen.

Further, in the negotiated agreement submitted by the Joint Stakeholders, they propose that negotiated standards are applicable to conventional room air cleaners with a minimum $PM_{2.5}$ CADR of 10 cfm. (Joint Stakeholders, No. 16 at p. 9)

As discussed, DOE's proposed scope pertains to conventional room air cleaners that are portable or wall mounted and plug into an electrical outlet. This is also the scope of the AHAM AC–7–2022 Draft and AHAM AC–1–2020 standards, which DOE is proposing to reference for the CADR and power measurement tests as discussed in later sections of this NOPR. Given that DOE is proposing to reference the AHAM industry standards for the DOE air cleaner test procedure, DOE requests comment on whether it should also specify the acceptable CADR range from AHAM AC–1–2020 as part of its test procedure scope. Specifically, DOE would consider specifying that the test procedure is applicable for conventional room air cleaners with smoke or dust CADR between 10 to 600 cfm.

DOE requests comment on whether it should reference Section 2 of AHAM AC–1–2020, which specifies that the standard is applicable for air cleaners only within rated CADR ranges of 10 to 600 cfm for dust and cigarette smoke. Additionally, DOE requests comment on whether this CADR range should be specified for $PM_{2.5}$ CADR instead of for dust CADR and smoke CADR.

B. Industry Standards Incorporated by Reference

1. AHAM AC–1 and AHAM AC–7 Industry Standards

As discussed, AHAM published AHAM AC–1–2020 for measuring the performance of portable household electric room air cleaners.

AHAM AC–1–2020 is a voluntary industry-developed test procedure that provides test methods to measure the relative reduction of smoke, dust, and pollen suspended in the air in a specified test chamber when an air cleaner is in operation. The test method is conducted by introducing a known initial concentration of a given particulate in the chamber, without the air cleaner in operation, to measure its natural decay. Next, the particulate is reintroduced in the chamber with the air cleaner in operation to measure the particulate decay with the air cleaner operating. The difference in the logarithmic rate of decay with the air cleaner in operation and without the air cleaner in operation, multiplied by the volume of the chamber, provides the CADR value of the test unit. AHAM AC–1–2020 additionally specifies methods to measure an air cleaner's active mode power consumption when conducting the pollen, smoke, or dust performance test in the test chamber, as well as methods to measure standby mode power consumption.

AHAM AC–1–2020 is currently referenced by the U.S. Environmental Protection Agency (''EPA'') in the ENERGY STAR Product Specification for Room Air Cleaners, Version 2.0, Rev. May 2022 (''ENERGY STAR V. 2.0 Specification'').[11] Further, the ENERGY STAR V. 2.0 Specification is referenced by air cleaner standards in Washington DC, New Jersey, Nevada, and Maryland.[12]

In the January 2022 RFI, DOE requested comment on whether AHAM AC–1–2020 provides an appropriate method to use as the basis for a Federal test method and for defining energy conservation standards for air cleaners. 87 FR 3702, 3708. DOE also sought feedback on industry standards that could be referenced for the standby power measurement procedure. Specifically, DOE requested feedback on the suitability of the standby power measurement test procedure specified in AHAM AC–1–2020, IEC 62301 Ed. 2.0, or any other test method for measuring standby mode and off mode energy use of consumer air cleaners, in light of EPCA's requirement in 42 U.S.C. 6295(gg)(2)(A)) for DOE to consider the most current version of IEC Standard 62301. *Id.* at 87 FR 3709, 3710.

The Joint Commenters stated that AHAM and its partners[13] are currently developing the AHAM AC–7–2022 Draft standard, which is a test procedure to measure the energy efficiency of air cleaners. (Joint Commenters, No. 8 at p. 3) The Joint Stakeholders recommended that DOE adopt AHAM AC–7–2022, which is currently in final draft form, as the test procedure. The Joint Stakeholders additionally stated that if a final version of AHAM AC–7–2022 is not available to incorporate by reference, DOE should align with the final draft version and AHAM authorized DOE to use the text of the final draft as the basis for DOE's test procedure. (Joint Stakeholders, No. 16 at p. 6)[14] Blueair expressed support for the AHAM AC–1–2020 standard as a robust method for determining air cleaner energy efficiency and stated that it should serve as the Federal test procedure. (Blueair, No. 11 at pp. 2–3) Blueair noted that laboratories across the country can readily run tests for manufacturers and third parties at reasonable costs and turnaround times. (*Id.*) Daikin commented that the AHAM AC–1–2020 test procedure was appropriate for testing portable small room air cleaners. (Daikin, No. 13 at p. 2) MIAQ and Lennox commented that the AHAM AC–1–2020 standard is appropriate to test portable air cleaners, but would not be appropriate to test non-portable air cleaners that would be included in the scope of DOE's covered product. (MIAQ, No. 5 at p. 3; Lennox, No. 7 at p. 2) Molekule commented that based on its research, existing standards, such as AHAM AC–1–2020 are limited in their ability to determine the efficacy of air cleaners that remove and oxidize airborne allergens (*i.e.,* aeroallergens). (Molekule, No. 12 at p. 4) Synexis commented that AHAM AC–1–2020 was designed for measuring the performance of indoor air cleaners, which remove particulates from the air, presumably via mechanical filtration and it does not account for the performance of devices that use mechanisms other than mechanical filtration. (Synexis, No. 9 at p. 2)

Since publication of the January 2022 RFI, DOE is aware that AHAM's air cleaner task force is working to establish a new test method, AHAM AC–7–2022 Draft, that would specify the test methods for measuring air cleaner efficiency. The power measurement test methods specified in AHAM AC–7–2022 Draft are being developed using the existing power measurement test methods specified in AHAM AC–1–2020, updated to reflect current air cleaner technologies and functionalities. Additionally, AHAM AC–7–2022 Draft specifies the methods to determine $PM_{2.5}$ CADR, which is calculated based on the smoke and dust CADR values; AEC; and IEF (expressed in CADR per watt (''CADR/W'')), which defines the efficacy of an air cleaner. DOE has participated in the meetings of the AHAM task force group responsible for developing AHAM AC–7–2022 Draft and has provided input on several topics during its development. DOE has also conducted testing according to AHAM AC–7–2022 Draft and provided input to the AHAM task force based on its observations and experience during testing.

AHAM AC–7–2022 Draft additionally references AHAM AC–1–2020 in several sections to specify requirements for the test chamber equipment and setup, as well as to conduct the in-chamber active mode power consumption test. All but one section refers to ''ANSI/AHAM AC–1,'' ''AHAM AC–1,'' or ''ANSI/AHAM AC–1–2020.'' DOE understands each of these references to be denoting the AHAM AC–1–2020 version of the standard, since it is included as a normative reference in AHAM AC–7–2022 Draft. In contrast, Section 5.7.1 of AHAM AC–7–2022 Draft references ANSI/AHAM AC–1–2022 Draft in stating that potassium chloride (''KCl'') is allowed as an alternate to cigarette smoke in ANSI/AHAM AC–1–2022 Draft. The text of AHAM AC–1–2022 Draft standard was not available publicly for DOE to review at the time of publication of this NOPR. However, from its participation on the AHAM task force, DOE understands AHAM AC–1–2022 Draft to be materially the same as AHAM AC–1–2020, with updates to harmonize with other AHAM air cleaners standards (*e.g.,* AC–7, AC–5[15] for microorganisms, AC–4[16] for gases, *etc.*) and to remove the power measurement requirements from AHAM AC–1–2020, given that these requirements are now specified in AHAM AC–7–2022 Draft.

In this NOPR, DOE proposes to incorporate by reference AHAM AC–7–2022 Draft into 10 CFR 430.3 and to reference the relevant sections of this industry standard in the DOE test procedure at the proposed new appendix FF. DOE is proposing modifications to certain aspects of AHAM AC–7–2022 Draft, as discussed in the relevant sections of this document that follow.

Specifically, DOE proposes to reference AHAM AC–7–2022 Draft to specify the test methods for determining $PM_{2.5}$ CADR, AEC, and IEF. AHAM AC–7–2022 Draft specifies definitions, test conditions, and test methods for determining active mode power, standby mode power, out of chamber active mode power, and $PM_{2.5}$ CADR. DOE has initially determined that the measurement of $PM_{2.5}$ CADR and power consumption as specified in the AHAM–AC–7–2022 Draft would produce test results that measure the energy efficiency of an air cleaner during a representative average use cycle or period of use and would not be unduly burdensome to conduct.

DOE additionally proposes to incorporate by reference AHAM AC–1–

[11] Further information on the ENERGY STAR V2.0 Specification is available online at: *www.energystar.gov/sites/default/files/asset/document/ENERGY%20STAR%20Version%202.0%20Room%20Air%20Cleaners%20Specification%20%28Rev.%20May%202022%29.pdf.*

[12] Further information on state air cleaner standards and timelines is available online from ASAP at: *https://appliance-standards.org/product/air-purifiers.*

[13] Partners include ASAP, the CA IOUs, DOE, and Guidehouse.

[14] The CA IOUs supported the updates that were being discussed by AHAM and its partners. (CA IOUs, No. 10 at p. 1) After publication of the Joint Statement, the CA IOUs also submitted a letter of support for the negotiated agreement, which includes using AHAM AC–7–2022 for the DOE air cleaner test procedure. (CA IOUs, No. 17 at p. 1).

[15] Method for Assessing the Reduction Rate of Key Bioaerosols by Portable Air Cleaners Using an Aerobiology Test Chamber, AHAM AC–5–2022.

[16] Method of Assessing the Reduction Rate of Chemical Gases by a Room Air Cleaner, AHAM AC–4–2022.

2020 to reference the test methods for determining pollen CADR, smoke CADR, and dust CADR and for each instance where AHAM AC–7–2022 Draft references AHAM AC–1–2020.

DOE additionally proposes to incorporate by reference IEC 62301 Ed. 2.0, which is referenced in AHAM AC–7–2022 Draft, for the instrumentation requirements and standby mode power measurement.

DOE additionally proposes to incorporate by reference ASTM E741–11(2017), which is the current version of the standard referenced in Section 3.3 of AHAM AC–7–2022 Draft with regard to determining the test chamber air exchange rate.

As discussed, DOE intends to update the reference to the final published version of AHAM AC–7–2022 in the test procedure final rule, should it publish prior to the final rule, unless there are substantive changes between the draft and published versions, in which case DOE may adopt the substance of the AHAM AC–7–2022 Draft or provide additional opportunity for comment on the changes to the industry consensus test procedure.

Given that AHAM is considering publishing an updated AHAM AC–1–2022, should AHAM AC–7–2022 Draft be updated to reference AHAM AC–1–2022, DOE will consider adopting the published version of AHAM AC–7–2022, including the reference to AHAM AC–1–2022 as long as it is also published and is substantively the same as AHAM AC–1–2020. If there are substantive changes between the final version of AHAM AC–1–2022 and AHAM AC–1–2020, DOE may consider providing additional opportunity for comment on the changes to the industry consensus test procedure or continue to reference AHAM AC–1–2020. Additionally, DOE is considering whether it should include reference to the use of KCl as an alternate to cigarette smoke, as currently specified in AHAM AC–7–2022 Draft.

DOE requests comment on its proposal to adopt the substantive provisions of AHAM AC–7–2022 Draft with certain modifications.

DOE requests comment on its proposal to incorporate by reference AHAM AC–1–2020, which is referenced in AHAM AC–7–2022 Draft, as well as to specify provisions related to the measurement of pollen CADR, smoke CADR, and dust CADR.

DOE also requests comment on whether it should consider specifying that KCl is an allowable alternate to cigarette smoke in the measurement of smoke CADR, even if AHAM AC–1–2022 Draft is not published by the time DOE publishes its final rule. DOE requests data and information on the implications of using cigarette smoke and KCl interchangeably when performing air cleaner performance tests. DOE requests data and information on how a CADR value obtained using KCl compares to the CADR value obtained using cigarette smoke.

DOE requests comment on its proposal to reference IEC 62301 Ed. 2.0, which is referenced in AHAM AC–7–2022 Draft for the instrumentation and testing provisions for measuring standby mode power consumption.

DOE requests comment on its proposal to reference ASTM E741–11(2017), which is referenced in AHAM AC–7–2022 Draft for determining the test chamber air exchange rate.

2. Other Industry Standards

In the January 2022 RFI, DOE also requested comment on whether it should consider any methodology for measuring the removal efficacy of microorganisms (*i.e.,* viruses, bacteria, mold, *etc.*) from indoor air as part of a Federal test procedure for air cleaners. 87 FR 3702, 3710. DOE also requested comment on other test methods that it should consider when developing a test procedure to measure the energy efficiency of air cleaners. *Id.*

In response to the January 2022 RFI, Lennox commented that the American Society of Heating, Refrigerating and Air-Conditioning Engineers (''ASHRAE'') standard ASHRAE 52.2–2017, ''Method of Testing General Ventilation Air-Cleaning Devices for Removal Efficiency by Particle Size,'' methodology is acceptable for air cleaners that remove particles. (Lennox, No. 7 at pp. 2–3) DOE notes that ASHRAE 52.2–2017 provides a test method for measuring the performance of general ventilation air cleaning devices; specifically, it provides a metric to determine the performance of air filters that are part of in-duct or whole-home air cleaners. Non-powered products such as filters are not included within the proposed scope of the proposed test procedure.

MIAQ and AHRI commented that ASHRAE and AHRI standards and State regulations already require manufacturers of air cleaners to optimize their product air filter designs and that DOE's new standard would create potential conflicts, such as competing goals. (MIAQ, No. 5 at pp. 5–7; AHRI, No. 15 at pp. 7–8) DOE notes that while the ASHRAE and AHRI standards and State regulations may specify requirements for air filter designs, DOE's proposed test procedure is intended to evaluate the energy efficiency of an air cleaner; *i.e.,* the ability of the air cleaner to deliver clean air as a function of its energy use.

MIAQ commented that in addition to the industry test standards that DOE referenced in the January 2022 RFI, DOE could consider evaluating other international air cleaners test methods such as the CNS 16098 standard specified in Taiwan's regulations,[17] TIS 3061:2563 that is used in Thailand's voluntary program,[18] and several other AHAM, IEC, ASHRAE, and AHRI standards, such as AHAM AC–3; AHAM AC–5–2021; AHAM AC–4; GB/T18801–2015 (Chinese); NRCC–54013 (Canadian); ISO 16000–36; ISO/CD 16000–43; ISO/CD 16000–44; NF–B44–200:2016; NF EN 16846–1:2017; JEM 1467 2015 (Japan); IEC 63086–2 (gases); SPS–KACA002 2016 Korean; ISO/TC 142–IEC 63086; ASHRAE 52.2; ASHRAE 52.2 with optional appendix J; ASHRAE 52.2 proposed appendix; ISO 16890; AHRI Standard 850; AHRI Standard 680/681–2017; ASHRAE 145.2; ISO 10121; and ASHRAE 185.1. (MIAQ, No. 5 at pp. 7–8; AHRI, No. 15 at pp. 8–9)

DOE's preliminary assessment of Taiwan and Thailand's regulations indicate that these standards specify the evaluation of $PM_{2.5}$ CADR and power consumption, similar to the AHAM AC–7–2022 Draft. Additionally, DOE notes that AHAM AC–3 is similar to AHAM AC–1–2020 except that it provides test methods to evaluate the performance of portable air cleaners before and after the air cleaners have been subjected to accelerated particulate loading conditions. DOE is not evaluating accelerated particulate loading [19] conditions at this time; therefore, DOE is not proposing to reference AHAM AC–3. AHAM AC–4 and AHAM AC–5 are also similar to AHAM AC–1–2020, but specify test methods using different contaminants—gases and microorganisms, respectively. These industry standards were published recently and, as discussed later in this section, DOE is currently evaluating these standards. GB/T18801–2015 (Chinese), NRCC–54013 (Canadian), JEM 1467 2015 (Japan), IEC 63086–2 (gases), SPS–KACA002 2016 Korean, ISO/TC 142–IEC 63086 test air cleaners to determine CADR in a manner similar to AHAM AC–1–2020 (*i.e.,* in a test chamber after introducing a

[17] CNS 16098: *Air Cleaners for household and similar use—Methods for measuring the performance,* available at: *www.cnsonline.com.tw/?node=result&typeof=common&locale=zh_TW.*

[18] *labelno5.egat.co.th/new58/wp-content/uploads/update/product/airpure.pdf.*

[19] Accelerated particle loading is a method for simulating defined periods of use of the filter.

contaminant and taking measurements without the air cleaner operating (natural decay) and with the air cleaner operating). However, these standards specify certain different contaminants, including gaseous pollutants. Some of these standards also include additional performance tests, such as noise and ozone emissions. Given the widespread use of AHAM AC–1–2020 in the United States, DOE is not proposing any requirements from these additional standards at this time. ISO 16000–36, ISO/CD 16000–43, and ISO/CD 16000–44 are standards for assessing the reduction rate of culturable airborne bacteria, culturable airborne fungi, and gases, respectively. As noted, DOE is still evaluating test methods for gaseous and microorganism contaminants and will consider these standards for gaseous and/or microorganism testing. NF–B44–200:2016 also specifies multiple contaminants including particulates, gasses, and microorganisms. However, DOE could not identify the specified test method for testing with each contaminant and requests additional information.

Similarly, NF EN 16846–1:2017 is a test method to evaluate photocatalytic devices used for the elimination of gasses and DOE will evaluate this standard. ASHRAE 52.2, ASHRAE 52.2 with optional appendix J, ASHRAE 145.2, and ISO 10121 are standards for air filters used as part of in-duct devices, which are not included within the proposed scope of the proposed test procedure. Similarly, ISO 16890 is a standard for the air filters of general ventilation air cleaners, which are not included within the proposed scope of the proposed test procedure. AHRI Standard 850 and AHRI Standard 680/681—2017 are standards for air filters and associated equipment, which DOE is not proposing to regulate in this proposed test procedure. Finally, ASHRAE 185.1 is a standard for testing ultraviolet (''UV'') lights in air ducts; DOE's definition of air cleaners excludes products that operate solely by means of UV light without a fan for air circulation.

The CA IOUs stated that DOE should consider provisions specified in ANSI and ASHRAE standards for air cleaners that generate ozone or UV light. (CA IOUs, No. 10 at p. 11) DOE's objective is to establish test procedures for air cleaners that would evaluate the energy efficiency of an air cleaner. It is DOE's understanding that safety standards and requirements specified in industry standards ensure that both ozone and UV light generated as part of air cleaner operation remain within specified threshold limits. Therefore, DOE is not proposing to adopt these provisions in the air cleaners test procedure.

The CA IOUs additionally commented that in the absence of an acceptable standardized energy performance rating for biological agents, it would be reasonable to focus on the accepted particulate-based energy test, but recommended that DOE validate if a correlation exists between the microorganism and particulate tests. (CA IOUs, No. 10 at p. 6)

Synexis commented that DOE should consider test methods used to measure the removal of microorganisms such as AHAM AC–5–2022 Draft. Synexis stated that the Korean Test Labs test method only tests for bacterial reduction. Synexis stated that utilizing the Research Triangle Institute (''RTI'') test method in combination with some additional test methods (National Research Council Canada (''NRCC'') or others) would provide better evidence of device effectiveness. For example, the RTI and NRCC test methods capture many of the effectiveness criteria, as the RTI method measures airborne virus, bacteria and mold reduction while the NRCC method measures VOC and ozone reduction and would demonstrate that the devices are not producing harmful levels of by-products. (Synexis, No. 9 at pp. 3–4) Molekule commented that many of the industry standards that evaluate the performance of air cleaners against microorganisms and chemicals, such as AHAM AC–4, AHAM AC–5–2022, and the NRCC_54013 protocol, only gauge the initial reduction of pollutants and do not provide any insight into sustained performance over time. (Molekule, No. 12 at p. 4)

Lennox commented that microorganisms and VOCs present complex issues that DOE must consider before proceeding with a test procedure or standard. Lennox further stated that AHAM is working to include microorganisms as a new contaminant in its air cleaner standard and DOE should wait until that standard is published. (Lennox, No. 7 at p. 3) It is DOE's understanding that the AHAM standard that Lennox is referencing is AHAM AC–5–2022, which published after the comment period for the January 2022 RFI closed.

In proposing to establish an initial test procedure for measuring energy efficiency of air cleaners, DOE is focusing on the functionality most broadly implemented in air cleaners on the market in the United States; *i.e.,* the removal of particulate matter through mechanical filtration means, which may include ionization particulate capture as well. Certain microorganisms, depending on their size, also may be removed from the air by such devices. In light of the ongoing coronavirus-19 pandemic and other health concerns, DOE recognizes the utility to consumers of additional means to reduce concentrations of microorganisms in the air, including destruction or deactivation of the microorganisms. DOE expects to monitor the air cleaner market for the presence of models with such antimicrobial features and may evaluate in the future test methods for air cleaners that eliminate microorganisms.

An example of a test method for air cleaners that reduce concentrations of airborne microorganisms is AHAM AC–5–2022, which AHAM issued in March 2022. Under this test method, air cleaners are tested in a manner similar to AHAM AC–1–2020, except microorganisms are aerosolized and introduced into the chamber rather than particulates. AHAM AC–5–2022 specifies different types of bacteria, bacteriophages, and mold spores that could be used for testing. Although DOE is not proposing provisions in this proposed test procedure to measure the efficacy of an air cleaner's removal of microorganisms, DOE welcomes comment on the impact the type of microorganism selected for testing has on the CADR for microbes (''m-CADR'') value (*e.g.,* Phi-X 174 vs. MS2). DOE also welcomes comment on whether measurements taken every 2 minutes for a duration of 10 minutes, as specified in Section 7.3 of AHAM AC–5–2022 is sufficient to determine m-CADR. DOE additionally requests comment on the duration for which a sample must be collected during each measurement point. DOE also observed from test results that the natural decay curve for microorganisms could be increasing during the first 10–15 minutes and welcomes feedback on whether this is reasonable.

DOE requests comment on whether the m-CADR value specified in AHAM AC–5–2022 would change, and if so, how, if a different type of microorganism was used for testing from the same general microorganism category (*e.g.,* using MS–2 vs. Phi X 174 for bacteriophage testing).

DOE requests comment on whether measurements taken every 2 minutes for a duration of 10 minutes, as specified in Section 7.3 of AHAM AC–5–2022, is sufficient to determine m-CADR. DOE also requests comment on the duration for which a sample must be collected for each measurement point.

Additionally, if stakeholders indicate that operating the test unit for 10 minutes is sufficient, DOE requests comment on whether the natural decay

test should also be conducted for only 10 minutes. DOE also requests comment on whether it is reasonable for the natural decay curve for microorganisms to be increasing during the first 10–15 minutes of the test, and if not, how should DOE mitigate this issue.

C. Definitions

As discussed, the July 2022 Final Determination established a definition for air cleaners. Additionally, as discussed in section III.A of this document, DOE is proposing to reference Section 2.1.1 of AHAM AC–7–2022 Draft in 10 CFR part 430.2 to specify the definition for ''conventional room air cleaner'' and additionally reference within this definition Sections 2.1.3.1 and 2.1.3.2 of AHAM AC–7–2022 Draft to define ''portable air cleaner'' and ''fixed air cleaner,'' respectively. These definitions are relevant to establish the scope of the proposed new appendix FF.

In addition to these definitions, DOE proposes to specify certain additional definitions in the proposed new appendix FF that would be required to test air cleaners according to the proposed test procedure.

DOE proposes to reference Sections 2.2 and 2.3, Sections 2.4.1 through 2.4.2.4, and Sections 2.6 through 2.8 of AHAM AC–7–2022 Draft to specify definitions for the following terms in section 2 of the proposed new appendix FF:

- Function—means a predetermined operation undertaken by the air cleaner. Functions may be controlled by an interaction of the user, of other technical systems, of the system itself, from measurable inputs from the environment and/or time. In AHAM AC–7–2022 Draft, functions are grouped into four main types:
  - Primary functions
  - Secondary functions
  - User oriented secondary functions
  - Network related secondary functions
- Primary function—means an air cleaning function that reduces the concentration of one or more types of indoor air pollutants.
- Secondary function—means a function that enables, supplements, or enhances a primary function. For air cleaners, secondary functions are other functions which are not directly related to air cleaning. Examples may include a vacuum, heating, humidification, or additional ambient room lights (*e.g.,* night light).
- User oriented and network function (*i.e.,* control functions)—may include network connection, Wi-Fi, clocks, radio, remote controls, or other programmable functions that may continue to be enabled when the primary function is inactive.
- Mode—means a state that has no function, one function or a combination of functions present.
- Active mode—means a product mode where the energy using product is connected to a mains power source and at least one primary function is activated.
- Low power mode—as per IEC 62301 Ed. 2.0 means a product mode that falls into one of the following broad mode categories:
  - Off Mode(s)
  - Standby Mode(s)
  - Network Mode(s)
  - Inactive Mode
- Standby mode—means a mode offering one or more of the following user-oriented or protective functions which may persist for an indefinite time:

(a) To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer.

Informative Note: A timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (e.g., switching) and that operates on a continuous basis.

(b) Continuous functions, including information or status displays (including clocks) or sensor-based functions.

- Inactive mode—means a standby mode that facilitates the activation of active mode by remote switch (including remote control) or internal sensor or which provides continuous status display.
- Off mode—means a mode in which a consumer room air cleaner is not providing any active or standby mode function and where the mode may persist for an indefinite time, including an indicator that only shows the user that the product is in the off position.
- Network mode—means any product modes where at least one network function is activated (such as reactivation via network command or network integrity communication) but where the primary function is not active.
- Clean Air Delivery Rate (CADR)—is the measure of the delivery of contaminant free air, within a defined particle size range, by an air cleaner, expressed in cubic feet per minute (cfm). CADR is the rate of contaminant reduction in the test chamber when the air cleaner is turned on, minus the rate of natural decay when the air cleaner is not running, multiplied by the volume of the test chamber as measured in cubic feet. Note: CADR values are always the measurement of an air cleaner performance as a complete system and have no linear relationship to the air movement per se or to the characteristics of any particle removal methodology.
- Integrated energy factor (IEF)—is the energy the air cleaner uses when it is in standby mode, as well as, its active mode energy. This is fully defined as the measured $PM_{2.5}$ CADR per watt.
- $PM_{2.5}$—means particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by a reference method based on 40 CFR part 50, annex I. and designated in accordance with 40 CFR part 53 or by an equivalent method designated in accordance with 40 CFR part 53.
- $PM_{2.5}$ CADR—is from ANSI/AHAM AC–1–2020; Annex I. The performance on $PM_{2.5}$ of an air cleaner is represented by a clean air delivery rate (CADR) based on the dust and cigarette smoke performance data.

The diversity of particle natures and the sizes of the dust and smoke pollutants gives a well-balanced representation of the ultra-fine and fine particulate matters that define $PM_{2.5}$.

- $PM_{2.5}$ CADR is obtained by combining the CADR of cigarette smoke particle sizes ranging from 0.1 to 0.5 microns with the CADR of dust particles that fall in the range of 0.5 to 2.5 microns and performing a geometric average calculation.

$$PM_{2.5}\ CADR = \sqrt[2]{[Smoke\ CADR\ (0.1 - 0.5\ \mu m)\ \times Dust\ CADR(\ 0.5 - 2.5\ \mu m)}$$

AHAM AC–7–2022 Draft also includes definitions for other terms that DOE is not proposing to incorporate into the proposed new appendix FF. Generally, these other terms are inconsistent with or not relevant to the proposed scope of the DOE test procedure.

DOE requests comment on its proposal to include definitions for the aforementioned terms, via reference to AHAM AC–7–2022 Draft, in the proposed new appendix FF. Should the AHAM task force consider any changes to any of these definitions or include definitions for additional terms that would be relevant to DOE's proposed test procedure, DOE requests comment on such changes and the justification for DOE to consider including them in its test procedure for air cleaners.

D. Test Conditions

Section 3 of AHAM AC–7–2022 Draft specifies test conditions for the measurement of active mode and standby mode power consumption and includes references to certain sections of AHAM AC–1–2020 as appropriate. Specifically, Sections 3.1 through 3.6 of AHAM AC–7–2022 Draft specify requirements for active mode and standby mode electrical supply, test chamber ambient temperature, test chamber air exchange rate, test chamber particulate matter concentrations, chamber equipment, and test unit preparation (including conditioning of the air cleaner prior to testing, placement of the air cleaner for testing, and network connection setup requirements), respectively.

Through participation in the task force to develop AHAM AC–7–2022 and conducting preliminary testing, DOE has initially determined that the AHAM AC–7–2022 Draft test conditions produce test results that measure the efficiency of air cleaners during a representative average use cycle and are not unduly burdensome. Therefore, DOE proposes to reference the test condition requirements specified in Sections 3.1 through 3.6 of AHAM AC–7–2022 Draft in the proposed new appendix FF. The following sections summarize each of the requirements specified in AHAM AC–7–2022 Draft along with DOE's proposals.

1. Electrical Supply

Section 3.1 of AHAM AC–7–2022 Draft specifies the electrical supply requirements for active mode and standby mode testing. These requirements specify that active mode power supply test voltage and frequency must be set to the nameplate voltage ±1 percent. If a range of voltage is provided on the nameplate, then the voltage for the country for which the measurement is being determined shall be used per Table 1 of AHAM AC–7–2022 Draft (±1 percent). Table 1 specifies 120 volts and 60 hertz for units in North America. For standby mode testing, the power supply test voltage and frequency are to be set as noted in Table 1 of AHAM AC–7–2022 Draft (±1 percent), which specifies 115 volts and 60 hertz for units in North America. DOE notes that these power supply requirements are generally consistent with DOE test procedures for other consumer products for which standby mode and active mode are tested. Accordingly, DOE proposes to reference Section 3.1 of AHAM AC–7–2022 Draft for the electrical supply requirements.

DOE requests comment on its proposal to reference Section 3.1 of AHAM AC–7–2022 Draft for the electrical supply requirements for active mode and standby mode power measurement.

2. Ambient Conditions

Section 3.2 of AHAM AC–7–2022 Draft specifies the test chamber ambient temperature requirements for active mode and standby mode tests. The active mode ambient temperature requirement is 70 ± 5 degrees Fahrenheit (''°F'') (21 ± 3 degrees Celsius (''°C'')) with a relative humidity of 40 ± 5 percent. The standby mode ambient temperature requirement is 70 ± 9 °F (21 ± 5 °C), with no relative humidity requirement specified. DOE notes that the active mode test requirements are similar to the ambient conditions specified for certain other consumer products that affect room air besides heating or cooling (*e.g.,* DOE's ceiling fan test procedure specifies maintaining the room temperature at 70 ± 5 °F and the room relative humidity at 50 ± 5 percent during testing),[20] and as such, DOE expects that these conditions would also produce representative test results for air cleaners. Additionally, Section 5.7.2 of AHAM AC–7–2022 Draft, which specifies the supplemental test to measure active mode power consumption outside a test chamber, also references Section 3.2 of AHAM AC–7–2022 Draft to specify that the same ambient conditions must be maintained when testing outside the chamber.

DOE recognizes that standby mode testing is likely to be much less sensitive to ambient room temperature or humidity compared to active mode testing, such that the wider tolerance on ambient temperature and the lack of a humidity requirement for standby mode testing are appropriate. DOE understands that test laboratories already have the expertise and equipment necessary to maintain these specified ambient temperature and relative humidity test conditions, within the specified tolerances, when testing air cleaners within the test chamber as well as the expertise and equipment necessary for maintaining temperature within the specified tolerance for standby mode. Accordingly, DOE proposes to reference these ambient temperature and relative humidity requirements from AHAM AC–7–2022 Draft.

DOE requests comment on its proposal to reference Section 3.2 of AHAM AC–7–2022 Draft for the ambient temperature and humidity requirements for active mode and standby mode power measurement.

3. Test Chamber Air Exchange Rate

Section 3.3 of AHAM AC–7–2022 Draft requires that, per AHAM AC–1–2020, the test chamber air exchange rate must be less than 0.03 air changes per hour as determined by ASTM E741 or an equivalent method. Section 4.3 of AHAM AC–1–2020 provides these specifications. DOE does not have information on typical air changes within a representative room, but this condition is necessary to ensure consistent test chamber conditions by minimizing the air exchange rate, and DOE has tentatively determined that the industry-accepted specification for the air exchange rate, as reviewed by the AHAM task force, would be appropriate for air cleaner testing. Accordingly, DOE proposes to additionally reference Section 4.3 of AHAM AC–1–2020 within the proposed provisions of Section 3 of the proposed new appendix FF. As discussed, DOE is also proposing to incorporate by reference ASTM E741–11(2017), the most recent version of that industry standard.

DOE requests comment on its proposal to reference Section 3.3 of AHAM AC–7–2022 Draft for the test chamber air exchange rate requirements, including its reference to ASTM E741–11(2017).

4. Test Chamber Particulate Matter Concentrations

Section 3.4 of AHAM AC–7–2022 Draft specifies the acceptable range of particle concentrations for the initial test condition for the smoke and dust tests, via reference to Section 4.4 of AHAM AC–1–2020. DOE recognizes that initial particle concentration is a necessary requirement for repeatability and reproducibility by ensuring consistent test chamber conditions prior to measuring decay rate, and DOE has tentatively determined that the industry-accepted specification for the initial particle concentrations, as

[20] See section 3.3.1(1) of appendix U to subpart B of part 430—Uniform Test Method for Measuring the Energy Consumption of Ceiling Fans.

reviewed by the AHAM task force, would be appropriate for air cleaner testing. Accordingly, DOE is proposing to reference Section 3.4 of AHAM AC–7–2022 Draft and additionally reference Section 4.4 of AHAM AC–1–2020 within the proposed provisions of section 3 of the proposed new appendix FF.

DOE requests comment on its proposal to reference Section 3.4 of AHAM AC–7–2022 Draft for the initial particulate concentrations in the test chamber.

Test Chamber Construction and Equipment

Section 3.5 of AHAM AC–7–2022 Draft references Annex A of AHAM AC–1–2020 to specify the test chamber construction and equipment positioning during testing. This includes requirements for chamber size, framework, constructions and material for the walls and flooring, as well as additional equipment that must be used in the chamber for conducting tests. DOE believes these requirements are relevant to ensure that testing is conducted in a representative chamber and that it is repeatable and reproducible.

In response to the January 2022 RFI, Synexis commented that the CADR test chamber is not representative of actual room sizes, that testing should be conducted in a larger chamber, and that the setup of an air cleaner (*e.g.,* wall-mounted, ceiling-mounted, free-standing, *etc.*) is less critical in measuring efficiency than the air cleaning mechanism. (Synexis, No. 9 at pp. 4–5)

EPCA requires that any test procedures DOE prescribes or amends be reasonably designed to produce test results that measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary, and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE recognizes that the test chamber size specified in AHAM AC–1–2020, 10.5 feet (''ft'') × 12 ft × 8 ft, may not be representative of larger rooms, but DOE does not have consumer data on the room sizes in which air cleaners are most commonly used that would indicate that a different test chamber size would be more representative of average use. Additionally, utilizing a chamber of the same size for testing all conventional room air cleaners and that is required for testing in accordance with the ENERGY STAR V. 2.0 Specification would produce repeatable and reproducible test results, while also ensuring that the test setup and chamber size requirements are not unduly burdensome. Those laboratories that are currently testing air cleaners for the purposes of ENERGY STAR qualification are equipped with the test chamber specified in AHAM AC–1–2020, and specifying a larger test chamber size may reduce the capability of the industry to test at third-party laboratories and would also impose burden on test laboratories to upscale their test chambers. Further, AHAM AC–1–2020 specifies a maximum theoretical CADR that can be achieved when testing according to this standard, which is determined by the maximum number of initial available particles in the chamber, the acceptable minimum number of available particles in the chamber, an average background natural decay rate (from statistical study), and the size of the test chamber, and the available minimum experiment time.[21] That is, the size of the test chamber is one of the inputs that limits the size of air cleaners that can be tested according to this standard. Products that exceed a smoke or dust CADR of 600 cfm are not intended to be tested using this test method. For these reasons, DOE proposes in this NOPR to utilize the same test chamber requirements as specified in AHAM AC–1–2020.

DOE proposes to reference Section 3.5 of AHAM AC–7–2022 Draft, which references Annex A of AHAM AC–1–2020 for the details of the test chamber construction and equipment.

DOE requests comment on its proposal to reference Section 3.5 of AHAM AC–7–2022 Draft, which references Annex A of AHAM AC–1–2020 to specify the test chamber construction and equipment requirements.

5. Test Unit Preparation

Section 3.6 of AHAM AC–7–2022 Draft specifies three requirements regarding test unit preparation: conditioning of the air cleaner prior to measurement in Section 3.6.1; test unit placement for testing in Section 3.6.2; and network connectivity requirements in Section 3.6.3.

For the conditioning requirements, Section 3.6.1 of AHAM AC–7–2022 Draft specifies that air cleaners must be operated for 48 hours in maximum performance mode to break-in the motor prior to conducting any tests. It further specifies that this break-in must be conducted with replacement filters and that after the break-in period is completed, all original and as-received filters must be reinstalled, and non-replaceable components should be cleaned according to manufacturers instructions prior to performing the active mode test. Additionally, Section 3.6.1 of AHAM AC–7–2022 Draft specifies that installation of a UV device that is energized during air cleaning function and lamp assembly within the air cleaner shall be according to manufacturer's instructions and the burn-in time for the UV lamp shall also be 48 hours, run concurrently with the break-in period of the motor.

DOE requests comment on its proposal to reference Section 3.6.1 of AHAM AC–7–2022 Draft for the air cleaner conditioning requirements.

DOE requests comment on whether the 48 hour burn-in time for air cleaners with UV lights is sufficient or if the burn-in time duration should be increased.

6. Test Unit Placement for Testing

Section 3.6.2 of AHAM AC–7–2022 Draft specifies that the air cleaner must be placed in the test chamber in accordance with Section 4.6 of AHAM AC–1–2020, which states that the air cleaner must be installed per manufacturer's instructions in the center of the test chamber, facing the test window, positioned with its air discharge as close as possible to the test chamber center. Section 4.6 of AHAM AC–1–2020 further requires that if the manufacturer's instructions ''do not specify'' [22] and the air cleaner is not a floor model, the air cleaner must be placed on the table for testing. AHAM AC–1–2020 does not provide further specificity as to how to determine if an air cleaner is a floor model, which may potentially cause ambiguity in determining whether a particular air cleaner would need to be placed on the table or not. DOE notes that Section 5.7 of IEC 63086–1 [23] requires that if placement of an air cleaner is not specified by the manufacturer and the air cleaner's height is less than 0.7 meters from the floor, the unit shall be placed on a table of 0.7 meters in height. In all other instances, IEC 63086–1 specifies that the air cleaner shall be placed on the floor of the test chamber.

While DOE is proposing to reference Section 3.6.2 of AHAM AC–7–2022 Draft, DOE is considering if it should

[21] DOE infers this to mean the minimum number of time points required for running the test.

[22] DOE understands the language ''If manufacturer's instructions do not specify'' to mean that the manufacturer's instructions do not clearly indicate the placement of the air cleaner on a floor, table, or another flat surface.

[23] Household and similar electrical air cleaning appliances—Methods for measuring the performance—Part 1: General requirements. IEC 63086–1:2020.

also include the additional test unit placement requirement from IEC 63086–1 and requests comment. By referencing a measurable metric (unit height) to determine the installation configuration of the air cleaner in the absence of manufacturer's instructions, IEC 63086–1 may provide greater certainty regarding how to test certain air cleaner models, which could contribute to a more reproducible and representative test measurement. For the DOE test procedure, DOE could consider specifying the height limit for placement on the table in the test chamber as 28 inches, given that 0.7 meters is approximately 27.6 inches. Additionally, DOE is considering whether it should include any requirement for air cleaners shipped with casters; specifically, DOE is considering whether such air cleaners should be tested on the floor regardless of the unit's height.

DOE requests comment on its proposal to reference Section 3.6.2 of AHAM AC–7–2022 Draft, which references Section 4.6 of AHAM AC–1–2020 for the test unit placement instructions.

DOE also requests comment on whether it should consider including the requirement from IEC 63086–1 that specifies that if the placement of the air cleaner is not specified by the manufacturer and the air cleaner's height is less than 28 inches, then the unit must be tested on the table. Specifically, DOE requests comment on whether the language in AHAM AC–7–2022 Draft which states that, ''if the air cleaner is not a floor model'' is clear to follow, without any ambiguity, or whether a quantitative metric such as unit height would be better to ensure consistent test setup.

DOE also requests comment on whether it should include any placement instructions for air cleaners shipped with casters.

7. Network Functionality

Section 3.6.3 of AHAM AC–7–2022 Draft specifies requirements for setting up air cleaners with network functionality, including requirements for the network connection and for establishing the connection between the air cleaner and the network. This section specifies that air cleaners must be tested on a Wi-Fi network and that if the unit has additional network capabilities (*e.g.,* Bluetooth®), these capabilities shall remain in their default, as-shipped configuration. Additionally, Section 3.6.3 of AHAM AC–7–2022 Draft specifies that the network shall support the highest and lowest data speeds of the air cleaner's network function, and that the live connection must be maintained for the duration of the active mode and standby mode tests. AHAM AC–7–2022 Draft also specifies that if the air cleaner needs to install any software updates, testing must wait until these updates have occurred; otherwise, if the unit can operate without updates, the updates may be bypassed.

DOE is aware of at least one air cleaner on the market [24] that cannot be operated by the user, unless it is connected to an active network connection. On such a model, control of the air cleaner is provided exclusively through a mobile phone application. Accordingly, DOE is proposing to reference the AHAM AC–7–2022 Draft network connection requirements.

DOE requests comment on its proposal to reference Section 3.6.3 of AHAM AC–7–2022 Draft regarding network connection requirements during active mode and standby mode tests. DOE also requests comment on the impact on repeatability and reproducibility when testing air cleaners with network functionality while connected to a network.

DOE requests comment on whether the software update requirements are adequately specified or whether DOE should explicitly state that software updates must always be executed prior to running the tests.

DOE requests comment on its proposal to reference Sections 3.1 to 3.6 of AHAM AC–7–2022 Draft for the test conditions and setup. Should AHAM AC–7–2022 Draft change any of these requirements between publication of this NOPR and publication of the final version of AHAM AC–7–2022, DOE requests comment on these changes, the reasons for these changes, and the impact of these changes on the overall air cleaners test procedure.

E. Instrumentation

Section 4 of AHAM AC–7–2022 Draft specifies requirements for instrumentation used for measuring voltage and power by referencing IEC 62301 Ed. 2.0 and specifies the accuracy required for power measuring equipment.

Sections 4.1.1 through 4.1.3 of AHAM AC–7–2022 Draft specify requirements for power measurement uncertainty, frequency response, and long-term averaging, by referencing requirements in Sections 4.4.1 through 4.4.3 of IEC 62301 Ed. 2.0. Along with these requirements, Section 4 of AHAM AC–7–2022 Draft specifies the accuracy of instruments used for measuring voltage and power to be accurate to within ±0.5 percent of the quantity measured. Section 4 of AHAM AC–7–2022 Draft also specifies requirements for the accuracy of the temperature measuring device (error no greater than ± 1 °F (± 0.6 °C) over the range being measured) and the relative humidity measuring device (resolution of at least 1 percent relative humidity, and an accuracy of at least ± 6 percent relative humidity over the temperature range of (24 ± 3) °C [(75 ± 5) °F]).

DOE understands these instrumentation specifications to be appropriate for producing repeatable, reproducible, and representative test results for air cleaners, and that test laboratories currently have instrumentation that meets these proposed specifications. Therefore, DOE proposes to reference these instrumentation requirements specified in Section 4 of AHAM AC–7–2022 Draft, including the applicable provisions from Sections 4.4.1, 4.4.2, and 4.4.3, of IEC 62301 Ed. 2.0 in the proposed new appendix FF.

DOE requests comment on its proposal to incorporate by reference Section 4 of AHAM AC–7–2022 Draft regarding instrumentation requirements, including the applicable provisions from relevant sections of IEC 62301 Ed. 2.0. Should AHAM AC–7–2022 Draft change any of these requirements between publication of this NOPR and publication of the final version of AHAM AC–7–2022, DOE requests comment on these changes, the reasons for these changes, and the impact of these changes on the overall air cleaner test procedure.

F. Active Mode Testing

1. Background on CADR

Section 3.14 of AHAM AC–1–2020 defines CADR as the metric which measures an air cleaner's efficacy in removing particulate matter from the air. CADR represents the logarithmic rate of particulate reduction in the test chamber when the air cleaner is turned on (expressed as a number per minute), minus the logarithmic rate of ''natural decay'' [25] when the air cleaner is not running (also expressed as a number per minute), multiplied by the volume of the test chamber (specified as 1,008 cubic feet). As such, testing an air

[24] See, for example: *auraair.io/pages/aura-air-1.*

[25] Section 3.13 of AHAM AC–1–2020 defines ''natural decay'' as the reduction of particulate matter due to natural phenomena in the test chamber: principally agglomeration [a process in which fine particles ''clump'' together], surface deposition [a process in which particles attach to a surface] (including sedimentation [a process in which particles settle out of suspension in the air onto a surface due to gravity]), and air exchange.

cleaner requires conducting two separate tests: a first test with the air cleaner not operating in active mode, and a second test with the air cleaner operating in active mode. The CADR value is expressed in units of cfm.[26]

Sections 5, 6, and 7 of AHAM AC–1–2020 specify procedures for measuring air cleaner efficacy using three different types of particulates representing three ranges of particulate matter size: cigarette smoke (0.10 micrometer (''µm'') to 1.0 µm diameter), dust (0.5 µm to 3.0 µm diameter), and pollen (5 µm to 11 µm diameter), respectively.

In the January 2022 RFI, DOE requested comment on the use of CADR, as opposed to another metric such as rate of decay, to characterize air cleaner performance. In particular, DOE requested comment on whether consumers could find the unit of measurement of cfm for CADR confusing and misunderstand it as referring to the rate of air movement through the device. 87 FR 3702, 3708.

Synexis commented that CADR is not an appropriate performance metric because it applies only to filtration devices and that any metric must consider the mechanism of action of the air cleaner and types of contaminants it addresses. (Synexis, No. 9 at p. 2)

Daikin commented that CADR primarily measures the capacity of the unit, but there are other air cleaning efficacy metrics that should be considered based on product categories. Daikin stated that metrics like CADR and MERV are similar to the capacity of delivering clean air and air cleaning efficacy respectively, but they are not an energy efficiency metric. (Daikin, No. 13 at p. 2)

DOE recognizes that other capacity metrics may be relevant for the removal of other air contaminants such as gases and microorganisms. However, for the scope of products covered by this proposed test procedure, *i.e.,* conventional room air cleaners, and the contaminants used to test such air cleaners, *i.e.,* smoke, dust, and pollen, DOE has tentatively determined that CADR would be an appropriate capacity metric, as DOE is not proposing to test for gases and microorganisms at this time. CADR is a well-established industry capacity metric, and the AHAM AC–1 standard has been in use for over 30 years. CADR is a measure of the reduction rate of specific particulates by an air cleaner in a controlled environment. Accordingly, DOE proposes to use the CADR metric to evaluate the capacity of air cleaners. As discussed in later sections, DOE is proposing an IEF metric, which specifies the efficiency of an air cleaner in CADR/W.

2. Particulate Used for Testing and CADR Measurement

In the January 2022 RFI, DOE requested comment on whether the power measurement could vary based on the particulate test that is used to measure operating power. 87 FR 3702, 3708. If power measurement varies based on the particulate test, DOE requested comment on which particulate test (pollen, dust, or smoke) should be used as the basis for the power measurement in any Federal test procedure that DOE may develop. Alternately, DOE requested comment on whether it should consider requiring power measurements for each particulate test and use a simple or weighted average to determine operating power. *Id.*

DOE also requested comment on whether cigarette smoke would be the appropriate particulate for determining a CADR rating of air cleaners under a DOE test procedure, should DOE adopt a measurement of CADR in a test procedure for air cleaners. If cigarette smoke is not the most appropriate particulate, DOE requested comment on other particulate(s) that would be more appropriate as the basis for measurement, including data and information to support such a recommendation. *Id.* at 87 FR 3710–3711.

Blueair commented that it supports the use of cigarette smoke as the appropriate particulate for CADR ratings as it can be a surrogate for much smaller particles that can be found in the home, but that any pollutants specified in AHAM AC–1–2020 could be suitable alternatives. (Blueair, No. 11 at p. 3) Blueair additionally supported using $PM_{2.5}$ CADR as the performance metric for air cleaners. (*Id.*) Further, Blueair noted $PM_{2.5}$ is the primary concern from a health standpoint and is often found indoors. Blueair also commented that this particulate is likely to be of greatest concern to consumers and is very fine and can adequately represent a unit's performance for other particles. (*Id.*)

The Joint Commenters recommended that DOE adopt an air cleaner metric based on a $PM_{2.5}$ CADR. The Joint Commenters noted that fine particulate matter has been shown to cause serious health problems and can get into the lungs and bloodstream and likely be of concern to consumers. (Joint Commenters, No. 8 at p. 4) The Joint Commenters stated that due to the small size, $PM_{2.5}$ particles can adequately represent a unit's performance for other larger particles and noted that AHAM AC–7–2022 Draft measures efficiency based on $PM_{2.5}$ CADR as the numerator. (*Id.*)

Synexis commented that an air cleaner's energy consumption may vary based on the size of particles used in particulate tests because particulates of various sizes can cause filters to become entrained with pollutant particles and require greater pressure to move air through the device. Synexis further commented that power measurements for each particulate test would not be representative of real-world energy consumption and would not provide any useful data. (Synexis, No. 9 at p. 2) Testing conducted by DOE, as well as power consumption data provided in ENERGY STAR's database, do not indicate any substantive differences in power consumption among the smoke, dust, and pollen tests.

The CA IOUs recommended a $PM_{2.5}$ CADR performance metric. (CA IOUs, No. 10 at p. 2) The CA IOUs commented that they analyzed the $PM_{2.5}$ CADR metric and observed that a top-performing model based on $PM_{2.5}$ CADR will likely perform well on pollen as well, which is a particulate of concern to consumers. (*Id.* at p. 3) Additionally, the CA IOUs asserted that since AHAM AC–1–2020 indicates testing with pollen particles is not considered sufficiently accurate and is thus out of scope for products with a CADR below 25 cfm, while cigarette smoke and dust particles can be considered sufficiently accurate down to a CADR of 10 cfm, DOE should adopt a performance metric based on $PM_{2.5}$ CADR. The CA IOUs commented that this would ensure products with a low cfm can be included within scope and that this metric would produce the most precise test procedure that balances the representativeness of consumer use cases. The CA IOUs encouraged DOE to monitor pollen CADR performance to ensure a strong correlation is maintained between $PM_{2.5}$ and pollen performance. (*Id.* at p. 5)

For compliance with the standards in tier one of the Joint Proposal, the Joint Stakeholders recommended that DOE permit Section 6.2 of AHAM AC–1–2020 for dust CADR to be applied as an alternative for calculating $PM_{2.5}$ CADR. The Joint Stakeholders stated that the dust CADR, determined according to Section 6.2 of AHAM AC–1–2020, is nearly identical to the subset dust CADR used to calculate $PM_{2.5}$ CADR. The Joint

[26] Although the unit of measurement for CADR is cfm, Section 3.14 of AHAM AC–1–2020 explains that CADR values indicate the performance of an air cleaner as a complete system and that the metric has no linear relationship to air movement or to the characteristics of any particular particle removal methodology *per se.*

Stakeholders further stated that given many products have already been tested per AHAM AC–1–2020, allowing this alternative would ensure that manufacturers are not required to retest using AHAM AC–7–2022 to demonstrate compliance with a new standard on a short timeline. (Joint Stakeholders, No. 16 at p. 6)

Section 2.8 of AHAM AC–7–2022 Draft specifies that $PM_{2.5}$ means particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers, as measured by a reference method based on 40 CFR part 50, annex I and designated in accordance with 40 CFR part 53 or by an equivalent method designated in accordance with 40 CFR part 53.

Section 2.9 of AHAM AC–7–2022 Draft specifies the method used to calculate $PM_{2.5}$ CADR, which is based on the measured smoke CADR and dust CADR values. This section discusses that the diversity of particle natures and the sizes of the dust and smoke pollutants gives a well-balanced representation of the ultra-fine and fine particulate matters that define $PM_{2.5}$. Specifically, $PM_{2.5}$ CADR is obtained by combining the CADR of smoke (which includes particle sizes ranging from 0.1 to 0.5 micron meters (''μm'')) with the CADR of dust (which includes particle sizes ranging from 0.5 to 2.5 μm) and performing a geometric average calculation as follows:

$$PM_{2.5}CADR = \sqrt{Smoke\ CADR\ (0.1 - 0.5\ \mu m) \times Dust\ CADR\ (0.5 - 2.5\ \mu m)}$$

The tests to determine smoke CADR and dust CADR are specified in Sections 5 and 6 of AHAM AC–1–2020. These sections of AHAM AC–1–2020 specify the procedure for introducing the smoke and dust particulates, conducting the natural decay test, and the measuring the decay with the air cleaner in operation. However, $PM_{2.5}$ CADR specifies a narrower range of allowable particle sizes for the smoke CADR and dust CADR than the smoke CADR and dust CADR tests in Sections 5.2 and 6.2, respectively, of AHAM AC–1–2020. That is, the allowable particle size for smoke particles is 0.1 to 1 μm for the smoke CADR test in AHAM AC–1–2020, while it is 0.1 to 0.5 μm for the $PM_{2.5}$ calculation in AHAM AC–7–2022 Draft. Similarly, the allowable particle size for dust particles is 0.5 to 3 μm for the dust CADR test in AHAM AC–1–2020, while it is 0.5 to 2.5 μm for the $PM_{2.5}$ calculation in AHAM AC–7–2022 Draft. DOE interprets the Joint Stakeholders' recommendation of an alternative approach to mean that the Joint Stakeholders want the allowable range of particle size to encompass all dust particle sizes, as specified in AHAM AC–1–2020, in the calculation of $PM_{2.5}$ CADR. While not mentioned in the Joint Proposal, the same alternative could be required for the smoke CADR used in the calculation of $PM_{2.5}$ CADR.

While the allowable smoke and dust particle size for the smoke CADR and dust CADR tests in Sections 5 and 6 of AHAM AC–1–2020 is larger (*i.e.,* 0.1 to 1 μm for smoke particles and 0.5 to 3 μm for dust particles) than the allowable smoke and dust particle size for the calculation of $PM_{2.5}$ CADR (*i.e.,* 0.1 to 0.5 μm for smoke particles and 0.5 to 2.5 μm for dust particles), the calculated $PM_{2.5}$ CADR according to AC–7–2022 Draft is nearly identical to the smoke CADR and dust CADR as measured according to Sections 5 and 6 of AHAM AC–1–2020, as shown in the figures included in the Joint Proposal.[27] Accordingly, DOE proposes that $PM_{2.5}$ CADR may alternatively be calculated using the full range of particles used to calculate smoke CADR and dust CADR according to Sections 5 and 6 of AHAM AC–1–2020, respectively. DOE may further consider the option to allow the use of both approaches to calculate $PM_{2.5}$ CADR in a future standards rulemaking.

DOE requests comment on the Joint Stakeholders' recommendation of using dust CADR as calculated in Section 6 of AHAM AC–1–2020 as an alternative for calculating $PM_{2.5}$ CADR. DOE also requests comment on its proposal to allow the same alternative for the smoke CADR value used in the $PM_{2.5}$ CADR calculation.

DOE notes that AHAM AC–7–2022 Draft specifies calculating IEF using $PM_{2.5}$ CADR. Conversely, ENERGY STAR V. 2.0 Specification specifies its metric based on smoke CADR, whereas ENERGY STAR V. 1.0 Specification specified its metric based on dust CADR.

Given the historic use of both smoke and dust particulates to define a metric for air cleaners, as well as the range of particle sizes covered by the smoke and dust test, DOE proposes to incorporate by reference Section 2.9 of AHAM AC–7–2022 Draft to specify testing with smoke and dust and calculating $PM_{2.5}$ CADR. DOE also proposes to include an alternative for using the smoke CADR and dust CADR as calculated according to Sections 5 and 6 of AHAM AC–1–2020.

Additionally, DOE proposes to reference Sections 5 and 6 of AHAM AC–1–2020 for conducting the smoke CADR and dust CADR tests.

DOE requests feedback on its proposal to incorporate by reference Section 2.9 of AHAM AC–7–2022 Draft to calculate $PM_{2.5}$ CADR based on measurements of smoke CADR and dust CADR. DOE also requests comment on its proposal to allow the use of smoke CADR and dust CADR calculated according to Sections 5 and 6 of AHAM AC–1–2020.

DOE also requests comment on its proposal to reference Sections 5 and 6 of AHAM AC–1–2020 to specify the test methods for determining smoke CADR and dust CADR, respectively.

3. Performance Mode for Testing

In the January 2022 RFI, DOE requested comment on whether it should consider testing air cleaners at any other power level in addition to the maximum power level required by AHAM AC–1–2020. 87 FR 3702, 3708.

Consistent with AHAM AC–1–2020, Section 5.3.1 of AHAM AC–7–2022 Draft specifies that the active mode test for all conventional room air cleaners be performed with the air cleaner set to the highest flow rate setting.[28] Section 5.3.1 of AHAM AC–7–2022 Draft additionally specifies that products that include additional air cleaning functionality beyond mechanical filtration shall additionally have all air cleaning functions switched on, set to maximum. Section 5.6 of AHAM AC–7–2022 Draft specifies requirements for automatic mode, which is a mode in which the air cleaner performs air cleaning functionality in response to a sensor input, timer, or scheduling feature. AHAM AC–7–2022 Draft states that although a product may have an automatic mode, the product shall be operated in its maximum performance mode.

Synexis stated that it was appropriate to test air cleaners at their maximum performance mode because it represents a worst-case scenario in terms of energy

[27] The figure appears on page 6 of the Joint Proposal. (Joint Stakeholders, No. 16 at p. 6).

[28] AHAM AC–7–2022 Draft FN1 specifies that ''highest flow rate setting'' is the highest fan speed setting as identified in the manufacturer's instructions that would allow the product to operate indefinitely.

consumption. Synexis explained that medium and low power settings are likely to exhibit different performance characteristics in different devices and would not provide an appropriate metric to compare different air cleaners. (Synexis, No. 9 at p. 3) Molekule stated that its air cleaners use sensors and automatic mode to address indoor air quality conditions, and that energy efficiency requirements should take these features into account, rather than only considering a unit's maximum speed. (Molekule, No. 12 at p. 5) The Joint Commenters stated that they recognize the efficiency benefits of automatic mode for air cleaners, but that no test procedure exists currently that can account for the associated efficiency benefits or measure the effectiveness of automatic mode. (Joint Commentors, No. 8 at p. 4)

As discussed, AHAM AC–7–2022 Draft specifies that the active mode test be performed at the highest flow rate with all air cleaning functions switched on, set to maximum. Section 1 of AHAM AC–7–2022 Draft includes an informative note stating the following: ''The purpose of this standard is to have one standard for measurement of energy of air cleaners. The standard is designed in such a way to maximize the validity, repeatability and reproducibility of the testing, and thus to give manufacturers, public information groups and consumers information to compare air cleaners. AHAM recognizes that not all consumers will operate their air cleaner at maximum speed or conditions all the time. While it is possible to test air cleaners at different speeds and settings, the difficulty is to arrive at a consistent speed or function setting on all air cleaners for multiple manufacturers. The most consistent measurement for all air cleaners is to test at the Maximum Performance Test Setting.''

This informative note in AHAM AC–7–2022 Draft indicates that the requirement to perform testing at the maximum performance level provides the best balance among repeatability, reproducibility, and representativeness of test results at this time. For this reason, DOE has tentatively determined that maximum performance mode is the best approach currently established by the industry standard for producing test results during a representative average use cycle or period of use, while not being unduly burdensome to conduct. DOE is therefore proposing to adopt the active mode test provisions of AHAM AC–7–2022 Draft, including the requirement to test at the maximum performance mode.

DOE is aware that the AHAM task force has initiated an effort to develop test methods for automatic mode, and DOE is continuing to participate in this effort. If a test method to measure air cleaner performance when operating in automatic mode that produces results that are more representative of an average use cycle or period of use were to be developed, DOE would consider it in a future test procedure rulemaking.

Specific proposals regarding the active mode measurement requirements are discussed in the following paragraphs.

Section 5.3 of AHAM AC–7–2022 Draft specifies that all products shall be tested with the air cleaner set to the highest flow rate setting, also known as maximum performance mode. Additionally, Section 5.3 of AHAM AC–7–2022 Draft specifies that for products that have air cleaning functionality beyond mechanical filtration (*i.e.,* ionization, UV, *etc.*) the test unit shall be configured such that these features are enabled and set to the maximum level during active mode testing.

DOE proposes to reference Section 5.3 of AHAM AC–7–2022 Draft regarding test unit setup requirements for testing in maximum performance mode.

DOE requests comment on its proposal to reference Section 5.3 of AHAM AC–7–2022 Draft to test units in maximum performance mode.

4. Secondary Functions

Section 5.4 of AHAM AC–7–2022 Draft specifies the configuration for secondary functions, which are unrelated to air cleaning (*i.e.,* humidifier, ambient light, *etc.*). As these functions do not contribute to the air cleaning capabilities of the unit, they are switched off or disconnected for the duration of the test. If it is not possible to switch off or disconnect such functions, AHAM AC–7–2022 Draft states that these functions shall be set to their lowest power-consuming mode that is selectable when running the air cleaner at its maximum performance mode or highest fan speed. For customized control displays, AHAM AC–7–2022 Draft specifies that the test unit shall be configured to its default or as-shipped control setting intensity level, unless the panel lights are adjustable in intensity and are shipped in the off mode, in which case the control panel is run in the least-intensity mode that would keep it on for the test. DOE proposes to reference this requirement for the configuration of secondary functions.

Section 5.5 of AHAM AC–7–2022 Draft specifies the configuration of control functions during active mode testing. Control functions include any programmable functions that may continue to be enabled when the primary function is inactive (*i.e.,* clocks, Wi-Fi, remote controls, *etc.*). AHAM AC–7–2022 Draft states that control functions are intended to be on and connected to any communication network during active mode testing.

DOE proposes to reference this requirement to specify that control functions shall be in on mode and connected to any communication network during active mode testing as specified in Section 5.5 of AHAM AC–7–2022 Draft.

DOE requests comment on its proposal to reference Sections 5.4 and 5.5 of AHAM AC–7–2022 Draft to specify the configuration of secondary functions and control functions during active mode testing.

5. Power Measurement Procedure

Section 5.7 of AHAM AC–7–2022 Draft specifies the methods for measuring active mode power. These methods include measuring the power consumption when operating the test unit within the test chamber at the same time as the smoke CADR test and dust CADR test or by measuring the power consumption during a supplemental power test outside of a test chamber.

More specifically, Section 5.7.1 of AHAM AC–7–2022 Draft specifies that the power consumption measurement can be conducted simultaneously with the smoke CADR or dust CADR test from Section 5.2.5 or 6.2.5 of AHAM AC–1–2020, respectively. Section 5.7.2 of AHAM AC–7–2022 Draft specifies an alternative method for measuring active mode power consumption, referred to as the ''supplemental'' test. This test can be used to determine the active mode power consumption outside of the test chamber used for smoke CADR and dust CADR testing. The supplemental power test specifies the same unit configuration and records power over a period of 15 minutes at no greater than 1 second intervals, averaging the power consumption over 13 minutes starting after the initial 2 minutes. AHAM AC–7–2022 Draft additionally specifies that if the test unit has pollutant indicators and they do not light up when no pollutant is present in the air, but light up when detecting pollutants, then the test unit cannot be tested outside the chamber to measure active mode power consumption.

Finally, Sections 5.7.3 and 5.7.4 of AHAM AC–7–2022 Draft specify the equations to determine the average active mode power consumption and the annual active mode energy use, respectively.

DOE performed testing at a third-party laboratory to investigate the similarity

in power measurement between a test conducted simultaneously with the CADR measurement and a supplemental test performed outside of a test chamber. Testing was conducted on 11 units using smoke for the CADR test. Table III.1 shows the test results.

TABLE III.1—DIFFERENCE IN POWER CONSUMPTION BETWEEN SMOKE TEST AND SUPPLEMENTAL TEST

Unit number	Smoke test power (W)	Supplemental test power (W)	Percent difference
1	44.2	43.9	−0.7
2	51.5	54.0	+4.7
3	55.0	55.6	+1.1
4	24.6	25.4	+3.2
5	18.8	18.9	+0.3
6	42.6	42.6	+0.1
7	5.9	5.8	−1.4
8	38.2	37.4	−2.2
9	37.9	38.3	+1.2
10	58.1	57.8	−0.5
11	84.8	81.7	−3.6
Average Difference	.....	.....	+0.2%

As indicated in Table III.1, the percent difference between power consumption measured during the smoke CADR test and the supplemental out-of-chamber test ranged from –3.7 percent to +4.9 percent, with an average of +0.2 percent. Based on these data, DOE has tentatively determined that the power consumption of the out-of-chamber supplemental power test is closely comparable to the in-chamber smoke, and likely dust, CADR tests because measured power using the maximum performance mode is not significantly impacted by whether a particle is present. Accordingly, DOE proposes to reference Sections 5.7.1 through 5.7.4 of AHAM AC–7–2022 Draft to measure active mode power either in the test chamber (Section 5.7.1) at the same time as the smoke or dust CADR test or outside the chamber (Section 5.7.2) as a supplemental power test and to calculate average power (Section 5.7.3) and annual active mode energy use (Section 5.7.4).

DOE requests comment on its proposal to reference Sections 5.7.1 through 5.7.4 of AHAM AC–7–2022 Draft, which specify methods for measuring active mode power at the same time as the smoke or dust CADR test when the test unit is operating within the chamber and measuring the power consumption during a supplemental power test outside of a test chamber, respectively.

6. Pollen CADR

To enable consistent and meaningful representations of metrics most desirable to consumers, DOE is considering including an additional test to determine pollen CADR. Similar to dust and smoke CADR, pollen CADR provides a measurement of the air cleaner's performance to remove pollen from indoor air. Pollen CADR typically increases with increasing air cleaner energy use, and therefore DOE believes this is an appropriate metric to measure. Further, according to the Asthma and Allergy Foundation of America more than 50 million people in the United States experience various types of allergies each year and allergies are the sixth leading cause of chronic illness in the United States.[29] Further, pollen is one of the most common environmental allergens to trigger an allergic reaction. Accordingly, many air purifiers are marketed as providing pollen removal. DOE notes that the ENERGY STAR V. 2.0 Specification requires reporting of pollen CADR. Therefore, DOE believes it is important that any representation related to an air cleaner's pollen CADR performance must be made based on testing conducted in a repeatable and representative manner. Accordingly, DOE is proposing to include the pollen CADR measurement test specified in Section 7 of AHAM AC–1–2020.

Section 7 of AHAM AC–1–2020 specifies the test procedure for determining paper mulberry pollen CADR. The method for measuring pollen CADR is the same as dust CADR and smoke CADR; however, the test duration is only 10 minutes compared to 20 minutes for the smoke test and dust test. The reduced test duration is specified because pollen decays faster than both dust and smoke and thus only 10 minutes is necessary to determine pollen CADR. All other test conditions remain the same including the test chamber, use of a recirculation and ceiling fan, and test equipment.

As discussed in section III.A of this NOPR, Section 2 of AHAM AC–1–2020 specifies the test procedure being applicable only to air cleaners within rated CADR ranges of 10 to 600 cfm for dust and cigarette smoke and 25 to 450 cfm for pollen. Given that DOE is proposing to reference the AHAM industry standards for the DOE air cleaner test procedure, including the pollen CADR test, DOE requests comment on whether it should also specify that the acceptable pollen CADR range from AHAM AC–1–2020 applies for measurements of pollen CADR. Specifically, DOE would consider specifying that the pollen CADR test is applicable for conventional room air cleaners with pollen CADR between 25 and 450 cfm.

Because this test is currently specified in the ENERGY STAR V. 2.0 Specification, DOE expects it would minimally increase test burden compared to the tests required for smoke CADR and dust CADR. While DOE is proposing to include only a pollen CADR test, it requests comment on whether it should also include an active mode power measurement associated with the pollen CADR test and specify a pollen CADR/W metric. If a pollen CADR/W metric is considered, DOE also welcomes comment on whether this measurement should be based only on active mode power consumption or if it should be calculated in a similar manner to the IEF metric, using energy consumption in both active mode and standby mode as opposed to active mode power.

DOE requests comment on its proposal to reference Section 7 of

[29] Asthma and Allergy Foundation of America. Allergy Facts and Figures. *www.aafa.org/allergy-facts/*.

AHAM AC–1–2020 for the pollen CADR measurement test.

DOE requests comment and data on the relationship between the pollen CADR measurement and the energy use of the air cleaner.

DOE requests comment on whether it should reference Section 2 of AHAM AC–1–2020, which specifies that the standard is applicable for air cleaners with pollen CADR of 25 to 450 cfm, for pollen CADR testing.

DOE also requests comment on whether it should specify measurement of active mode power consumption when conducting the pollen CADR measurement test.

DOE requests comment on whether it should consider specifying a pollen CADR/W metric and whether such a metric should be based on active mode power consumption or include energy consumption in both active mode and standby mode.

7. Consumer Use Hours

In the January 2022 RFI, DOE requested comment on consumer usage of air cleaners, in particular, the amount of time spent in active mode, standby mode, and off mode. 87 FR 3702, 3710. DOE requested comment on its example approach of defining an integrated CADR/W metric, in which the denominator would represent a weighted average of the power consumption associated with active mode, standby mode, and off mode, weighted by the amount of time spent in each mode. *Id.*

In response to the January 2022 RFI, Blueair supported the use of the active mode and standby mode hours specified in ENERGY STAR V. 2.0 Specification, which assumes 16 active mode hours per day and 8 inactive mode hours per day, to calculate the annual energy consumption of qualifying air cleaners. (Blueair, No. 11 at p. 3) Daikin commented that DOE's assumption that an air cleaner runs at 100-percent capacity for 16 hours a day is flawed and asserted that most air cleaners currently on the market are recommended by the manufacturer to operate in automatic mode, which runs the unit at 100-percent capacity only when indoor air quality drops. (Daikin, No. 13 at pp. 2–3) The CA IOUs presented data from a survey conducted by Evergreen Economics, which indicated a wide range of active mode operating hours: 23 percent of respondents reported operating their air cleaners all day (*i.e.,* 24 hours), while 53 percent of respondents reported operating their air cleaners for 6 hours or fewer each day. The CA IOUs further stated that DOE should consider the prevalence of automatic mode and the time spent in each mode when determining appropriate weighting factors. (CA IOUs, No. 10 at p. 8)

AHAM AC–7–2022 Draft Section 5.7.4 specifies the calculation for E_{active}, which is used to convert the power consumption measurement to an energy consumption value. To calculate E_{active}, AHAM AC–7–2022 Draft estimates that an air cleaner spends 5,840 annual hours in active mode, which is equivalent to 16 hours per day.

DOE is proposing to align with the estimated active mode annual hours specified in AHAM AC–7–2022 Draft (corresponding to 16 hours per day) and consistent with the ENERGY STAR V. 2.0 specification. As discussed, the informative note in Section 1 of AHAM AC–7–2022 Draft acknowledges that not all consumers will operate their air cleaner at maximum speed or conditions all the time. For the reasons discussed in section III.F.3 of this document, DOE has tentatively determined, in accordance with AHAM AC–7–2022 Draft, that the most consistent measurement for all air cleaners is to test in the maximum performance mode and is proposing to allocate the same active mode annual hours in the proposed new appendix FF as in AHAM AC–7–2022 Draft. DOE is aware that the AHAM task force is initiating an effort to develop test methods for automatic mode. DOE will continue to participate in this effort and may consider any such method, including any associated active mode annual hours, in a future test procedure rulemaking.

DOE requests comment on its proposal to reference Section 5.7.4 of AHAM AC–7–2022 Draft, which specifies the calculation of active mode energy consumption using an estimated 5,840 hours per year in active mode.

G. Standby Mode Testing

In the January 2022 RFI, DOE requested comment on the suitability of the standby power measurement procedure specified in AHAM AC–1–2020, IEC 62301 Ed. 2.0, or any other test method for measuring standby mode and off mode energy use of air cleaners, in light of EPCA's requirement in 42 U.S.C. 6295(gg)(2)(A) for DOE to consider the most current version of IEC Standard 62301. 87 FR 3702, 3709.

The CA IOUs commented that DOE should test standby power in the as-shipped condition, with any manufacturer's recommended settings for normal use enabled. (CA IOUs, No. 10 at p. 8) As discussed further in this section, DOE is proposing to reference the relevant sections of AHAM AC–7–2022 Draft pertaining to the standby power measurement, which includes the specification that standby power be tested in the as-shipped condition.

Synexis commented that a standby mode power test may provide baseline energy use data, but maximum energy utilization would occur when the air cleaner is operating, and that many air cleaners are intended to operate continuously. (Synexis, No. 9 at p. 3) Synexis further commented that if standby mode power is tested, the test time period would need to be 24 hours to provide meaningful results. (Synexis, No. 9 at p. 5) DOE has initially determined based on stakeholder comments and a review of existing test standards that testing an air cleaner in standby mode would be representative of average use. Further, as noted in section III.F.7 of this document, DOE is proposing to align with the estimated active mode annual hours specified in AHAM AC–7–2022 Draft (corresponding to 16 hours per day). AHAM AC–7–2022 Draft additionally estimates the remaining hours in a day are spent in standby mode (*i.e.,* 8 hours per day in standby mode). DOE is proposing to align with the estimated standby mode annual hours specified in AHAM AC–7–2022 Draft. DOE additionally notes that IEC 63201 Ed. 2.0, which EPCA requires to be considered by DOE, specifies a maximum duration of 3 hours for standby mode testing. DOE specifies use of IEC 63201 Ed. 2.0 for measuring the standby power of numerous other consumer products and finds the procedure to be suitable for providing a repeatable, reproducible, and representative measure of standby power. Based on successful application of IEC 63201 Ed. 2.0 for other consumer products, DOE tentatively concludes that requiring a 24-hour time period for measuring standby power would be unduly burdensome.

DOE notes that while the January 2022 RFI requested comment on the use of AHAM AC–1–2020 or IEC 62301 Ed. 2.0, AHAM AC–7–2022 Draft references IEC 62301 Ed. 2.0 for conducting standby mode tests. Section 6 of AHAM AC–7–2022 Draft defines the setup and procedures to measure air cleaner standby mode power consumption. DOE proposes to incorporate by reference all subsections of Section 6 of AHAM AC–7–2022 Draft, which establish conditions of measurement, preparation of the air cleaner model for testing, test procedure, test results, and the annual combined low power mode energy consumption calculations.

Section 6.3 of AHAM AC–7–2022 Draft references Section 5.3 of IEC 62301 Ed. 2.0 for the procedure to

measure standby mode power. Sections 6.4.1 and 6.4.2 of AHAM AC–7–2022 Draft define measurements for inactive mode power, P^{IA}, and off mode power, P^{OM}, respectively. DOE proposes to reference Section 6.4 of AHAM AC–7–2022 Draft.

Section 6.5 of AHAM AC–7–2022 Draft defines an annual combined low power mode energy consumption calculation based on P^{IA} and P^{OM} as follows:

$E^{TLP} = \{P_{IA} \times S_{IA} + P_{OM} \times S_{OM}\} \times K$

where:

P^{IA} = air cleaner inactive mode power, in W, for air cleaners capable of operating in inactive mode; otherwise, $P^{IA} = 0$,

P^{OM} = air cleaner off mode power, in W, for air cleaners capable of operating in off mode; otherwise, $P^{OM} = 0$,

S_{IA} = annual hours in inactive mode and defined as S_{LP} if no off mode is possible, [S^{LP}/2] if both inactive mode and off mode are possible, and 0 if no inactive mode is possible,

S^{OM} = annual hours in off mode and defined as LP^{LP} if no inactive mode is possible, [S^{LP}/2] if both inactive mode and off mode are possible, and 0 if no off mode is possible,

K = 0.001 kWh/Wh conversion factor for Wh to kWh.

S^{LP} = 2,920 air cleaner inactive mode annual hours

Consistent with the active mode energy consumption calculation, AHAM AC–7–2022 Draft specifies 2,920 annual hours in standby mode, which is equivalent to 8 hours per day and is consistent with the estimated standby mode hours specified in the ENERGY STAR V. 2.0 Specification. Accordingly, DOE proposes to reference these requirements for standby mode.

DOE requests feedback on its proposal to reference Section 6 of AHAM AC–7–2022 Draft to determine annual combined low power mode energy consumption.

H. Integrated Energy Factor Metric

In the January 2022 RFI, DOE requested comment on the technical feasibility of integrating measures of standby mode and off mode energy consumption into the overall energy efficiency metric (*i.e.,* creating an integrated metric) for air cleaners. 87 FR 3702, 3710. In particular, DOE requested comment on its example approach of defining an integrated CADR/W metric, in which the denominator would represent a weighted average of the power consumption associated with active mode, standby mode, and off mode, weighted by the amount of time spent in each mode. *Id.*

The Joint Commenters stated that it is technically feasible to integrate standby mode and off mode energy consumption into the overall energy efficiency metric and intend to propose a method to do so in the future. (Joint Commenters, No. 8 at p. 4)

Blueair commented that CADR/W was the appropriate metric to determine air cleaner efficiency as a function of the unit's performance output. (Blueair, No. 11 at pp. 2–4) Trane commented that the integrated CADR/W metric is appropriate and stated that additional metrics should be considered as well, such as noise thresholds to avoid occupant space disruption and lack of use. (Trane, No. 3 at p. 2) DOE is aware that noise and noise reduction is an important representation for air cleaners; however, DOE has initially determined that noise is unrelated to energy consumption and is therefore not a suitable performance metric for DOE's test procedure.

Synexis stated that CADR/W would not be an effective metric for air cleaners that do not utilize filtration (*e.g.,* air cleaners that destroy microorganisms or particulates) and commented that a metric expressed in square feet per watt would be more representative. (Synexis, No. 9 at p. 6) Synexis also commented that a systemic approach, which accounts for a device's power use, capacity, and environment in which the device is working to improve air quality, should be adopted to evaluate air cleaners. (*Id.* at p. 7)

The CA IOUs commented that an integrated performance metric that appropriately allocates active, standby, and off mode operating hours should be implemented for air cleaners and that it is technically feasible to integrate measures of standby and off mode energy consumption into an overall performance metric for air cleaners. The CA IOUs further commented that DOE should review survey information when allocating hours to active mode and standby modes for the calculation of an IEF. (CA IOUs, No. 10 at p. 8)

DOE's analysis shows that it is technically feasible to integrate active mode and standby mode energy consumption into an overall performance metric for air cleaners. Specifically, active mode and standby mode power consumption can be combined into the AEC metric using the respective estimated annual usage hours. Further, to express air cleaner performance as a function of its power use, DOE's analysis shows that an integrated metric, such as IEF, is technically feasible. This approach is similar to other DOE test procedures, such as room air conditioners and dehumidifiers, which specify a metric that is expressed as space conditioning function provided per unit power. DOE additionally notes that all products included in the scope of the proposed test procedure are those that could remove, destroy, and/or deactivate particulates. Accordingly, a CADR/W metric is appropriate. Additionally, DOE is proposing to include a calculation for representation of room size, in square feet, as discussed in section III.I of this document.

DOE proposes to incorporate by reference Section 7 of AHAM AC–7–2022 Draft, which provides a calculation to determine AEC and IEF for air cleaners as follows:

$$AEC = E_{active} + E_{TLP}$$

$$IEF = \left[\frac{CADR\left(\frac{ft^3}{min}\right)}{\left(AEC\left(\frac{kWh}{year}\right) * \frac{1\ year}{5{,}840\ hours} * \frac{1000\ Wh}{1\ kWh}\right)}\right]$$

where,

$CADR = PM_{2.5}$ Clean air delivery rate from the combined smoke and dust test [cfm]
E_{active} = air cleaner active mode test energy consumption (in kWh per year).
E_{TLP} = low power mode annual energy consumption (expressed in kWh per year).

DOE requests comment on its proposal to reference Section 7 of AHAM AC–7–2022 Draft for the AEC and IEF calculations. Should AHAM AC–7–2022 Draft specify a different method to calculate AEC and/or IEF, DOE requests comment on the new methodology, the reasons for adopting this new methodology, and the impact, if any, of using the new methodology compared to the equations proposed in this document.

I. Representations

DOE is aware that air cleaner manufacturers typically include several representations in marketing materials for their air cleaner models (*e.g.,* smoke CADR, dust CADR, pollen CADR, CADR/W, room size, *etc.*) DOE has observed that room size is represented in different ways among various models and different values of suitable room sizes may be specified even for the same model. As an illustrative example, DOE identified a model that is marketed for a large room up to 912 square feet, when completing one air change per hour and taking up to 60 minutes to clean air, while the same air cleaner is also represented as being suitable for a room size of 190 square feet with 4.8 air changes per hour and taking about 12.5 minutes to clean air. Further, this unit is rated in the AHAM Verifide [30] program as being applicable for a room size of 190 square feet. It is unlikely that the acceptable room size for an air cleaner of a given capacity can be increased proportionally, potentially to infinity, in such a manner, without having an impact on the cleaning performance of the air cleaner.

Room size would strongly impact the capacity of the air cleaner that would be required to clean the air in the desired room. For instance, if the air cleaner is too small compared to the size of the room it is being used in, it will be ineffective, thus providing low efficiency. Conversely, if an air cleaner is too big for the room that it is operated in, it will clean the air very quickly and still continue operating, leading to wasted energy use. Therefore, it is important that an air cleaner be selected such that its capacity (expressed in terms of its CADR) is appropriate for the size of the room that it is intended to be used in. Additionally, for any air cleaner, the represented values of CADR and IEF are inherently a function of the room size that the unit is expected to operate in; *i.e.,* the represented CADR value is inherently a function of the test chamber size, number of air exchanges provided, and the initial concentration of the contaminant. Accordingly, DOE considers room size an important metric that must be represented accurately and consistently to provide meaningful information to consumers.

Section 8.6 and Annex E of AHAM AC–1–2020 specify a calculation for the effective room size based on standard construction criteria for rooms and a history of the natural decay rate of small particles as determined for cigarette smoke. Specifically, the room size calculation is based on the ability of the air cleaner to reduce the concentration of particles, expressed in CADR, in a room at steady-state to a new steady-state concentration that is 80 percent less than the original when the air cleaner is operating. The calculation includes additional assumptions such as a mixing factor equal to 1.0, an air exchange rate of 1 per hour, a cigarette smoke particle natural decay equal to the average background natural decay (from statistical study), a ceiling height of 8 ft, and a cigarette smoke particle generation or influx rate such that a cigarette smoke particle concentration of 1 is maintained at the initial steady state. Based on its estimations, AHAM AC–1–2020 specifies that the effective room size, in square feet, that can be serviced by an air cleaner is 1.55 times the smoke CADR value of the air cleaner.

DOE is proposing to include this calculation as a represented value for room size. Specifically, DOE is proposing to include in 10 CFR 429.67 that the effective room size be calculated as the product of 1.55 and the basic model's represented value of smoke CADR. DOE further proposes that this represented value of effective room size, in square feet, be rounded to the nearest whole number.

While DOE is proposing to align with AHAM AC–1–2020 to specify that the effective room size be calculated from smoke CADR, DOE welcomes comment on if it should consider using $PM_{2.5}$ CADR, or a different CADR value, instead.

DOE requests comment on its proposal to include a calculation from AHAM AC–1–2020 for the effective room size that can be serviced by an air cleaner. DOE requests comment on whether it is appropriate to use smoke CADR as the metric to calculate effective room size or if it should be based on $PM_{2.5}$ CADR instead. If stakeholders indicate the use of $PM_{2.5}$ CADR, DOE requests comment on whether multiplying $PM_{2.5}$ CADR by 1.55 to determine effective room size in square feet is appropriate or if a different constant would need to be used instead.

J. Sampling Plan

DOE is proposing the following sampling plan and rounding requirements applicable to any representations of energy consumption or energy efficiency of air cleaners. The sampling requirements would be included in the proposed 10 CFR 429.67. Specifically, DOE is proposing that the general sampling requirements of 10 CFR 429.11 for selecting units to be tested be applicable to air cleaners. In addition, DOE is proposing that for each air cleaner basic model, a sufficient sample size must be randomly selected to ensure that a representative value of energy consumption for a basic model is greater than or equal to the higher of the mean of the sample or upper 95 percent confidence limit (''UCL'') of the true mean divided by 1.10. For IEF or other measure of energy consumption where a higher value is preferable to the consumer, the representative value shall be less than or equal to the lower of the mean of the sample or the lower 95 percent confidence limit (''LCL'') of the true mean divided by 0.90. The mean, UCL, and LCL are calculated as follows:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

$$LCL = \bar{x} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

Where:
$\bar{x}$ is the sample mean;
n is the number of units in the test sample;
x_i is the ith sample;
s is the sample standard deviation; and
$t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with n–1 degrees of freedom.

This proposed sampling plan for air cleaners is consistent with sampling plans already established for portable

[30] AHAM Verifide. *https://ahamverifide.org/directory-of-air-cleaners/.*

air conditioners,[31] dehumidifiers [32] and other similar products that are portable and/or provide space conditioning functionality.

DOE also proposes that all calculations be performed with the unrounded measured values, and that representations of pollen CADR, smoke CADR, dust CADR, and $PM_{2.5}$ CADR values of a basic model be calculated as the mean of the CADR for each tested unit of the basic model, rounded to the nearest whole number. DOE further proposes that AEC be rounded to the nearest 0.1 kWh/year and the IEF be rounded to the nearest 0.1 CADR/W. As noted previously, DOE also proposed that the effective room size be rounded to the nearest whole number. DOE notes that these rounding instructions would be included in the proposed sampling plan for air cleaners.

As discussed, manufacturers would not be required to test according to the DOE test procedure until such time as compliance is required with energy conservation standards for air cleaners, should DOE establish such standards. Were DOE to establish test procedures as proposed, manufacturers choosing to make voluntary representations would be required to test the subject air cleaner according to the established test procedure, and any such representations would have to fairly disclose the results of such testing.

DOE is not proposing any certification or reporting requirements for air cleaners at this time. DOE will propose certification requirements through a separate rulemaking in the future.

DOE seeks comment on the proposed sampling plan and rounding requirements for smoke CADR, dust CADR, $PM_{2.5}$ CADR, AEC, and IEF.

K. Test Procedure Costs and Harmonization

1. Test Procedure Costs and Impact

EPCA requires that test procedures proposed by DOE not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE proposes to reference industry standards AHAM AC–7–2022 Draft, AHAM AC–1–2020, and IEC 62301 Ed. 2.0 to measure pollen CADR, smoke CADR, dust CADR, and active mode and standby mode power consumption. DOE also proposes to use these measured values to calculate $PM_{2.5}$ CADR, AEC, and IEF as specified in AHAM AC–7–2022 Draft and effective room size as specified in AHAM AC–1–2020. The following paragraphs discuss DOE's evaluation of estimated costs associated with this proposal.

Based on quotes from third-party laboratories, DOE estimates average testing costs to be approximately $3,000 to test one unit according to AHAM AC–1–2020 at such a laboratory. These costs would include the tests to determine pollen CADR, smoke CADR, dust CADR, active mode power, and standby mode power. DOE typically requires at least two units to be tested for each basic model. Therefore, DOE estimates that manufacturers would incur testing costs of approximately $6,000 per basic model (because of the minimum sample size of two units, as specified in 10 CFR 429.11(b)).

DOE requests comment on its initial determination of the costs for testing according to the proposed new air cleaner test procedure. DOE also requests comment on the potential impact to manufacturers from the proposed new air cleaner test procedure.

2. Harmonization With Industry Standards

DOE's established practice is to adopt relevant industry standards as DOE test procedures unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that product during a representative average use cycle or period of use. Section 8 of appendix A of 10 CFR part 430 subpart C. In cases where the industry standard does not meet EPCA statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards as the DOE test procedure.

The test procedure for air cleaners at the proposed new appendix FF references AHAM AC–7–2022 Draft, which specifies the methods of measurement for active mode power consumption of conventional room air cleaners, and IEC 62301 Ed. 2.0, which is referenced in AHAM AC–7–2022 Draft for the measurement of standby mode power consumption. Proposed new appendix FF also references AHAM AC–1–2020, which specifies the methods to determine smoke CADR and dust CADR and is also referenced in AHAM AC–7–2022 Draft to specify the test chamber setup requirements. AHAM AC–7–2022 Draft specifies definitions, test setup, instrumentation, test methods for the measurement of active mode and standby mode power consumption, and calculation of AEC and IEF. The industry standards DOE proposes to incorporate by reference are discussed in further detail in section IV.N of this document.

DOE requests comments on the benefits and burdens of referencing the identified industry standards in the proposed new test procedure for air cleaners.

L. Compliance Date

EPCA prescribes that, if DOE amends a test procedure, all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with that amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2))

If DOE were to publish a test procedure, EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing

[31] 10 CFR 429.62.

[32] 10 CFR 429.36.

information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action does not constitute a ''significant regulatory action'' under section 3(f) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

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

The following sections detail DOE's IRFA for this test procedure rulemaking.

1. Description of Why Action is Being Considered

Currently, no energy conservation standards or test procedures are prescribed by DOE for air cleaners. On July 15, 2022, DOE published the July 2022 Final Determination in which it determined that air cleaners qualify as a ''covered product'' under EPCA. 87 FR 42297. DOE determined in the July 2022 Final Determination that coverage of air cleaners is necessary or appropriate to carry out the purposes of EPCA. Accordingly, air cleaners are included in the list of ''covered products'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292)(a)(20)) In this NOPR, DOE proposes to establish a new test procedure for air cleaners that would include methods to (1) measure the performance of the covered product and (2) use the measured results to calculate an IEF to represent the energy efficiency of an air cleaner.

2. Objective of, and Legal Basis for, Rule

EPCA, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [33] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain products, referred to as ''covered products.'' [34] In addition to specifying a list of consumer products that are covered products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products.

3. Description and Estimate of Small Entities Regulated

DOE uses the Small Business Administration (''SBA'') small business size standards to determine whether manufacturers qualify as ''small businesses,'' which are listed by the North American Industry Classification System (''NAICS''). The SBA considers a business entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specific in 13 CFR part 121.

Air cleaner manufacturers, who produce the products covered by this rulemaking, are classified under NAICS code 335210: ''Small Electrical Appliance Manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer for an entity to be considered a small business for this category.[35] This employee threshold includes all employees in a business's parent company and any other subsidiaries.

DOE conducted a focused inquiry into small business manufacturers of the products covered by this rulemaking. DOE reviewed AHAM's database of Certified Room Air Cleaners,[36] ENERGY STAR's data set of Certified Air Purifiers (Cleaners),[37] and retailer websites to create a list of companies that manufacture or import the products covered by this proposal. DOE then consulted other publicly available data, such as manufacturer specifications and product literature, import/export logs (*e.g.,* bills of lading from Panjiva,) [38] and model numbers, to identify original equipment manufacturers (''OEMs'') of the products covered by this proposed rulemaking. DOE further relied on public sources and subscription-based market research tools (*e.g.,* Dun & Bradstreet reports) [39] to determine company location, headcount, and annual revenue. DOE screened out companies that do not offer products covered by this proposed rulemaking, do not meet the SBA's definition of a ''small business,'' or are foreign-owned and operated.

DOE initially identified 31 OEMs offering covered air cleaners for the U.S. market. Of the 31 OEMs identified, DOE estimates that five qualify as small domestic OEMs.

4. Description and Estimate of Compliance Requirements

In this NOPR, DOE proposes to establish a new test procedure for air cleaners at appendix FF. DOE proposes to incorporate by reference in part 430 the industry standards AHAM AC–7–2022 Draft, AHAM AC–1–2020, and IEC 62301 Ed. 2.0. Specifically, DOE proposes to specify the following provisions from within the referenced industry standards:

(1) From AHAM AC–7–2022 Draft, the following items:

(a) Definition of ''conventional room air cleaners'' in 10 CFR 430.2, which would be used to specify the scope of the air cleaners test procedure in the proposed new appendix FF;

(b) Definitions of terms that are relevant to the test procedure;

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

[34] The enumerated list of covered products is at 42 U.S.C. 6292(a)(1)–(19).

[35] U.S. Small Business Administration. Table of Size Standards (Effective July 14, 2022). Available at: *www.sba.gov/document/support-table-size-standards* (Last accessed September 1, 2022).

[36] Association of Home Appliance Manufacturers. *Certified Room Air Cleaners.* Available at: *www.ahamdir.com/room-air-cleaners/* (Last accessed January 24, 2022).

[37] Energy Star. *ENERGY STAR Certified Air Purifiers (Cleaners).* Available at: *www.energystar.gov/productfinder/product/certified-room-air-cleaners/results* (Last accessed May 31, 2022).

[38] Panjiva Supply Chain Intelligence is available at: *panjiva.com/import-export/United-States.* (Last accessed July 8, 2022).

[39] The Dun & Bradstreet Hoovers subscription login is available online at: *app.dnbhoovers.com/.* (Last accessed July 8, 2022).

(c) Test setup requirements for electrical supply and test chamber, which additionally include a reference to AHAM AC–1–2020;

(d) Instrumentation requirements for power measuring instruments and temperature and relative humidity measuring devices;

(e) Active mode and standby mode power measurements; the standby mode power measurement method additionally includes a reference to IEC 62301 Ed. 2.0 for the test conduct; and

(f) Calculations for $PM_{2.5}$ CADR, AEC, and IEF.

(2) From AHAM AC–1–2020, test methods for determining the pollen CADR, smoke CADR, and dust CADR, calculation of effective room size, and test chamber construction and equipment.

This NOPR also proposes requirements regarding the sampling plan and representations for air cleaners at 10 CFR 429.67. DOE also proposes rounding requirements for the measured and calculated values of the air cleaners test procedure.

Were the proposed test procedure and associated provisions made final, manufacturers would not be required to test according to the DOE test procedure until such time as compliance is required with energy conservation standards for air cleaners, should DOE establish such standards. Were DOE to establish test procedures as proposed, manufacturers choosing to make voluntary representations would be required to test covered air cleaners according to the established test procedure, and any such representations would have to fairly disclose the results of such testing.

Air cleaner manufacturers, including small manufacturers, would not be required to test according to the proposed test procedure (other than making voluntary representations of energy consumption) until the compliance date of any energy conservation standards for products in these categories. As detailed in section III.K.1 of this document, DOE estimated that it would cost approximately $3,000 to test one unit of a basic model to obtain all the necessary measurements proposed in this document.[40] DOE typically requires at least two units to be tested for each basic model. Therefore, DOE estimates that manufacturers would incur testing costs of approximately $6,000 per basic model, should DOE establish the test procedure as proposed and establish energy conservation standards for air cleaners.

As previously discussed, DOE initially identified five domestic OEMs that qualify as ''small businesses.'' Based on a review of publicly available model databases and individual company product catalogues, DOE estimated the number of air cleaners covered by this test procedure proposal for each small business. DOE estimated the number of air cleaners covered by this test procedure proposal for each small business ranges from two unique basic covered models to 10 unique basic covered models, depending on the specific small business. As previously detailed, DOE estimated it would cost air cleaner manufacturers approximately $6,000 per basic model to be tested at a third-party laboratory facility. Therefore, DOE estimated that a small business could incur anywhere from $12,000 to $60,000, should DOE adopt the test procedure as proposed and establish energy conservation standards.

DOE used subscription-based market research tools[41] to estimate the annual revenue for each potential small business. DOE used these annual revenue estimates in addition to the number of air cleaner models covered by this proposal to estimate the potential impact on small businesses, should energy conservation standards be adopted in the future. Table IV.1 displays the potential testing costs these small businesses would incur at the time of compliance of any adopted energy conservation standards. DOE would reassess and incorporate the potential testing burden on small businesses at the NOPR stage of any proposed energy conservation standards for air cleaners.

TABLE IV.1—ESTIMATED POTENTIAL TESTING BURDEN ON SMALL BUSINESSES, BY ANNUAL REVENUE

Small business	Estimated annual revenue ($)	Number of models	One-time testing cost ($)	Testing cost as a percent of annual revenue (%)
Manufacturer A	1,000,000	10	60,000	6.0
Manufacturer B	1,300,000	10	60,000	4.6
Manufacturer C	500,000	2	12,000	2.4
Manufacturer D	3,600,000	5	30,000	0.8
Manufacturer E	19,600,000	4	24,000	0.1

To the extent that air cleaner manufacturers currently make claims regarding the energy consumption of their models, DOE observed that they typically do so in accordance with ENERGY STAR V. 2.0 Specification, which references AHAM AC–1–2020. Manufacturers currently making voluntary representations of air cleaners would be required to test according to the proposed test procedure beginning 180 days after the final rule, should DOE finalize the proposal.

Based on a review of AHAM's database of Certified Room Air Cleaners and ENERGY STAR's data set of Certified Air Purifiers, DOE identified only one small domestic OEM making claims regarding the energy consumption of their air cleaner models. Based on Dun & Bradstreet reports, this small domestic OEM has an estimated annual revenue of approximately $3.6 million. As previously discussed, DOE estimates a per-basic model test cost of $6,000. Therefore, DOE estimates that the potential costs associated with re-testing would be minimal, accounting for approximately 0.5 percent of annual revenue for this small business.[42]

DOE requests comments on its finding that there are five small, domestic OEMs of air cleaners. DOE also requests comment on its findings that costs are small relative to annual revenue for

[40] Approximately $3,000 to test each air cleaner at a third-party laboratory equipped with the test chamber to determine pollen CADR, smoke CADR, dust CADR, active mode power and standby mode power.

[41] The Dun & Bradstreet Hoovers subscription login is available online at: *app.dnbhoovers.com/*. (Last accessed July 8, 2022).

[42] The small domestic OEM currently makes claims regarding the energy consumption of three air cleaner models. (3 × $6,000)/$3.6 million = 0.5% of its annual revenue.

small manufacturers that currently make voluntary representations.

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

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

6. Significant Alternatives to the Rule

DOE considered alternative test methods for air cleaners and tentatively determined that there are no better alternatives than the procedures proposed in this NOPR. DOE expects the proposals outlined would have no impact before an amended energy conservation standard is adopted, unless manufacturers make representations regarding energy use or efficiency. DOE examined relevant industry test standards, and the Department incorporated these standards in the proposed test procedure whenever appropriate. Specifically, DOE proposes to incorporate by reference the industry standards AHAM AC–7–2022 Draft, AHAM AC–1–2020, and IEC 62301 Ed. 2.0.

Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details for additional details.

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. (*See generally* 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOE is not proposing any certification or reporting requirements for air cleaners in this NOPR. Instead, DOE may consider proposals to establish certification requirements and reporting for air cleaners under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this NOPR, DOE proposes a new test procedure that it expects will be used to develop and implement future energy conservation standards for air cleaners. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, appendix A to subpart D, A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a

proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

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

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

The proposed regulatory action to establish a test procedure for measuring the energy efficiency of air cleaners is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

The proposed test procedure for air cleaners would incorporate testing methods contained in certain sections of the following commercial standards: AHAM AC–7–2022 Draft, AHAM AC–1–2020, and IEC 62301 Ed. 2.0. DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with both the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition, prior to prescribing a final rule.

M. Description of Materials Incorporated by Reference

AHAM AC–7–2022 Draft is a voluntary industry-accepted test procedure that measures active mode and standby mode power consumption of air cleaners. The proposed test procedure in this NOPR generally references AHAM AC–7–2022 Draft including provisions for: definitions, test conditions, instrumentation, active mode and standby mode power measurement, and calculation of $PM_{2.5}$ CADR, AEC, and IEF.

AHAM AC–1–2020 is a voluntary industry-accepted test procedure that provides test methods to measure the relative reduction of particulate matter, including smoke and dust, suspended in the air in a specified test chamber when an air cleaner is in operation. The proposed test procedure in this NOPR generally references Sections 5 and 6 of AHAM AC–1–2020 to determine the smoke and dust CADR of the air cleaner test unit. AHAM AC–1–2020 is also

referenced in several sections of AHAM AC–7–2022 Draft that DOE proposes to reference in its test procedure.

These standards are reasonably available from AHAM (*www.aham.org/AHAM/AuxStore*).

IEC 62301 Ed. 2.0 is an international standard that specifies methods of measurement of electrical power consumption of household appliances in standby mode(s) and other low power modes, as applicable. The proposed new appendix FF references AHAM AC–7–2022 Draft, to specify the standby mode power consumption test method, which further references IEC 62301 Ed. 2.0 for the measurement of air cleaners standby power consumption. IEC 62301 Ed. 2.0 is reasonably available from IEC (*webstore.ansi.org*).

ASTM E741–11(2017) specifies techniques using tracer gas dilution for determining a single zone's air change with the outdoors, as induced by weather conditions and by mechanical ventilation. The proposed new appendix FF references AHAM AC–7–2022 Draft to specify the test chamber air exchange rate, which further references ASTM E741–11(2017) as the method to measure test chamber air exchange rate. ASTM E741–11(2017) is reasonably available from ASTM (*www.astm.org*).

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar meeting are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar, it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=77&action=viewlive.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this document, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the webinar. Such persons may submit requests to speak by email to: *ApplianceStandardsQuestions@ee.doe.gov.* Persons who wish to speak should include with their request a computer file in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons selected to make an oral presentation to submit an advance copy of their statements at least two weeks before the webinar. At its discretion, DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Office. As necessary, requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of the Webinar

DOE will designate a DOE official to preside at the webinar and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the webinar. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the webinar and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The webinar will be conducted in an informal, conference style. DOE will provide a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this proposed rulemaking. The official conducting the webinar/public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the webinar.

A transcript of the webinar will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this document and will be accessible on the DOE website. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule.[43] Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

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

[43] DOE has historically provided a 75-day comment period for test procedure NOPRs pursuant to the North American Free Trade Agreement, U.S.-Canada-Mexico (''NAFTA''), Dec. 17, 1992, 32 I.L.M. 289 (1993); the North American Free Trade Agreement Implementation Act, Public Law 103–182, 107 Stat. 2057 (1993) (codified as amended at 10 U.S.C.A. 2576) (1993) (''NAFTA Implementation Act''); and Executive Order 12889, ''Implementation of the North American Free Trade Agreement,'' 58 FR 69681 (Dec. 30, 1993). However, on July 1, 2020, the Agreement between the United States of America, the United Mexican States, and the United Canadian States (''USMCA''), Nov. 30, 2018, 134 Stat. 11 (*i.e.,* the successor to NAFTA), went into effect, and Congress's action in replacing NAFTA through the USMCA Implementation Act, 19 U.S.C. 4501 *et seq.* (2020), implies the repeal of E.O. 12889 and its 75-day comment period requirement for technical regulations. Thus, the controlling laws are EPCA and the USMCA Implementation Act. Consistent with EPCA's public comment period requirements for consumer products, the USMCA only requires a minimum comment period of 60 days. Consequently, DOE now provides a 60-day public comment period for test procedure NOPRs.

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

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

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

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

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

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

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

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on its proposal to define the scope of the proposed air cleaner test procedure as those air cleaners that meet the definition of a conventional room air cleaner as defined in Section 2.1.1 of AHAM AC–7–2022 Draft.

(2) DOE requests comment on its proposal to reference Sections 2.1.1, 2.1.3.1, and 2.1.3.2 of AHAM AC–7–2022 Draft in 10 CFR 430.2 for the definitions of conventional room air cleaner, portable conventional room air cleaner, and fixed conventional room air cleaner, respectively.

(3) DOE requests comment on whether it should reference Section 2 of AHAM AC–1–2020, which specifies that the standard is applicable for air cleaners only within rated CADR ranges of 10 to 600 cfm for dust and cigarette smoke. Additionally, DOE requests comment on whether this CADR range should be specified for $PM_{2.5}$ CADR instead of for dust CADR and smoke CADR.

(4) DOE requests comment on its proposal to adopt the substantive provisions of AHAM AC–7–2022 Draft with certain modifications.

(5) DOE requests comment on its proposal to incorporate by reference AHAM AC–1–2020, which is referenced in AHAM AC–7–2022 Draft, as well as to specify provisions related to the measurement of pollen CADR, smoke CADR, and dust CADR.

(6) DOE also requests comment on whether it should consider specifying that KCl is an allowable alternate to cigarette smoke in the measurement of smoke CADR, even if AHAM AC–1–2022 Draft is not published by the time DOE publishes its final rule. DOE requests data and information on the implications of using cigarette smoke and KCl interchangeably when performing air cleaner performance tests. DOE requests data and information on how a CADR value obtained using KCl compares to the CADR value obtained using cigarette smoke.

(7) DOE requests comment on its proposal to reference IEC 62301 Ed. 2.0, which is referenced in AHAM AC–7–2022 Draft for the instrumentation and testing provisions for measuring standby mode power consumption.

(8) DOE requests comment on its proposal to reference ASTM E741–11(2017), which is referenced in AHAM AC–7–2022 Draft for determining the test chamber air exchange rate.

(9) DOE requests comment on whether the m-CADR value specified in AHAM AC–5–2022 would change, and if so, how, if a different type of microorganism was used for testing from the same general microorganism category (*e.g.,* using MS–2 vs. Phi X 174 for bacteriophage testing).

(10) DOE requests comment on whether measurements taken every 2 minutes for a duration of 10 minutes, as specified in Section 7.3 of AHAM AC–5–2022, is sufficient to determine m-CADR. DOE also requests comment on the duration for which a sample must be collected for each measurement point.

(11) Additionally, if stakeholders indicate that operating the test unit for 10 minutes is sufficient, DOE requests comment on whether the natural decay test should also be conducted for only 10 minutes. DOE also requests comment on whether it is reasonable for the natural decay curve for microorganisms to be increasing during the first 10–15 minutes of the test, and if not, how should DOE mitigate this issue.

(12) DOE requests comment on its proposal to include definitions for the aforementioned terms, via reference to AHAM AC–7–2022 Draft, in the proposed new appendix FF. Should the AHAM task force consider any changes to any of these definitions or include definitions for additional terms that would be relevant to DOE's proposed test procedure, DOE requests comment on such changes and the justification for DOE to consider including them in its test procedure for air cleaners.

(13) DOE requests comment on its proposal to reference Section 3.1 of AHAM AC–7–2022 Draft for the electrical supply requirements for active mode and standby mode power measurement.

(14) DOE requests comment on its proposal to reference Section 3.6.1 of AHAM AC–7–2022 Draft for the air cleaner conditioning requirements.

(15) DOE requests comment on whether the 48 hour burn-in time for air cleaners with UV lights is sufficient or if the burn-in time duration should be increased.

(16) DOE requests comment on its proposal to reference Section 3.6.2 of AHAM AC–7–2022 Draft, which references Section 4.6 of AHAM AC–1–2020 for the test unit placement instructions.

(17) DOE also requests comment on whether it should consider including the requirement from IEC 63086–1 that specifies that if the placement of the air cleaner is not specified by the manufacturer and the air cleaner's height is less than 28 inches, then the unit must be tested on the table. Specifically, DOE requests comment on whether the language in AHAM AC–7–2022 Draft which states that, ''if the air cleaner is not a floor model'' is clear to follow, without any ambiguity, or whether a quantitative metric such as unit height would be better to ensure consistent test setup.

(18) DOE also requests comment on whether it should include any placement instructions for air cleaners shipped with casters.

(19) DOE requests comment on its proposal to reference Section 3.6.3 of AHAM AC–7–2022 Draft regarding network connection requirements during active mode and standby mode tests. DOE also requests comment on the impact on repeatability and reproducibility when testing air cleaners with network functionality while connected to a network.

(20) DOE requests comment on whether the software update requirements are adequately specified or whether DOE should explicitly state that software updates must always be executed prior to running the tests.

(21) DOE requests comment on its proposal to reference Sections 3.1 to 3.6 of AHAM AC–7–2022 Draft for the test conditions and setup. Should AHAM AC–7–2022 Draft change any of these requirements between publication of this NOPR and publication of the final version of AHAM AC–7–2022, DOE requests comment on these changes, the reasons for these changes, and the impact of these changes on the overall air cleaners test procedure.

(22) DOE requests comment on its proposal to incorporate by reference Section 4 of AHAM AC–7–2022 Draft regarding instrumentation requirements, including the applicable provisions from relevant sections of IEC 62301 Ed. 2.0. Should AHAM AC–7–2022 Draft change any of these requirements between publication of this NOPR and publication of the final version of AHAM AC–7–2022, DOE requests comment on these changes, the reasons for these changes, and the impact of these changes on the overall air cleaner test procedure.

(23) DOE requests comment on the Joint Stakeholders' recommendation of using dust CADR as calculated in Section 6 of AHAM AC–1–2020 as an alternative for calculating $PM_{2.5}$ CADR. DOE also requests comment on its proposal to allow the same alternative for the smoke CADR value used in the $PM_{2.5}$ CADR calculation.

(24) DOE requests feedback on its proposal to incorporate by reference Section 2.9 of AHAM AC–7–2022 Draft to calculate $PM_{2.5}$ CADR based on measurements of smoke CADR and dust CADR. DOE also requests comment on its proposal to allow the use of smoke CADR and dust CADR calculated according to Sections 5 and 6 of AHAM AC–1–2020.

(25) DOE also requests comment on its proposal to reference Sections 5 and 6 of AHAM AC–1–2020 to specify the test methods for determining smoke CADR and dust CADR, respectively.

(26) DOE requests comment on its proposal to reference Section 5.3 of AHAM AC–7–2022 Draft to test units in maximum performance mode.

(27) DOE requests comment on its proposal to reference Sections 5.4 and 5.5 of AHAM AC–7–2022 Draft to specify the configuration of secondary functions and control functions during active mode testing.

(28) DOE requests comment on its proposal to reference Sections 5.7.1 through 5.7.4 of AHAM AC–7–2022 Draft, which specify methods for measuring active mode power at the same time as the smoke or dust CADR test when the test unit is operating within the chamber and measuring the power consumption during a supplemental power test outside of a test chamber, respectively.

(29) DOE requests comment on its proposal to reference Section 7 of AHAM AC–1–2020 for the pollen CADR measurement test.

(30) DOE requests comment and data on the relationship between the pollen CADR measurement and the energy use of the air cleaner.

(31) DOE requests comment on whether it should reference Section 2 of AHAM AC–1–2020, which specifies that the standard is applicable for air cleaners with pollen CADR of 25 to 450 cfm, for pollen CADR testing.

(32) DOE also requests comment on whether it should specify measurement of active mode power consumption when conducting the pollen CADR measurement test.

(33) DOE requests comment on whether it should consider specifying a pollen CADR/W metric and whether such a metric should be based on active mode power consumption or include energy consumption in both active mode and standby mode.

(34) DOE requests comment on its proposal to reference Section 5.7.4 of AHAM AC–7–2022 Draft, which specifies the calculation of active mode energy consumption using an estimated 5,840 hours per year in active mode.

(35) DOE requests feedback on its proposal to reference Section 6 of AHAM AC–7–2022 Draft to determine annual combined low power mode energy consumption.

(36) DOE requests comment on its proposal to reference Section 7 of AHAM AC–7–2022 Draft for the AEC and IEF calculations. Should AHAM AC–7–2022 Draft specify a different method to calculate AEC and/or IEF, DOE requests comment on the new methodology, the reasons for adopting this new methodology, and the impact, if any, of using the new methodology compared to the equations proposed in this document.

(37) DOE requests comment on its proposal to include a calculation from AHAM AC–1–2020 for the effective room size that can be serviced by an air cleaner. DOE requests comment on whether it is appropriate to use smoke CADR as the metric to calculate effective room size or if it should be based on $PM_{2.5}$ CADR instead. If stakeholders indicate the use of $PM_{2.5}$ CADR, DOE requests comment on whether multiplying $PM_{2.5}$ CADR by 1.55 to determine effective room size in square feet is appropriate or if a

different constant would need to be used instead.

(38) DOE seeks comment on the proposed sampling plan and rounding requirements for smoke CADR, dust CADR, $PM_{2.5}$ CADR, AEC, and IEF.

(39) DOE requests comment on its initial determination of the costs for testing according to the proposed new air cleaner test procedure. DOE also requests comment on the potential impact to manufacturers from the proposed new air cleaner test procedure.

(40) DOE requests comments on the benefits and burdens of referencing the identified industry standards in the proposed new test procedure for air cleaners.

(41) DOE requests comments on its finding that there are five small, domestic OEMs of air cleaners. DOE also requests comment on its findings that costs are small relative to annual revenue for small manufacturers that currently make voluntary representations.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and request for comment.

List of Subjects

10 CFR Part 429

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

10 CFR Part 430

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

Signing Authority

This document of the Department of Energy was signed on September 28, 2022, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 30, 2022.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE is proposing to further amend 10 CFR parts 429 and 430 (as proposed at 87 FR 14622, March 15, 2022) as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317, 28 U.S.C. 2461 note.

§§ 429.64–429.65 [Added and Reserved]

■ 2. Add and reserve §§ 429.64 and 429.65.

■ 3. Add § 429.67 to read as follows:

§ 429.67 Air cleaners.

(a) *Sampling plan for selection of units for testing.* (1) The requirements of § 429.11 are applicable to air cleaners; and

(2) For each basic mode of air cleaners, a sample of sufficient size shall be randomly selected and tested to ensure that—

(i) Any represented value of annual energy consumption or other measure of energy consumption of a basic mode for which consumers would favor lower values shall be greater than or equal to the higher of:

(A) The mean of the sample:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

Where:

$\bar{x}$ is the sample mean;
n is the number of samples; and,
x_i is the ith sample.

Or,

(B) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.10:

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

Where:

$\bar{x}$ is the sample mean;
s is the sample standard deviation;
n is the number of samples; and,
$t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with $n-1$ degrees of freedom (from appendix A).

And

(ii) Any represented value of the integrated energy factor or other measure of energy consumption of a basic mode for which consumers would favor higher values shall be less than or equal to the high:

(A) The mean of the sample:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

Where:

$\bar{x}$ is the sample mean;
n is the number of samples; and,
x_i is the i^{th} sample.

Or,

(B) The lower 95 percent confidence limit (LCL) of the true mean divided by 0.90:

$$LCL = \bar{x} - t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

Where:

$\bar{x}$ is the sample mean;
s is the sample standard deviation;
η is the number of samples; and,
$t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with n-1 degrees of freedom (from appendix A).

And

(3) Any represented value of the pollen, smoke, dust, and $PM_{2.5}$ clean air delivery rate (CADR) of a basic model must be the mean of the CADR for each tested unit of the basic model. Round the mean clean air delivery rate value to the nearest whole number.

(4) Any represented value of the effective room size, in square feet, of a basic model must be calculated as the product of 1.55 and the represented smoke CADR value of the basic model as determined in paragraph (a)(3) of this section. Round the value of the effective room size, in square feet, to the nearest whole number.

(5) Round the value of the annual energy consumption of a basic model to the nearest 0.1 kWh/year.

(6) Round the value of the integrated energy factor of a basic model to the nearest 0.1 CADR/W.

(b) [Reserved]

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

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

■ 5. Amend § 430.2 by adding in alphabetical order the definition for ''Conventional room air cleaner'' to read as follows:

§ 430.2 Definitions.

* * * * *

Conventional room air cleaner means an air cleaner as defined in Section 2.1.1 of AHAM AC–7–2022 Draft (incorporated by reference; see § 430.3). With respect to the term *conventional room air cleaner*—

(1) The term *portable* is as defined in Section 2.1.3.1 of AHAM AC–7–2022 Draft; and

(2) The term *fixed* is as defined in Section 2.1.3.2 of AHAM AC–7–2022 Draft.

* * * * *

■ 6. Section 430.3 is amended by:

a. Redesignating paragraphs (i)(1) through (6) as (i)(3) through (8);

b. Adding new paragraphs (i)(1) and (2) and paragraph (j)(4); and

c. Revising paragraph (p)(7).

The additions and revision read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(i) * * *

(1) ANSI/AHAM AC–1–2020 (''AHAM AC–1–2020''), *Method for Measuring Performance of Portable Household Electric Room Air Cleaners,* approved December 14, 2020; IBR approved for appendix FF to subpart B.

(2) AHAM AC–7–2022 Draft, *Energy Test Method for Consumer Room Air Cleaners,* approved 2022; IBR approved for § 430.2 and appendix FF to subpart B.

* * * * *

(j) * * *

(4) ASTM E741–11 (Reapproved 2017) (''ASTM E741–11(2017)''), *Standard Test Method for Determining Air Change in a Single Zone Means of a Tracer Gas Dilution,* Reapproved September 1, 2017; IBR approved for appendix FF to subpart B.

* * * * *

(p) * * *

(7) IEC 62301, *Household electrical appliances—Measurement of standby power,* Edition 2.0, 2011–01; IBR approved for appendices C1, D1, D2, F, G, H, I, I1, J, J2, N, O, P, Q, U, X, X1, Y, Y1, Z, BB, CC, and FF to subpart B.

* * * * *

■ 7. Amend § 430.23 by adding paragraph (hh) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(hh) *Air Cleaners.* (1) The pollen clean air delivery rate (CADR), smoke CADR, and dust CADR, expressed in cubic feet per minute (cfm), for conventional room air cleaners shall be measured in accordance with section 5 of appendix FF of this subpart.

(2) The $PM_{2.5}$ CADR, expressed in cfm, for conventional room air cleaners, shall be measured in accordance with section 5 of appendix FF of this subpart.

(3) The active mode and standby mode power consumption, expressed in watts, shall be measured in accordance with sections 5 and 6, respectively, of appendix FF of this subpart.

(4) The annual energy consumption, expressed in kilowatt-hours per year, and the integrated energy factor, expressed in CADR per watts (CADR/W), for conventional room air cleaners, shall be measured in accordance with section 7 of appendix FF of this subpart.

(5) The estimated annual operating cost for conventional room air cleaners, expressed in dollars per year, shall be determined by multiplying the following two factors:

(i) The annual energy consumption as calculated in accordance with section 7 of appendix FF of this subpart, and

(ii) A representative average unit cost of electrical energy in dollars per kilowatt-hour as provided by the Secretary, the resulting product then being rounded off to the nearest dollar per year.

■ 8. Appendix FF to subpart B of part 430 is added to read as follows:

Appendix FF to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Air Cleaners

Note: Beginning [*date 180 days after date of publication of a final rule in the* **Federal Register**], any representations made with respect to the energy use or efficiency of air cleaners must be made in accordance with the results of testing pursuant to this appendix.

0. Incorporation by Reference

DOE incorporated by reference in § 430.3 the entire standard for AHAM AC–1–2020, AHAM AC–7–2022 Draft, ASTM E741–11(2017), and IEC 62301. However, only enumerated provisions of AHAM AC–1–2020, AHAM AC–7–2022 Draft, and IEC 62301 apply to this appendix, as follows:

0.1 AHAM AC–1–2020

(a) Sections 4.2 through 4.6 as specified in section 3 of this appendix;

(b) Sections 5 through 7 as specified in section 5 of this appendix;

(c) Section 8.1 as specified in section 5 of this appendix;

(d) Annex A as specified in section 3 of this appendix;

(e) Annex I as specified in section 2 of this appendix.

0.2 AHAM AC–7–2022 Draft

(a) Sections 2.2 and 2.3, sections 2.4.1 through 2.4.2.4, and sections 2.6 through 2.8 as referenced in section 2 of this appendix;

(b) Section 2.9 as referenced in section 2 and section 5.3 of this appendix;

(c) Sections 3.1 through 3.6.3 as specified in section 3 of this appendix;

(d) Section 4, excluding section 4.1.4, as specified in section 4 of this appendix;

(e) Sections 5.3 through 5.7.4 as specified in section 5 of this appendix;

(f) Section 6 as specified in section 6 of this appendix;

(g) Section 7 as specified in section 7 of this appendix.

0.3 IEC 62301: Household Electrical Appliances—Measurement of Standby Power

(a) Sections 4.4.1 through 4.4.3 as specified in section 4 of this appendix;

(b) Section 5.3 as specified in section 6 of this appendix.

1. Scope of Coverage

This appendix contains the test requirements to measure the energy performance of a conventional room air cleaner, as defined at § 430.2.

2. Definitions

The definitions in Sections 2.2, 2.3, 2.4.1 through 2.4.2.4, 2.6 through 2.8, and 2.9 of AHAM AC–7–2022 Draft apply to this test procedure, including the applicable provisions of AHAM AC–1–2020 as referenced in Section 2.9 of AHAM AC–7–2022 Draft.

3. Test Conditions

Testing conditions shall be as specified in Sections 3.1 through 3.6.3 of AHAM AC–7–2022 Draft, including the applicable provisions of AHAM AC–1–2020 as referenced in Sections 3.2.1, 3.3, 3.4, 3.5, and 3.6.2 of AHAM AC–7–2022 Draft and the applicable provisions of ASTM E 741–11(2017) as referenced in Section 3.3 of AHAM AC–7–2022 Draft.

4. Instrumentation

Test instruments shall be as specified in Section 4 of AHAM AC–7–2022 Draft, including the applicable provisions of IEC 62301 Ed. 2.0, except Section 4.1.4 of AHAM AC–7–2022 Draft.

5. Active Mode CADR and Power Measurement

Measurement of smoke CADR, dust CADR, and pollen CADR shall be as specified in Sections 5 through 7 of AHAM AC–1–2020, respectively. Measurement of active mode power shall be as specified in Sections 5.3 through 5.7.4 of AHAM AC–7–2022 Draft, including the applicable provisions of AHAM AC–1–2020 as referenced in Section 5.7.1 of AHAM AC–7–2022 Draft. Additionally, the following requirement is also applicable:

5.1. *Calculation of $PM_{2.5}$ CADR.*

5.1.1. $PM_{2.5}$ CADR is calculated as specified in Section 2.9 of AHAM AC–7–2022 Draft.

5.1.2. $PM_{2.5}$ CADR may alternately be calculated using the smoke CADR and dust CADR values determined according to

Sections 5 and 6, respectively, of AHAM AC–1–2020, according to the following equation:

$$PM_{2.5}CADR = \sqrt{Smoke\ CADR\ (0.1 - 1\ \mu m) \times Dust\ CADR\ (0.5 - 3\ \mu m)}$$

6. Standby Mode Power Measurement

Standby mode power consumption shall be measured as specified in Section 6 of AHAM AC–7–2022 Draft, including the applicable provisions of IEC 62301 Ed. 2.0.

7. Total Energy Calculation

Annual energy consumption, expressed in kilowatt-hours per year, and integrated energy factor, expressed in CADR per watt, shall be calculated as specified in Section 7 of AHAM AC–7–2022 Draft.

[FR Doc. 2022–21698 Filed 10–17–22; 8:45 am]

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Part VI

Department of Energy

10 CFR Parts 429 and 430
Energy Conservation Program: Test Procedure for Portable Electric Spas; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[EERE–2022–BT–TP–0024]

RIN 1904–AF35

Energy Conservation Program: Test Procedure for Portable Electric Spas

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

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (''DOE'') proposes to establish definitions, a test procedure, and sampling requirements for portable electric spas. Currently, portable electric spas are not subject to DOE test procedures or energy conservation standards. The proposed test method references the relevant industry test standard. DOE is seeking comment from interested parties on the proposals within the notice of proposed rulemaking (''NOPR'').

DATES: DOE will accept comments, data, and information regarding this proposal no later than December 19, 2022. See section V, ''Public Participation,'' for details. DOE will hold a webinar on Thursday, November 17, 2022, from 1:00 p.m. to 4:00 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2022–BT–TP–0024. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2022–BT–TP–0024, by any of the following methods:

Email: PortableElecSpas2022TP0024@ee.doe.gov. Include the docket number EERE–2022–BT–TP–0024 in the subject line of the message.

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

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

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

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

The docket web page can be found at *www.regulations.gov/docket/EERE-2022-BT-TP-0024.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–9870. Email *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Kristin Koernig, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–3593. Email: *Kristin.koernig@hq.doe.gov.*

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

SUPPLEMENTARY INFORMATION: DOE proposes to incorporate by reference the following industry standard into 10 CFR part 430:

ANSI/APSP/ICC–14 2019 ''American National Standard for Portable Electric Spa Energy Efficiency''; approved November 19, 2019.

Copies of ANSI/APSP/ICC–14 2019 can be obtained from the Pool & Hot Tub Alliance, 2111 Eisenhower Avenue, Suite 500, Alexandria, VA 22314, or by going to *www.phta.org.*

See section IV.M of this document for a further discussion of this standard.

Table of Contents

I. Authority and Background

Portable electric spas are factory-built hot tubs or spas that are intended for the immersion of people in heated, temperature-controlled water that is circulated in a closed system. Currently, portable electric spas are not subject to DOE test procedures or energy conservation standards.

On September 2, 2022, DOE published a final determination (''September 2022 Final Determination'') in which it determined that portable electric spas qualify as a ''covered product'' under the Energy Policy and Conservation Act, as amended (''EPCA'').[1] 87 FR 54123. In the September 2022 Final Determination, DOE determined that coverage of portable electric spas is necessary or appropriate to carry out the purposes of EPCA, and that the average U.S. household energy use for portable electric spas is likely to exceed 100 kilowatt-hours (''kWh'') per year. *Id.* at 87 FR 54127.

Accordingly, portable electric spas are now included in the list of ''covered products'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292(a)(20))

The following sections discuss DOE's authority to establish a test procedure for portable electric spas and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain products, referred to as ''covered products.'' [3] In addition to specifying a list of consumer products that are covered products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products. To classify a consumer product as a covered product, the Secretary must determine that classifying the consumer product as a covered product is necessary or appropriate to carry out the purpose of EPCA and the average annual per household [4] use by such a product is likely to exceed 100 kWh per year. (42 U.S.C. 6292(b)(1))

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

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making other representations about the efficiency of those consumer products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

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

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. Specifically, EPCA provides that DOE may, in accordance with certain requirements, prescribe test procedures for any consumer product classified as a covered product under section 6292(b). (42 U.S.C. 6293(b)(1)(B)) EPCA requires that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already account for and incorporate standby and off mode energy consumption or such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)(i)–(ii)) If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (''IEC'') Standard 62301 [5] and IEC Standard 62087,[6] as applicable. (42 U.S.C. 6295(gg)(2)(A))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed, the Secretary shall promptly publish in the **Federal Register** a proposed test procedure and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such a procedure. The comment period on a proposed rule to prescribe a test procedure shall be at least 60 days and no more than 270 days. In prescribing a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)) In prescribing a new test procedure, DOE must follow the statutory criteria of 42 U.S.C. 6293(b)(3)–(4) and follow the

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

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

[3] The enumerated list of covered products is at 42 U.S.C. 6292(a)(1)–(19).

[4] The definition for ''household'' is found at 10 CFR 430.2.

[5] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[6] IEC 62087, *Audio, video and related equipment—Methods of measurement for power consumption* (Edition 1.0, Parts 1–6: 2015, Part 7: 2018).

rulemaking procedures set out in 42 U.S.C. 6293(b)(2).

DOE is publishing this NOPR in accordance with the statutory authority in EPCA. DOE has determined that it was not necessary to do an early assessment request for information prior to initiating this NOPR, as the requirement in section 8(a) of 10 CFR part 430, subpart C, appendix A (''appendix A'') to do an early assessment applies only when DOE is considering amending a test procedure, not establishing one. In this NOPR, DOE is proposing to establish a new test procedure for portable electric spas. Thus, an early assessment as to whether to move forward with a proposal to establish a test procedure for portable electric spas is not necessary.

B. Background

DOE has not previously conducted a test procedure rulemaking for portable electric spas. DOE published in the **Federal Register** a notification of proposed determination (''NOPD'') of coverage on February 16, 2022 (''February 2022 NOPD''), and published the September 2022 Final Determination, in which it determined that portable electric spas satisfy the provisions of 42 U.S.C. 6292(b)(1) to be classified as a covered product, on September 2, 2022. 87 FR 8745; 87 FR 54123.

Although portable electric spas are not currently subject to Federal energy conservation standards under EPCA, several states have adopted standards—based on an industry-developed test procedure or a similar state test procedure—including California, Arizona, Colorado, Connecticut, Maine, Massachusetts, Nevada, Oregon, Rhode Island, Vermont, and Washington.[7]

C. Deviation From Appendix A

In accordance with section 3(a) of appendix A, DOE notes that it is deviating from the provision in appendix A that DOE will finalize coverage for a product/equipment at least 180 days prior to publication of a proposed rule to establish a test procedure. 10 CFR part 430, subpart C, appendix A, section 5(c). DOE is opting to deviate from this provision because of: (1) the availability of an industry standard for testing portable electric spas that is already in use by State efficiency programs; and (2) general support for development of a DOE test procedure based on this industry test method as expressed by commenters in response to the February 2022 NOPD.

II. Synopsis of the Notice of Proposed Rulemaking

In this NOPR, DOE proposes to establish a test procedure for measuring the energy use of portable electric spas in a new appendix GG to subpart B of 10 CFR part 430 (''appendix GG''). DOE proposes to incorporate the applicable industry test method published by the Pool and Hot Tub Alliance (''PHTA'')[8] in partnership with the International Code Council (''ICC''), and approved by the American National Standards Institute (''ANSI''), ANSI/APSP/ICC–14 2019, ''American National Standard for Portable Electric Spa Energy Efficiency'' (''ANSI/APSP/ICC–14 2019'') with certain exceptions and additions. The proposed test method produces a measure of the energy consumption of portable electric spas that represents the average power consumed by the spa, normalized to a standard temperature difference between the ambient air and the water in the spa, while the cover is on and the product is operating in its default operation mode. As discussed further in section III.C.3 of this NOPR, DOE proposes to refer to this power use metric as ''standby loss.''

DOE has reviewed the relevant sections of ANSI/APSP/ICC–14 2019 and has tentatively determined that ANSI/APSP/ICC–14 2019, in conjunction with the additional test methods and calculations proposed in this test procedure, would produce test results that reflect the energy efficiency, energy use, or estimated operating costs of a portable electric spa during a representative average use cycle. (42 U.S.C. 6314(a)(2))

DOE also has reviewed the burdens associated with conducting the proposed portable electric spa test procedure and, based on the results of such analysis, has tentatively determined that the proposed test procedure would not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) DOE's analysis of the burdens associated with the proposed test procedure is presented in section III.G.1 of this document.

This NOPR also proposes definitions for certain categories of portable electric spas in appendix GG and proposes requirements regarding the sampling plan and representations for portable electric spas in 10 CFR part 429.

The proposals in the NOPR are summarized in Table II.1 and discussed further in section III of this NOPR.

TABLE II.1 SUMMARY OF PROPOSALS IN THIS NOPR

Topic	Location in CFR	Summary of proposals	Applicable preamble discussion
Definitions	Appendix GG	Define varieties of portable electric spas.	III.B.2
Test Procedure	10 CFR 430.23 and appendix GG	Establish standby loss as the metric for portable electric spas, incorporate by reference ANSI/APSP/ICC–14 2019, and provide additional instructions for determining standby loss for portable electric spas.	III.C and III.D

[7] *https://appliance-standards.org/product/portable-electric-spas.*

[8] The PHTA is a result of a 2019 merger between the Association of Pool and Spa Professionals (''APSP'') and the National Swimming Pool Foundation (''NSPF''). The reference to APSP has been retained in the ANSI designation of ANSI/APSP/ICC–14 2019.

TABLE II.1 SUMMARY OF PROPOSALS IN THIS NOPR—Continued

Topic	Location in CFR	Summary of proposals	Applicable preamble discussion
Sampling Plan	10 CFR 429.68	Specify the sampling plan for determination of representative values.	III.E.2

DOE notes that if DOE were to finalize a test procedure for portable electric spas, manufacturers would not be required to test according to the DOE test procedure until such time as compliance is required with any future applicable energy conservation standards that are established, unless manufacturers voluntarily chose to make representations as to the energy use or energy efficiency of a portable electric spa. See section III.H of this document for a complete discussion of compliance dates.

III. Discussion

In the following sections, DOE discusses its proposals for the portable electric spa test procedure. For each proposal, DOE provides relevant background information, discusses relevant public comments, summarizes the proposal, and provides justification for the proposal.

A. General Comments

DOE received general comments in response to the February 2022 NOPD that are relevant to establishing a test procedure for portable electric spas.

DOE received several comments that encouraged DOE to establish a test procedure for portable electric spas. PHTA and International Hot Tub Association (''IHTA'') encouraged DOE to move forward with both a test procedure and standard rule based on ANSI/APSP/ICC–14 2019. (PHTA/IHTA, EERE–2022–BT–DET–0006–0003 at p. 2) [9] California Energy Commission (''CEC'') and New York State Energy Research and Development Authority (''NYSERDA'') also encouraged DOE to begin test procedure and energy conservation standards proceedings for portable electric spas following the final determination. (CEC, EERE–2022–BT–DET–0006–0004 at p. 5; NYSERDA, EERE–2022–BT–DET–0006–0006 at p. 2)

In addition, DOE received several comments in response to the February 2022 NOPD that are relevant to topics discussed later in this NOPR. Those comments are summarized in the corresponding sections of this NOPR.

B. Scope and Definitions

1. Scope of DOE Test Procedure

The applicable industry test procedure, ANSI/APSP/ICC–14 2019,[10] provides recommended minimum guidelines for testing the energy efficiency of factory-built residential portable electric spas. The standard methods included in ANSI/APSP/ICC–14 2019 provide a means to compare and evaluate the energy efficiency of different models of portable electric spas in conditions relevant to product use. CEC uses ANSI/APSP/ICC–14 2019 as the method of test for its portable electric spa standards.[11] And in response to the February 2022 NOPD, PHTA and IHTA also commented that several other states use, or have approved the use of, ANSI/APSP/ICC–14 2019. (PHTA/IHTA, EERE–2022–BT–DET–0006–0003 at p. 2)

Section 3 of ANSI/APSP/ICC–14 2019 defines ''portable electric spa'' as ''a factory-built electric spa or hot tub, supplied with equipment for heating and circulating water at the time of sale or sold separately for subsequent attachment.'' This ANSI/APSP/ICC–14 2019 definition is identical to the definition used by CEC and adopted by DOE in the September 2022 Final Determination. 87 FR 54123, 54125. Section 3 of ANSI/APSP/ICC–14 2019 also defines certain categories of portable electric spas, as discussed in section III.B.2 of this NOPR.

DOE has reviewed the market for portable electric spas, and DOE has tentatively concluded that all products on the market can be tested using methods consistent with or similar to those in ANSI/APSP/ICC–14 2019 based on DOE's review. DOE has not found any products meeting DOE's definition of portable electric spa that would warrant exclusion from the scope of the DOE test procedure. Therefore, DOE proposes for the scope of the test procedure to include all products meeting the definition of ''portable electric spa'' in 10 CFR 430.2.

DOE requests comment on its proposal for the scope of the test procedure to include all products that meet the definition of ''portable electric spa.'' DOE requests comment on whether any additional products should be included within the scope of the proposed DOE test procedure. DOE requests comment on whether any products that meet the definition of ''portable electric spa'' should be excluded from the scope of the proposed DOE test procedure, and, if so, on what basis.

2. Definitions of Categories of Portable Electric Spas

Section 3 of ANSI/APSP/ICC–14 2019 defines the following categories of portable electric spas:

(1) *Standard Spa:* A portable electric spa that is not an inflatable spa, an exercise spa, or the exercise spa portion of a combination spa.

(2) *Exercise Spa (also known as a swim spa):* Variant of a portable electric spa in which the design and construction includes specific features and equipment to produce a water flow intended to allow recreational physical activity including, but not limited to, swimming in place.

(3) *Combination Spa:* A portable electric spa with two separate and distinct reservoirs, where (a) one reservoir is an exercise spa; (b) the second reservoir is a standard spa; and (c) each reservoir has an independent water temperature setting control.

(4) *Inflatable Spa:* A portable electric spa where the structure is collapsible and designed to be filled with air to form the body of the spa.

The categories of portable electric spas defined in ANSI/APSP/ICC–14 2019 differ in the way they are tested and in the allowed energy consumption specified in ANSI/APSP/ICC–14 2019.

[9] The parenthetical reference here and following provides a reference for information located in the docket of DOE's rulemaking to determine coverage for portable electric spas. (Docket No. EERE–2022–BT–DET–0006, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[10] ANSI/APSP/ICC–14 2019 is available at: *webstore.ansi.org/standards/apsp/ansiapspicc142019.*

[11] California Code of Regulations (''CCR'') at 20 CCR 1604(g)(2).

Based on DOE's review of the market, DOE has tentatively determined that the category definitions defined in ANSI/APSP/ICC–14 2019 accurately categorize the products available on the market. Therefore, the category definitions would be relevant for the DOE test procedure, if adopted. DOE is proposing to include definitions for ''standard spa,'' ''exercise spa,'' ''combination spa,'' and ''inflatable spa'' in section 3 of appendix GG that are generally consistent with those category definitions in ANSI/APSP/ICC–14 2019. For all definitions other than ''exercise spa,'' DOE is proposing a definition that is identical to the wording in ANSI/APSP/ICC–14 2019. For ''exercise spa,'' DOE is proposing to include only the first paragraph of the definition from ANSI/APSP/ICC–14 2019 because the second paragraph [12] of the definition is informative, describing examples of products that may be included within the definition.

DOE requests comment on whether the definitions for the categories of portable spas proposed in section 3 of appendix GG (*i.e.,* ''standard spa,'' ''exercise spa,'' ''combination spa,'' and ''inflatable spa'') adequately delineate the categories of portable electric spas and whether any additional or different categories are warranted.

3. Therapeutic Spas

Section 1.3 of ANSI/APSP/ICC–14 2019 states that spas operated for medical treatment or physical therapy, among other types,[13] are not included within the scope of ANSI/APSP/ICC–14 2019. However, DOE notes that the definition of exercise spa in Section 3 of ANSI/APSP/ICC–14 2019 indicates that exercise spas may include peripheral jetted seats intended for water therapy. DOE has reviewed the market and found that ''therapeutic,'' ''water therapy,'' or ''hydrotherapy'' applications are frequently advertised in marketing materials for many portable electric spas, including many models that do not appear to have features that are different than those found on models that do not mention therapeutic applications in their marketing materials.

DOE presumes that the types of spas operated for medical treatment or physical therapy intended to be referenced by Section 1.3 of ANSI/APSP/ICC–14 2019 would not be portable and, therefore, would not be considered a *portable* electric spa (emphasis added). As discussed further in section III.D.2 of this NOPR, DOE is proposing to exclude all of Section 1 of ANSI/APSP/ICC–14 2019 from appendix GG. To the extent that any of the categories of spas referenced by Section 1.3 of ANSI/APSP/ICC–14 2019 do not meet the definition of a portable electric spa, such products would not be within the scope of the test procedure.

DOE requests comment on whether there are portable electric spas used for special purposes, such as those operated for medical treatment or physical therapy, that should be excluded from the scope of the proposed DOE test procedure or tested in a different manner. If so, DOE requests comment on the method to determine the spas to exclude or test differently.

4. Portable Electric Spa Size

ANSI/APSP/ICC–14 2019 does not specify any minimum or maximum size to limit the scope of ANSI/APSP/ICC–14 2019.

Based on DOE's tentative conclusion that all portable electric spas on the market can be tested using methods consistent with or similar to those in ANSI/APSP/ICC–14 2019, DOE has tentatively determined that there is no need to limit the scope of the DOE test procedure based on the size of the portable electric spa. Therefore, DOE is not proposing to specify any minimum or maximum size to limit the scope of the DOE test procedure.

DOE requests comment on its tentative determination not to propose a minimum or maximum size to limit the scope of the proposed DOE test procedure.

C. Energy Consumption Metric

1. Background

As discussed, EPCA requires that any test procedures prescribed or amended must be reasonably designed to produce test results which reflect energy efficiency, energy use, or estimated annual operating cost of a given type of covered product during a representative average use cycle, and that test procedures not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption into the overall energy efficiency, energy consumption, or other energy descriptor, taking into consideration the most current versions of IEC Standards 62301 and 62087, unless the current test procedure already incorporates the standby mode and off mode energy consumption, or if such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)) If an integrated test procedure is technically infeasible, DOE must prescribe separate standby mode and off mode energy use test procedures for the covered product, if that separate test is technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii))

EPCA defines three different modes of operation in 42 U.S.C. 6295(gg)(1)(A). ''Active mode'' means the condition in which an energy-using product is connected to a main power source, has been activated, and provides one or more main functions. ''Standby mode'' means the condition in which an energy-using product is connected to a main power source and offers one or more of the following user-oriented or protective functions: (a) to facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; or (b) continuous functions, including information or status displays (including clocks) or sensor-based functions. ''Off mode'' means the condition in which an energy-using product is connected to a main power source and is not providing any standby or active mode function. *See* 42 U.S.C. 6295(gg)(1)(A)(i) through (iii).

2. Modes of Use

Based on market research performed by DOE and analyses from CEC,[14] portable electric spas are typically connected to a main power source, activated, and provide one or more main functions 24 hours a day, 365 days per year. Although a portable electric spa is typically used for a small number of hours throughout the year, heating the water from ambient temperature to the use temperature takes a long time, and the water must be filtered regularly to keep it fresh. Therefore, most users maintain the spa at their preferred use temperature at all times with periodic or continuous water filtration, even when not in use.[15]

[12] The second paragraph of the definition of exercise spa states the following: Exercise spas may include peripheral jetted seats intended for water therapy, heater, circulation and filtration system, or may be a separate distinct portion of a combination spa and may have separate controls. These aquatic vessels are of a design and size such that it has an unobstructed volume of water large enough to allow the 99th Percentile Man as specified in ANSI/APSP/ICC–16 to swim or exercise in place.

[13] Section 1.3 of ANSI/APSP/ICC–14 2019 states the following: These requirements do not apply to public spas (ANSI/APSP–2), permanently installed or inground spas (ANSI/APSP/ICC–3), or other spas, such as those operated for medical treatment, physical therapy, or other purposes.

[14] Final Staff Report, Analysis of Efficiency Standards and Marking for Spas, 2018 Appliance Efficiency Rulemaking for Spas Docket Number 18–AAER–02 TN 222413. Available online at *efiling.energy.ca.gov/GetDocument.aspx?tn=222413&DocumentContentId=31256.*

[15] *Ibid.*

Based on DOE's research and analysis, DOE has found that, during most hours of the year, the spa contains no people, the spa cover is on, and the spa continually or periodically filters and heats the water in the spa, so that the spa is ready for use. During a smaller number of hours in a year, the spa cover is removed, and consumers use the spa. Consumers who prefer calm water in the spa may not activate any other spa features, such that the spa continues operating in the same operation mode as when the spa is covered. Conversely, other consumers may opt to activate bubbles, jets, or other features of the spa during usage.

Finally, research has shown that spas that are newly installed, or that were drained and re-filled, will experience a small number of hours during the year in which the spa is heating water from its initial water fill temperature to the preferred operating temperature.

DOE has tentatively concluded that all of these operational modes for portable electric spas would be considered ''active modes'' as defined in 42 U.S.C. 6295(gg)(1)(A)(i). As such, portable electric spas are considered to operate in active mode at all times, and standby mode and off mode, as defined by EPCA, are not applicable to portable electric spas. Therefore, DOE has tentatively concluded that there is no standby mode or off mode energy consumption that can be accounted for or incorporated into the proposed DOE test procedure.

DOE requests comment on whether it is necessary to measure standby mode or off mode energy consumption in the proposed DOE test procedure.

3. Metric for Active Mode Energy Consumption

ANSI/APSP/ICC–14 2019 includes a method for measuring the energy consumption of portable electric spas while the cover is on and the spa is operating in its default operation mode.[16] The metric used by ANSI/APSP/ICC–14 2019 is normalized standby power, which is the average power consumed by the spa, normalized to a standard temperature difference between the ambient air and the water in the spa. Normalized standby power is the metric used by CEC and other states that use ANSI/APSP/ICC–14 2019 as the basis for their efficiency programs. It is also the metric used by the Canadian Standards Association (''CSA'') test method CAN/CSA–C374–11 (R2021),[17] ''Energy performance of hot tubs and spas'' (''CAN/CSA–374–11 (R2021)''), which is a method used for testing portable electric spas in Canada.

According to analyses from CEC,[18] the mode of operation measured in ANSI/APSP/ICC–14 2019 represents approximately 75 percent of the energy consumed by a portable electric spa. DOE estimates that this percentage may be approximately 95 percent in some cases, based on investigative testing that DOE performed and data on typical spa usage from PKData.[19] Taken together, the two estimates indicate that the mode of operation measured in ANSI/APSP/ICC–14 2019 represents the largest portion of active mode energy consumption by far. Based on these data sources, DOE has tentatively determined that the most representative average use cycle or period of use of a portable electric spa is with the spa cover on (*i.e.,* with no consumers in the spa), and with the spa continually or periodically filtering and heating the water in the spa, such that the spa is always ready for use.

DOE is not aware of any existing test methods that measure the energy consumption in any other parts of active mode described in section III.C.2 of this NOPR. DOE has also been unable to determine any representative durations for those portions of active mode use.

As a result, DOE is proposing to use normalized standby power from ANSI/APSP/ICC–14 2019 as the performance-based metric for representing the energy use of portable electric spas. DOE is proposing to refer to this metric as ''standby loss,'' rather than ''normalized standby power,'' to avoid misinterpretation with the statutory definition of ''standby mode'' as defined in 42 U.S.C. 6295(gg)(1)(A)(iii). DOE also notes that the term ''standby loss'' has been used previously to describe the energy use of a water heater associated with maintaining water temperature.[20] A portable electric spa is similar to a water heater in that regard, because both products consume energy to maintain their contents at a specified temperature over a long period of time. DOE is proposing to define the term ''standby loss'' in section 3.9 of appendix GG as ''the mean normalized power required to operate the portable electric spa in default operation mode with the cover on, as calculated in section 4.3 of this appendix.''

DOE requests comment on its proposal to use standby loss, equivalent to the normalized standby power as defined by ANSI/APSP/ICC–14 2019, as the performance-based metric for representing the energy use of portable electric spas.

DOE requests comment on its proposed definition for ''standby loss'' in section 3.9 of appendix GG.

DOE requests comment and data on the representative operation of spas when in use with the cover removed, including typical frequency and duration of use, operation of jets or other features, and number of users. DOE also requests comment on how usage varies across spa types.

DOE requests comment on any test methods that measure the operation of spas when in use with the cover removed.

D. Test Method

This section discusses DOE's proposal for a test method to measure all quantities needed to determine portable electric spa standby loss in a standardized and reproducible manner. DOE proposes to incorporate by reference the test method contained in certain applicable sections of ANSI/APSP/ICC–14 2019 as the basis for the portable electric spas test procedure. DOE also proposes several modifications and additions to ANSI/APSP/ICC–14 2019 to ensure the repeatability, reproducibility, and representativeness of test results. These proposals are discussed in sections III.D.1 through III.D.11 of this NOPR.

1. Referenced Industry Test Method

As discussed, ANSI/APSP/ICC–14 2019 contains a test method for measuring the standby loss [21] of portable electric spas. ANSI/APSP/ICC–14 2019 measures standby loss as the average power required to maintain the spa's water at a ready-to-use temperature over a period of at least 72

[16] Section 5.1 of ANSI/APSP/ICC–14 2019 specifies that the purpose of ANSI/APSP/ICC–14 2019 is to measure the energy consumption in ''standby mode.'' This use of the term ''standby mode'' is not consistent with the term standby mode as defined by EPCA, but rather, as explained in section III.C.2 of this NOPR, refers to a type of active mode as defined by EPCA.

[17] *www.csagroup.org/store/product/2703317/.*

[18] Final Staff Report, Analysis of Efficiency Standards and Marking for Spas, 2018 Appliance Efficiency Rulemaking for Spas Docket Number 18–AAER–02 TN 222413. Available online at *efiling.energy.ca.gov/GetDocument.aspx?tn=222413&DocumentContentId=31256.*

[19] P.K. Data Inc. 2022 Hot Tub Market Data: Custom Compilation for Lawrence Berkeley National Laboratory (through 2021). 2022. Alpharetta, GA. (Last accessed April 12, 2022) *https://www.pkdata.com/reports-store.html#/.*

[20] *See* sections 1.13 and 6.3.3 of appendix E to subpart B of 10 CFR part 430.

[21] As discussed section III.C.3 of this document, ANSI/APSP/ICC–14 2019 uses the term ''normalized standby power'' to refer to the metric that DOE is proposing to call ''standby loss.'' To avoid confusion about multiple terms, the term ''standby loss'' is used throughout section III.D of this NOPR to refer to ''normalized standby power'' in ANSI/APSP/ICC–14 2019.

hours, while the spa remains covered in a controlled-temperature environment.

The test method in CAN/CSA–374–11 (R2021) is very similar to that in ANSI/APSP/ICC–14 2019, differing only in ambient temperature, floor design, and certain aspects of measurement. DOE is not aware of any other industry test methods for measuring standby loss in portable electric spas.

In response to the February 2022 NOPD, both PHTA/IHTA and CEC encouraged DOE to proceed with both a test procedure and an energy conservation standard based on ANSI/APSP/ICC–14 2019. (PHTA/IHTA, EERE–2022–BT–DET–0006–0003 at p. 2; CEC, EERE–2022–BT–DET–0006–0004 at p. 5)

DOE has reviewed ANSI/APSP/ICC–14 2019 and tentatively concluded that it is reasonably designed to produce test results to determine the energy use of portable electric spas during a representative average use cycle or period of use. DOE also reviewed CAN/CSA–374–11 (R2021) and has tentatively concluded that ANSI/APSP/ICC–14 2019 is a better test procedure to adopt for the DOE test procedure. Although the methods in ANSI/APSP/ICC–14 2019 and CAN/CSA–374–11 (R2021) are very similar, several of the requirements in CAN/CSA–374–11 (R2021) are specified in only International System of Units (''SI'') units and not specified in U.S. customary system (''USCS'') units (*e.g.,* °C vs. °F). The need to provide conversions from SI to USCS for these values means that adoption of CAN/CSA–374–11 (R2021) in the DOE test procedure would require more modifications to the adopted test procedure than adoption of ANSI/APSP/ICC–14 2019.

Therefore, DOE is proposing to adopt specific sections of ANSI/APSP/ICC–14 2019 in DOE's proposed test procedure for portable electric spas, along with several proposed modifications and additions that DOE has tentatively determined would improve repeatability and representativeness of test results.

These specific modifications, additions, and exceptions are discussed in sections III.D.2 through III.D.11 of this NOPR.

DOE requests comment on its proposal to adopt specific sections of ANSI/APSP/ICC–14 2019 in DOE's proposed test procedure for portable electric spas.

2. Excluded Sections of ANSI/APSP/ICC–14 2019

DOE proposes to exclude the following sections, subsections, and appendices of ANSI/APSP/ICC–14 2019 from DOE's proposed test procedure:

- Sections 1, 2, 4, 6, and 7 in their entirety;
- Section 3 definitions for ''cover, specified,'' ''fill volume,'' ''rated volume,'' and ''standby mode;''
- Subsections 5.1, 5.2, 5.5.2, 5.5.4, 5.5.5, and 5.7;
- Appendix A subsection ''Chamber floor''; and
- Appendices B, C, and D.

The following paragraphs discuss the rationale for excluding each section from the proposed DOE test procedure.

Section 1 of ANSI/APSP/ICC–14 2019 discusses the scope of applicability of ANSI/APSP/ICC–14 2019. Certain categories of spas mentioned in Section 1, such as public spas and permanently installed or inground spas, are not applicable to the proposed DOE test procedure because they do not meet DOE's definition of portable electric spa. To avoid ambiguity regarding the applicability of the proposed Federal test procedure for portable electric spas, DOE is proposing to exclude Section 1 of ANSI/APSP/ICC–14 2019 in its entirety and to define instead the scope of the DOE test procedure in section 2 of appendix GG.

Section 2 of ANSI/APSP/ICC–14 2019 provides normative references to other industry test procedures. None of the normative references in section 2 are necessary for, or relevant to, the proposed DOE test procedure. As a result, DOE is proposing to exclude Section 2 of ANSI/APSP/ICC–14 2019 in its entirety.

Section 4.1 of ANSI/APSP/ICC–14 2019 requires that all certification bodies shall be accredited to ISO/IEC 17065. Section 4.2 of ANSI/APSP/ICC–14 2019 requires that all testing laboratories shall be qualified by a certification body or accredited by an accreditation body who is a member of the International Laboratory Accreditation Cooperation (''ILAC''). Sections 4.3 through 4.5 of ANSI/APSP/ICC–14 2019 provide further specifications regarding the roles and responsibilities of the testing laboratory, certification body, and/or accredited body. Section 5.2 and appendices B and C of ANSI/APSP/ICC–14 2019 specify further requirements and procedures for qualification of the testing laboratory by a certification body.

DOE is not proposing to adopt the requirement in Sections 4.1 and 4.2 of ANSI/APSP/ICC–14 2019 that a testing laboratory be qualified by a certification body accredited to ISO/IEC 17065 or accredited by an accreditation body who is a member of ILAC. DOE's experience in conducting testing according to ANSI/APSP/ICC–14 2019 and to the DOE test procedure as proposed in this NOPR suggests that the proposed DOE test procedure adequately outlines the details required to perform the test. As a result, the accreditation as specified in Section 4.2 of ANSI/APSP/ICC–14 2019 is not necessary to achieve repeatable, reproducible, and representative test results from DOE's proposed test procedure for portable electric spas. DOE has tentatively concluded that the requirement for a testing laboratory to be qualified by a certification body accredited to ISO/IEC 17065 or accredited by an accreditation body who is a member of ILAC is not necessary for the purposes of conducting the DOE test procedure as proposed. Therefore, DOE is proposing to exclude the sections in ANSI/APSP/ICC–14 2019 regarding laboratory qualification from the proposed DOE test procedure.

Section 6 of ANSI/APSP/ICC–14 2019 provides maximum allowable energy consumption functions; *i.e.,* standards applicable to portable electric spas. These standard levels are not applicable to the proposed DOE test procedure and DOE is proposing to exclude Section 6 from the proposed DOE test procedure. However, DOE would review Section 6 of ANSI/APSP/ICC–14 2019 when considering establishing Federal standards for portable electric spas in a separate energy conservation standard rulemaking.

Section 7 of ANSI/APSP/ICC–14 2019 specifies labeling requirements for portable electric spas. These labeling requirements are not applicable to the proposed DOE test procedure and would not be required for use were DOE to finalize a test procedure for portable electric spas. As a result, DOE is proposing to exclude Section 7 from the proposed DOE test procedure.

Section 5.1 of ANSI/APSP/ICC–14 2019 states that the purpose of the test method is to measure the energy consumption in standby mode, using a repeatable and reproducible test procedure, and that the results shall be used to calculate standby power demand for each basic model. Section 3 of ANSI/APSP/ICC–14 2019 defines ''standby mode'' as ''all settings at default as shipped by the manufacturer, except water temperature, which may be adjusted to meet the test conditions. No manual operations are enabled.'' As discussed in section III.C.3 of this NOPR, use of the term ''standby mode'' in ANSI/APSP/ICC–14 2019 is not consistent with the term ''standby mode'' as defined by EPCA, but rather, as explained in section III.C.2 of this NOPR, refers to a type of active mode as defined by EPCA. 42 U.S.C.

6295(gg)(1)(A)(iii) As a result, DOE is proposing to exclude Section 5.1 and the ''standby mode'' definition in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Section 5.5.2 of ANSI/APSP/ICC–14 2019 specifies that the spa shall be filled with water to the halfway point between the bottom of the skimmer opening and the top of the skimmer opening. In the absence of a wall skimmer, the fill volume is 6 inches below the overflow level of the spa. The resulting fill level is defined as ''fill volume'' and corresponds to the definition of ''fill volume'' provided in Section 3 of ANSI/APSP/ICC–14 2019. Section 3 of ANSI/APSP/ICC–14 2019 defines ''rated volume'' as the water capacity of a portable electric spa, in gallons (liters), as specified by the manufacturer on the spa, on the spa packaging, or the spa marketing materials. These water fill volume instructions and definitions are not consistent with DOE's proposed requirements for fill volume in section 4.1.4 of appendix GG, as explained in section III.D.6 of this NOPR. Therefore, DOE is proposing to exclude Section 5.5.2 and the volume definitions in Section 3 in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Section 5.5.4 of ANSI/APSP/ICC–14 2019 specifies that the ambient air temperature shall be a maximum of 63 °F (17 °C) for the duration of the test. This temperature is inconsistent with DOE's proposed requirements for ambient temperature in section 4.2.1 of appendix GG, as explained in section III.D.3 of this NOPR. As a result, DOE is proposing to exclude Section 5.5.4 in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Section 5.5.5 of ANSI/APSP/ICC–14 2019 states that the manufacturer's specified cover shall be used during the test. Section 3 of ANSI/APSP/ICC–14 2019 defines ''cover, specified'' as the cover that is provided or specified by the spa manufacturer. As discussed in section III.D.7 of this NOPR, DOE is proposing more explicit requirements regarding the cover that must be used during testing and is proposing to exclude Section 5.5.5 in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Section 5.7 of ANSI/APSP/ICC–14 2019 specifies the equations for calculating ''standby power'' as that term is defined by ANSI/APSP/ICC–14 2019. These equations include standard temperature differences defined for each type of portable electric spa, among other defined parameters. DOE is proposing in section 4.3 of appendix GG to reproduce the equations in Section 5.7 of ANSI/APSP/ICC–14 2019, using the term ''standby loss'' instead of ''standby power,'' and to use different standard temperature differences that correspond with DOE's proposed water and air temperature requirements, as explained in section III.D.11 of this NOPR, and is proposing to exclude Section 5.7 in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Appendix A of ANSI/APSP/ICC–14 2019 includes subsection ''Chamber floor'' that provides requirements for the floor on which the spa is installed, including the option to include 2 inches of insulation between the chamber floor and the spa. These requirements are not consistent with DOE's proposed requirements for the chamber floor in section 4.1.2 of appendix GG, as discussed in section III.D.4.b of this NOPR. Therefore, DOE is proposing to exclude the ''Chamber floor'' subsection of appendix A in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

Informative appendix D of ANSI/APSP/ICC–14 2019 contains a template for reporting data from the portable electric spa tests. This template would not be required for use were DOE to finalize a test procedure for portable electric spas, so DOE is proposing to exclude appendix D in ANSI/APSP/ICC–14 2019 from the proposed DOE test procedure.

DOE requests comment on whether any of the sections of ANSI/APSP/ICC–14 2019 that DOE is proposing to exclude from the proposed DOE test procedure should be included in the DOE test procedure.

3. Ambient Air Temperature

DOE reviewed the ambient air temperature requirements specified in several existing test procedures for portable electric spas.

ANSI/APSP/ICC–14 2019 requires all portable electric spas to be tested with an ambient air temperature of 63 °F or lower.

An earlier version of the CEC portable electric spa test procedure, on which ANSI/APSP/ICC–14 2019 is based, specified an ambient air temperature of 60 °F ± 3 °F.[22] DOE notes that 60 °F is approximately equal to the annual average temperature for all of California.[23]

CAN/CSA–374–11 (R2021) specifies a mandatory test with ambient temperature of 44.6 °F ± 1.8 °F (7 °C ± 2 °C), and an optional cold-weather test with ambient temperature of 17.6 °F ± 1.8 °F (−8 °C ± 2 °C).

The proposed DOE test procedure will be used for representations of portable electric spa energy consumption throughout the United States; therefore, the specified ambient air temperature must reflect a nationally representative value. DOE determined a nationally representative ambient air temperature that could be applicable to portable electric spas throughout the United States by first determining the average annual air temperature across all states in the contiguous United States, and then calculating a weighted average across all states, weighted by the estimated number of spas installed in each state.[24] DOE used data from the National Oceanic and Atmospheric Administration [25] indicating average temperature in each state for the years 2012–2021, and data from PKData [26] indicating the number of spas installed in each state in 2020. This methodology resulted in an average air temperature of 56.1 °F. Rounded to the nearest degree Fahrenheit, DOE has tentatively determined that 56 °F is a nationally representative ambient air temperature applicable to testing portable electric spas.

Based on the preceding analysis, DOE is proposing to specify 56.0 °F as the target ambient air temperature in section 4.2.1 of appendix GG.

Consistent with the earlier CEC test procedure, DOE is proposing to specify a tolerance of ±3 °F on the ambient air temperature during the test. DOE tentatively determines that specifying an allowable range of temperatures will provide greater assurance of repeatable, reproducible, and representative test results compared to the approach used in ANSI/APSP/ICC–14 2019 of specifying only a maximum ambient air temperature.

For the reasons discussed previously, DOE is proposing in section 4.2.1 of appendix GG to specify that the ambient air temperature must be maintained at 56.0 ± 3 °F for the duration of the test. DOE is also proposing to specify that this requirement applies to each individual ambient air temperature measurement taken for the duration of

[22] *See* table in p. 5 of CEC Docket Number 12–AAER–2G, document TN 73027. Available online at *https://efiling.energy.ca.gov/GetDocument.aspx?tn=73027&DocumentContentId=8328*.

[23] See climate data from National Oceanic and Atmospheric Administration here: *https://www.ncei.noaa.gov/cag/statewide/time-series/4/tavg/12/12/2012-2021?base_prd=true&begbaseyear=2012&endbaseyear=2021*.

[24] DOE used only the contiguous U.S., excluding Alaska and Hawaii, because the data from PKData on the number of spas in each state excluded Alaska and Hawaii.

[25] *https://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/statewide/time-series*.

[26] P.K. Data Inc. 2022 Hot Tub Market Data: Custom Compilation for Lawrence Berkeley National Laboratory (through 2021). 2022. Alpharetta, GA. (Last accessed April 12, 2022) *https://www.pkdata.com/reports-store.html#/*.

the test. This proposal makes clear that the ambient temperature requirement applies to individual measurements of ambient air temperature and not the overall average ambient air temperature during the test.

DOE requests comment on its determination that, rounded to the nearest degree, 56 °F is a nationally representative ambient air temperature applicable to testing portable electric spas.

DOE requests comment on its proposal to specify an ambient air temperature of 56.0 ± 3.0 °F during testing. If commenters recommend a different ambient temperature, DOE requests data demonstrating the representativeness of that ambient temperature.

4. Chamber

a. Requirements in ANSI/APSP/ICC–14 2019

ANSI/APSP/ICC–14 2019 includes informative appendix A that provides minimum requirements for the chamber in which the portable electric spa is installed. These include optional specifications regarding chamber internal dimensions, air circulation, chamber insulation, and chamber floor insulation. The requirements to use this appendix are referenced only in the sections of ANSI/APSP/ICC–14 2019 pertaining to qualification of the test laboratory. As discussed in section III.D.2 of this NOPR, DOE is proposing to exclude all sections of ANSI/APSP/ICC–14 2019 pertaining to qualification of the test laboratory. As a result, none of the sections of ANSI/APSP/ICC–14 2019 that DOE is proposing to include in DOE's proposed test procedure require the use of appendix A to ANSI/APSP/ICC–14 2019.

DOE has reviewed appendix A to ANSI/APSP/ICC–14 2019 and has tentatively concluded that the specifications regarding chamber internal dimensions, air flow, and chamber insulation are appropriate for testing portable electric spas and would produce test results that reflect representative consumer use and would not be unduly burdensome to require for testing. However, DOE has tentatively concluded that the specifications regarding chamber floor would not provide test results that are representative of consumer use, as discussed further in section III.D.4.b of this NOPR.

Therefore, DOE proposes to specify in section 4.1.1 of appendix GG to install the portable electric spa in a chamber satisfying the requirements specified in appendix A to ANSI/APSP/ICC–14 2019 regarding chamber internal dimensions, air flow, and chamber insulation.

DOE requests comment on its tentative determination that the specifications regarding chamber internal dimensions, air flow, and chamber insulation in appendix A to ANSI/APSP/ICC–14 2019 are appropriate for testing portable electric spas and would produce test results that reflect representative consumer use and would not be unduly burdensome to require for testing.

DOE requests comment on the proposed chamber requirements in section 4.1.1 of appendix GG and whether any alternate or additional requirements are needed.

b. Chamber Floor Requirements

Appendix A to ANSI/APSP/ICC–14 2019 specifies that the chamber floor may be insulated with 2 inches of polyisocyanurate insulation, that the insulation shall be laid directly on a level surface, and that the insulating layer shall be sheathed with at least 0.5 inches of plywood. DOE conducted an analysis to determine whether these requirements would produce test results that reflect representative consumer use in a proposed test procedure for portable electric spas.

DOE reviewed installation and owner's manuals for a representative sample of portable electric spas available on the market and found that the majority of manuals specify that the preferred method of installation is directly on a poured concrete slab. A smaller portion of manuals specify installation on a wooden deck, while a small number of manuals specify other acceptable installation surfaces, such as concrete pavers or crushed gravel. None of the manuals that DOE reviewed specify installing the portable electric spa with insulation between the ground and the spa. Presuming that portable electric spas are installed consistent with the installation manual, DOE's findings suggest that the most representative installation of a portable electric spa is to be installed directly on a concrete slab with no insulation between that surface and the spa.

DOE performed investigative testing to determine the extent to which installation with the optional insulation specified in the chamber floor section of appendix A to ANSI/APSP/ICC–14 2019 impacts energy use in comparison to installation with no insulation. The results of this testing are summarized in Table III.1.

TABLE III.1—IMPACT OF CHAMBER FLOOR INSULATION ON ENERGY USE

Spa	Measured standby loss (W)		Measured effect of floor insulation on standby loss (%)
	With no insulation on chamber floor	With chamber floor insulation as specified in Appendix A to ANSI/APSP/ICC–14 2019	
Spa 1	339	213	−37
Spa 2	233	204	−13

As shown in Table III.1, the amount of insulation and plywood specified in the chamber floor section of appendix A to ANSI/APSP/ICC–14 2019 reduced standby loss by up to 37 percent compared to testing with no insulation. These results demonstrate that the inclusion or exclusion of chamber floor insulation has a significant impact on measured energy use.

To ensure that test results are representative of an average consumer use cycle or period of use, DOE is proposing in section 4.1.2 of appendix GG to specify that the portable electric spa be installed directly on a level concrete floor or slab.

As discussed, none of the installation manuals that DOE reviewed specify installing the spa with insulation between the ground and the spa. Although DOE is not aware of any portable electric spas that include insulation and/or other materials such as plywood as part of the installation

materials for the spa, DOE presumes that a consumer would be likely to install insulation and/or plywood if insulation and/or wood were to be included with the spa and specified by the installation instructions to be installed for use. In such case, DOE tentatively concludes that testing with the insulation and/or plywood provided would produce test results that are representative of consumer use. To ensure representative test results in such cases, DOE is proposing to specify in section 4.1.2 of appendix GG that, if insulation and/or plywood is provided with the portable electric spa, and the manufacturer's installation instructions indicate that insulation and/or plywood be installed between the ground and the spa for normal use, to install the minimum amount of insulation between the floor and the spa that the manufacturer's installation instructions specify to be installed between the floor and the spa. Otherwise, install no insulation or plywood between the floor and the portable electric spa.

DOE recognizes that certain test facilities may not have concrete floors or slabs within the test area that otherwise would meet the specified test conditions and installation requirements proposed for portable electric spas. For example, some chambers have solid or perforated floors made of steel or aluminum. DOE welcomes information regarding the availability of concrete floors or slabs within test facilities and potential alternatives for testing that would best represent portable electric spa operation to reflect representative consumer use when installed on concrete floors or slabs.

DOE seeks comment on its tentative determination, based on review of portable electric spa user manuals, that the most representative installation of a portable electric spa is to be installed directly on concrete with no insulation between that surface and the spa.

DOE requests comment on its proposal to specify installing the portable electric spa directly on the chamber floor without any insulation between the spa and the floor.

DOE seeks comment on its presumption that a consumer would be likely to install insulation and/or wood if insulation and/or wood were to be included with the portable electric spa and specified by the installation instructions to be installed for use, and that in such cases, testing with the insulation and/or wood provided would produce test results that are representative of consumer use.

DOE requests comment on the availability of concrete floors or slabs within test facilities and on whether any test chamber floor alternatives, such as solid or perforated steel or aluminum floors, would represent portable electric spa operation when installed on concrete floors or slabs.

5. Electrical Supply Voltage and Amperage Configuration

Section 5.5.6 of ANSI/APSP/ICC–14 2019 specifies that the voltage supplied to the portable electric spa be within 10 percent of the nameplate voltage during testing, but specifies no other requirements for the electrical supply or amperage configuration. The following paragraphs discuss additional considerations regarding voltage supply and amperage configuration relevant to testing portable electric spas.

DOE's market research indicates that most portable electric spas operate at a single voltage (*e.g.,* either 120 or 240 volts (''V''), nominally). Models that operate at 120 V are often referred to as ''plug and play'' models and are plugged into an ordinary 120 V electrical outlet. Models that operate at 240 V are typically required to be permanently connected (*i.e.,* hard wired) into a 240 V circuit, similar to that which would supply an electric water heater. DOE is aware of models on the market that can be configured to operate at either 120 V or 240 V, depending on the preference of the consumer. Such models are most often pre-configured by the manufacturer to operate at 120 V and include instructions for converting the model to operate at 240 V. The conversion process typically requires changing the configuration of internal wiring and controls in addition to changes to the external wiring.

Similarly, certain portable electric spas on the market allow the consumer to configure the maximum amperage at which the portable electric spa can operate at a particular voltage level. This configurability ensures that the operation of the portable electric spa is compatible with the electrical service of the home. For example, for a home with a 50 ampere (''A'') circuit breaker available, all the features on a particular portable electric spa may be capable of operating at the same time; whereas, for a home with only a 30 A circuit breaker available, the portable electric spa may still operate, albeit with reduced or restricted functionality. Units that provide amperage configurability most commonly operate at 240 V. On such units, changing the maximum amperage corresponds to allowing more or fewer components to operate at the same time (*e.g.,* whether the heater is able to be energized at the same time as a secondary pump), or setting the level of operation for certain components (*e.g.,* varying the number of heating elements that can operate simultaneously).

The choice of voltage and maximum amperage can affect the rate of heating in the portable electric spa and the occurrence of multiple components of the spa (*e.g.,* pump and heater) operating simultaneously. These differences in operation may affect measured energy use. Therefore, DOE has tentatively concluded that additional specifications regarding the supply voltage and amperage configuration to be used during testing would ensure the reproducibility of the DOE test procedure across different test laboratories.

DOE is proposing in section 4.1.3 of appendix GG a hierarchy to use for configuring the voltage and amperage configuration of the portable electric spa during testing. Specifically, DOE is proposing that if the portable electric spa can be installed or configured with multiple options of voltage, maximum amperage, or both, testing should use the as-shipped configuration. If no configuration is provided in the as-shipped condition, DOE is proposing that testing be conducted using the option specified in the manufacturer's instructions as the recommended configuration for normal consumer use. If no configuration is provided in the as-shipped condition and the manufacturer's instructions do not provide a recommended configuration for normal operation, DOE is proposing that testing be conducted using the maximum voltage specified in the manufacturer's installation instructions and the maximum amperage that the manufacturer's installation instructions specify for use with the maximum voltage.

DOE requests comment on the proposed hierarchy for specifying voltage and maximum amperage for portable electric spas that have multiple options for voltage and/or amperage. DOE requests comment on any cases for which the proposed language would not make clear the voltage and/or maximum amperage to be used during testing.

6. Fill Volume

Section 3 of ANSI/APSP/ICC–14 2019 defines two quantities for the volume of water in a portable electric spa: fill volume and rated volume. ''Fill volume'' is the amount of water that is required to be in the spa during testing and is defined as the halfway point between the bottom of the skimmer opening and the top of the skimmer opening. In the absence of a wall skimmer, the fill volume is 6 inches (152 mm) below the overflow level of the spa. ''Rated volume'' is defined as

the water capacity of a portable electric spa, in gallons (liters), as specified by the manufacturer on the spa, on the spa packaging, or the spa marketing materials. ANSI/APSP/ICC–14 2019 provides no requirement for the rated volume to correspond to the fill volume. ANSI/APSP/ICC–14 2019 also does not specify any tolerance on the fill volume measurement.

DOE compared fill volume and rated volume of portable electric spas on the market by reviewing certification records available in the CEC Modernized Appliance Energy Efficiency Database System (''MAEDbS'').[27] Fill volume and rated volume are equivalent for some models, but differ for other models. For most models with differing values of fill volume and rated volume, the variation is within a few percent. For example, in some cases, the value of rated volume corresponds to the fill volume rounded to the nearest multiple of 10. For other models, however, the difference between rated and fill volume is much greater than any difference due to rounding, ranging from 10 to 50 percent of fill volume.

The volume of the water in a portable electric spa has a significant effect on the energy consumption of the spa, such that any significant difference between fill volume and rated volume for particular portable electric spas suggests that the standby loss determined for those models (based on fill volume) may not be representative of the way those models are advertised or used by consumers (presumably, rated volume). Furthermore, lack of tolerance on the fill level specification may result in variation in the fill level that could reduce repeatability and reproducibility of the test.

To ensure that the volume of water in the portable electric spa during the test is representative of consumer use, DOE is proposing three sets of additional provisions in the proposed test procedure. First, DOE is proposing to exclude from incorporation by reference the definitions of ''fill volume'' and ''rated volume'' in ANSI/APSP/ICC–14 2019, and to create a new definition of ''fill volume'' in section 3.5 of appendix GG. DOE proposes to define ''fill volume'' as the volume of water held by the portable electric spa when it is filled as specified in section 4.1.4 of appendix GG.

Second, DOE proposes to exclude the spa filling instructions in Section 5.5.2 of ANSI/APSP/ICC–14 2019 and define new filling instructions in section 4.1.4 of appendix GG. While the filling instructions in Section 5.5.2 of ANSI/APSP/ICC–14 2019 rely only on the geometry of the spa, with no reference to the manufacturer's instructions, the filling instructions proposed in section 4.1.4 of appendix GG would first indicate to fill the spa according to manufacturer's instructions, and would refer to the geometry of the spa only for cases in which the manufacturer's instructions do not specify a fill level. Specifically, section 4.1.4 of appendix GG would specify filling the spa with water as follows:

(a) If the manufacturer's instructions specify a single fill level, fill to that level with a tolerance of ±0.125 inches.

(b) If the manufacturer's instructions specify a range of fill levels and not a single fill level, fill to the middle of that range with a tolerance of ±0.125 inches.

(c) If the manufacturer's instructions do not specify a fill level or range of fill levels, fill to the halfway point between the bottom of the skimmer opening and the top of the skimmer opening with a tolerance of ±0.125 inches.

(d) If the manufacturer's instructions do not specify a fill level or range of fill levels, and there is no wall skimmer, fill to 6.0 inches ± 0.125 inches below the overflow level of the spa.

By defining the fill level for testing to be the same as that specified in the manufacturer's instructions, if available, DOE has tentatively concluded that the proposed fill level is more likely to be representative of consumer use than the fill level specified by ANSI/APSP/ICC–14 2019.

DOE has also tentatively concluded that DOE's specified fill levels for units without manufacturer's fill level instructions are likely to be representative of consumer use for these units. DOE understands that these fill levels are often the levels used for filling portable electric spas for proper operation of the spa, and the levels are often close to the levels specified in manufacturers' instructions.

In each of these instructions, DOE specifies a tolerance of ±0.125 inches (*i.e.,* one eighth of an inch). DOE's experience testing portable electric spas indicates that achieving a tolerance of one eighth of an inch is feasible and would not introduce undue burden for test laboratories. Furthermore, DOE calculated that a tolerance of ±0.125 inches would result in a maximum variation in the measured standby loss of less than 1 percent based on typical wall profiles of portable electric spas.

DOE recognizes the possibility that it might be difficult to measure the fill level with a tolerance of ±0.125 inches if the landmark used to determine fill level is unsteady or a long way from the water level. DOE also recognizes that fill level can affect the energy use of a spa and that a tighter tolerance might be desired to minimize the impact of the tolerance on measured energy use. Therefore, DOE welcomes information on whether any other tolerances on fill level, such as ±0.0625 inches (*i.e.,* one sixteenth of an inch) or ±0.25 inches (*i.e.,* one quarter of an inch), would be more appropriate than ±0.125 inches.

To ensure that the fill volume includes the water in all components of the portable electric spa, DOE is also proposing in section 4.1.4 of appendix GG to follow the manufacturer's instructions for filling the spa with water, connecting and/or priming the pump(s), and starting up the spa. After verifying that the portable electric spa is operating normally and that all water lines are filled, DOE is proposing to power off the spa and adjust the fill level as needed. DOE is proposing to measure the volume of water added to the portable electric spa with a water meter while filling the spa, and to measure any water removed from the spa using a water meter, graduated container, or scale with an accuracy of ±2 percent of the quantity measured. DOE is proposing that the fill volume is the volume of water held by the portable electric spa when the spa is filled as specified in section 4.1.4 of appendix GG.

Finally, DOE is proposing in the newly proposed provisions at 10 CFR 429.66 that all representations of fill volume be within 5 gallons of the mean fill volume measured for the sample of the basic model. As discussed, the data on fill volume and rated volume in MAEDbS indicates that some rated volumes correspond to the fill volume rounded to the nearest multiple of 10. The proposed requirement for representations of fill volume to be within 5 gallons of the measured fill volume would allow manufacturers to continue to represent fill volume as a value rounded to the nearest multiple of 10, because any such rounded value would vary by no more than 5 gallons from the measured value. See section III.E.2 of this NOPR for further discussion of DOE's proposals regarding represented values.

DOE requests comment on the proposals to exclude from incorporation by reference the definitions of ''fill volume'' and ''rated volume'' in ANSI/APSP/ICC–14 2019, to define a new term for ''fill volume,'' and to specify new filling instructions in appendix GG.

[27] CEC Modernized Appliance Efficiency Database System. Accessed September 12, 2022. Available online at *cacertappliances.energy.ca.gov*.

DOE requests comment on its proposal to specify a tolerance of ±0.125 inches on the defined fill level.

DOE requests comment on whether any other tolerances on fill level, such as ±0.0625 inches or ±0.25 inches would be more appropriate than ±0.125 inches.

DOE requests comment on its proposal to allow represented values of fill volume to be within 5 gallons of the mean fill volume measured for the sample of the basic model.

7. Spa Cover

Portable electric spas are typically covered when not in active use. The standby loss of a portable electric spa is significantly affected by the presence and thermal properties of a spa cover. Section 5.5.5 of ANSI/APSP/ICC–14 2019 requires that the manufacturer's specified cover be used during the test. Section 3 of ANSI/APSP/ICC–14 2019 defines ''cover, specified'' as the cover that is provided or specified by the manufacturer. However, ANSI/APSP/ICC–14 2019 does not specify how to conduct testing if the manufacturer does not specify a cover. For such cases, differences in laboratory testing decisions regarding the spa cover to be used for testing could result in significant variation in results between laboratories (*i.e.,* low reproducibility of test results) and could also produce test results that are not representative of average consumer use.

To ensure reproducible and representative test results, DOE is proposing to exclude Section 5.5.5 of ANSI/APSP/ICC–14 2019 and to exclude the definition in ANSI/APSP/ICC–14 2019 for ''cover, specified''. DOE is proposing in section 4.1.5 of appendix GG to specify installing the spa cover following the manufacturer's instructions.

Also, as explained in sections III.E.1 and III.E.2 of this NOPR, DOE is proposing in 10 CFR 429.66 that if a basic model is distributed in commerce with multiple covers designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model based on the cover that results in the highest standby loss, except that the manufacturer may choose to identify specific individual combinations of spa and cover as additional basic models.

Additionally, DOE is proposing to provide instructions for testing if the manufacturer does not specify a particular cover to be used with a portable electric spa. DOE considered specifying that no cover be used for testing in such cases; however, DOE testing indicates that maintaining the required test conditions throughout the duration the test (*e.g.,* ambient air temperature and water temperature requirements) can be difficult, or in some cases unachievable, if a portable electric spa is tested without a cover. Furthermore, among the wide range of portable electric spa models that DOE has researched, every identified user manual contains instructions or recommendations regarding the use of a cover. In most cases, use of a cover is recommended for safety purposes as well as sanitation (*e.g.,* to prevent debris from accumulating in the water). This practice suggests that consumers would be likely to use some type of cover even if the spa manufacturer does not specify a particular cover to be used. For these reasons, DOE has tentatively determined that testing without a cover would not be representative of consumer use and could introduce undue test burden.

DOE considered options for specifying a cover to be used for cases in which no cover is designated by the spa manufacturer. DOE is not aware of any information to suggest what type of cover a consumer would use if the spa manufacturer does not specify a particular cover to be used. In such cases, DOE presumes that some consumers may purchase a high-performing spa cover from a third-party supplier; whereas other consumers may opt to use a low-cost, minimally protective cover that would prevent debris from entering the spa but that would not provide substantial insulative properties (*e.g.,* a tarp or thin sheet of plastic). For such consumers opting to use a low-cost minimally insulative cover, a representation of spa energy use based on testing with a thermally insulative cover would not be representative of the energy use experienced by such consumers.

Given that some consumers may opt to use a low-cost, minimally insulative cover if the spa manufacturer does not specify use of a particular cover, DOE is proposing that if no cover is designated by the spa manufacturer for use with the portable electric spa, the portable electric spa be covered during testing with a material that would be low-cost, widely available, would prevent debris from entering the spa, be durable enough for repeated use, but that would provide no substantive insulative properties. DOE tentatively finds that a material with these properties would be feasible for consumer use as a low-cost spa cover. Specifically, DOE is proposing to specify in section 4.1.5 of appendix GG the following: If no cover is designated by the spa manufacturer for use with the portable electric spa, cover the spa with a single layer of 6 mil thickness (0.006 inches; 0.15 mm) plastic film. Cut the plastic to cover the entire top surface of the spa and extend over each edge of the spa approximately 6 inches below the top surface of the spa. Use fasteners or weights to keep the plastic in place during the test, but do not seal the edges of the plastic to the spa (by using tape, for example).

DOE market research indicates that 6 mil thickness plastic film is widely available at home improvement retailers. In addition, DOE testing indicates that covering a portable electric spa during testing with a thin plastic material, such as the material proposed, would be sufficient to maintain the required ambient air temperature and water temperature test conditions throughout the duration the test.

DOE notes that this proposal to test portable electric spas for which the manufacturer does not designate a particular spa cover is conceptually similar to DOE's testing approach for central air conditioners (''CACs''), which typically consist of both an indoor unit and an outdoor unit. The measured efficiency of a CAC is dependent upon the performance characteristics of both the indoor unit and outdoor unit. For CACs sold as an outdoor unit with no matched indoor unit, the DOE test procedure requires that the outdoor unit be tested with an indoor unit that is representative of the least efficient unit with which it would typically be installed. (*see* 10 CFR 429.16, Table 1 and section (b)(2)(i), and 10 CFR part 430, subpart B, appendix M1, section 2.2.e)

However, DOE also notes that this proposal to test portable electric spas for which the manufacturer does not designate a particular spa cover may not be applicable when the spa manufacturer specifically designates a model of portable electric spa for use without a cover or with ''no cover'' as one of multiple cover options designated by the spa manufacturer. In both of these cases, testing the spa with a cover made of 6 mil plastic might not be representative of field use. Therefore, in such cases it might be more representative to test the spa without a cover.

DOE requests comment on its proposed requirements for testing a portable electric spa that does not have a cover designated for use by the spa manufacturer.

DOE requests comment on whether manufacturers would ever designate a portable electric spa model to be used without a cover or designate a ''no cover'' option. If so, DOE requests comment on how such a spa should be tested to determine the highest standby

loss (*e.g.,* should it be tested with a 6 mil plastic cover, or tested with no cover).

8. Air Temperature Measurement Location

Section 5.6.3 of ANSI/APSP/ICC–14 2019 requires that ambient air temperature be measured at one point located 12 to 18 inches above the level of the spa cover and a minimum of 8 inches from the wall of the chamber. The temperature probe will be positioned and out of direct airflow from the circulation fan. ANSI/APSP/ICC–14 2019 does not provide any further requirements on the location of the ambient air temperature measurement point, such that it would be possible in a large chamber for the measurement point to be located beyond the immediate proximity of the portable electric spa. This lack of direction presents the possibility that the temperature could be taken at a location in the chamber with an ambient temperature that is different than the ambient temperature immediately around the portable electric spa.

To avoid this potential issue, DOE is proposing further requirements on the horizontal location of the ambient air temperature measurement point. DOE understands that it is common for ambient air temperature to be measured directly above the center of the portable electric spa. Therefore, DOE is proposing in section 4.1.6 of appendix GG that the ambient air temperature measurement point specified in Section 5.6.3 of ANSI/APSP/ICC–14 2019 must be located above the center of the portable electric spa. DOE has tentatively concluded that this proposal will ensure that the ambient air temperature is measured close to the portable electric spa and in the same general location each time, thereby increasing test repeatability, reproducibility, and representativeness.

DOE requests comment on the proposal to require that ambient air temperature be measured above the center of the portable electric spa.

9. Water Temperature Settings

The definition of standby mode in ANSI/APSP/ICC–14 2019 indicates that water temperature settings may be adjusted to meet the test conditions.[28] ANSI/APSP/ICC–14 2019 does not specify, however, whether adjustments to the water temperature settings can be made during the test. As discussed in section III.C.2 of this NOPR, users typically leave a portable electric spa at the desired water temperature setting while the spa is operating in default operation mode with the cover on. Based on these consumer usage patterns, water temperature adjustments during a test would be unrepresentative of field use. In addition, the permitting of water temperature setting adjustments during a test could influence the outcome of the test.

For these reasons, DOE has tentatively concluded that water temperature setting adjustments would not be appropriate during the test and that further specification is required to ensure repeatable, reproducible, and representative test results. Therefore, DOE proposes in section 4.2.2 of appendix GG to specify that portable electric spa water temperature settings be adjusted to meet the test requirements, but that spa water temperature settings must not be adjusted between the start of the stabilizing period specified in Section 5.6.1 of ANSI/APSP/ICC–14 2019 and the end of the test period specified in Section 5.6.4.7 of ANSI/APSP/ICC–14 2019.

DOE requests comment on its proposed requirement that water temperature settings must not be adjusted between the start of the stabilizing period and the end of the test period.

10. Water Temperature Requirements

The sub-sections within Section 5.6.1 of ANSI/APSP/ICC–14 2019 specify the range of water temperatures that are allowed during the test based on the capabilities of the portable electric spa.[29] DOE understands that these requirements apply to every temperature measurement taken during the test. However, some consumer product test procedures specify requirements for the average temperature during a test instead of the individual temperature measurements.[30] The phrasing used in Section 5.6.1 of ANSI/APSP/ICC–14 2019 could be interpreted to refer to requirements on the average temperature during the test instead of every temperature measurement taken during the test. This wording creates the possibility that the range of water temperatures could vary between tests based on a laboratory's interpretation of whether the water temperature requirements apply to the average temperature or each individual measurement.

To ensure that the water temperature requirements are interpreted consistently and repeatably, DOE is proposing to specify explicitly in section 4.2.3 of appendix GG that each individual water temperature measurement taken during the stabilization period and test period must meet the applicable water temperature requirements specified in Section 5.6.1 of ANSI/APSP/ICC–14 2019. DOE conducted investigative testing and found that this requirement can be met in typical spa operation.

DOE requests comment on its proposal to state explicitly that each individual water temperature measurement taken during the stabilization period and test period must meet the applicable water temperature requirements.

11. Standby Loss Calculation

Section 5.7 of ANSI/APSP/ICC–14 2019 contains calculations for normalized standby power. This includes calculating the measured standby power and normalizing that standby power to a normalized temperature difference between the water in the spa and the ambient air. As discussed in section III.C.3 of this NOPR, DOE is proposing to use the term ''standby loss'' instead of ''normalized standby power.'' In addition, as discussed in section III.D.3 of this NOPR, DOE is proposing to specify a representative ambient air temperature of 56 °F. Because these proposals are inconsistent with the calculations defined in Section 5.7 of ANSI/APSP/ICC–14 2019, DOE is proposing to exclude Section 5.7 of ANSI/APSP/ICC–14 2019 from incorporation by reference and to specify a new standby loss calculation in section 4.3 of appendix GG. DOE is proposing for this section to use the term ''standby loss'' instead of ''normalized standby power'' and to use normalized temperature differences that are consistent with DOE's proposed representative ambient air temperature of 56 °F.

In determining the normalized temperature differences, DOE also is proposing to use a different approach to calculate the normalized temperature differences than the approach used in ANSI/APSP/ICC–14 2019. In Sections

[28] The definition of standby mode in Section 3 of ANSI/APSP/ICC–14 2019 is as follows: All settings at default as shipped by the manufacturer, except water temperature, which may be adjusted to meet the test conditions. No manual operations are enabled.

[29] For example, Section 5.6.1.1 states that for exercise spas or the exercise portion of a combination spa, that are capable of maintaining a minimum water temperature of 100 °F (38 °C) for the duration of the test, the spa shall be tested at 102 °F +/− 2 °F (39 °C +/− 1 °C) and maintain a minimum water temperature of 100 °F (38 °C) for the duration of the test.

[30] For example, the test procedure for refrigerators and refrigerator-freezers at appendix A to subpart B of part 430 contains several requirements on the average temperature of the compartment(s) within the appliance.

5.7.2 and 5.7.3 of ANSI/APSP/ICC–14 2019, the normalized temperature differences are equal to the minimum of the allowed water temperature range (*i.e.,* 100 °F or 85 °F) minus the maximum of the allowed ambient air temperature range (*i.e.,* 63 °F), resulting in a normalized temperature difference of 37 °F for units tested at a water temperature of 102 °F ± 2 °F, and a normalized temperature difference of 22 °F for units tested at a water temperature of 87 °F ± 2 °F. DOE has tentatively concluded that this approach may not be representative of an average use cycle, because it normalizes standby loss to the minimum expected temperature difference resulting from the two defined ranges. DOE has tentatively concluded that a more representative result would be obtained by calculating the normalized temperature difference as the difference between the midpoint of the allowable water temperature and ambient air temperature ranges.

Therefore, DOE is proposing to define a normalized temperature difference of 46 °F (*i.e.,* 102 °F − 56 °F) for units tested at a water temperature of 102 °F ± 2 °F, and a normalized temperature difference of 31 °F (*i.e.,* 87 °F − 56 °F) for units tested at a water temperature of 87 °F ± 2 °F.

DOE requests comment on the proposed standby loss calculations, including the method used to calculate normalized temperature differences based on the midpoint of the allowable temperature ranges. DOE requests comment on its tentative conclusion that normalizing standby loss to the midpoint of the allowable temperature ranges would produce test results that are more representative than normalizing standby loss to the minimum expected temperature difference between the allowable ranges.

E. Represented Values Provisions

For determining the proposed represented values (*i.e.,* standby loss and fill volume) for each basic model, DOE proposes that manufacturers must use a statistical sampling plan of tested data. The following sections discuss the concept of a basic model as well as DOE's proposed sampling plan.

1. Basic Model

In the course of regulating consumer products, DOE has developed the concept of a ''basic model'' to determine the specific product or equipment configuration(s) to which the regulations would apply. Specifically, in DOE's existing definition of basic model at 10 CFR 430.2, basic model means all units of a given type of covered product (or class thereof) manufactured by one manufacturer that have the same primary energy source and have essentially identical electrical, physical, and functional (or hydraulic) characteristics that affect energy consumption, energy efficiency, water consumption, or water efficiency.[31]

DOE has reviewed this definition of ''basic model'' and tentatively determined that the general definition is appropriate for portable electric spas. For the purposes of applying the proposed portable electric spa regulations, DOE is proposing to rely on the definition of ''basic model'' as currently defined at 10 CFR 430.2. Application of the current definition of ''basic model'' would allow manufacturers of portable electric spas to group similar models within a basic model to minimize testing burden, while ensuring that key variables that differentiate portable electric spa energy performance or utility are maintained as separate basic models. As proposed, manufacturers would be required to test only a representative number of units of a basic model in lieu of testing every individual model they manufacture, and individual models of portable electric spas would be permitted to be grouped under a single basic model so long as all grouped models have the same representative energy performance, which is representative of the unit with the highest standby loss.

For example, characteristics that might distinguish basic models of a portable electric spa might be the amount and location of insulation or reflective material in the spa cabinet, and the configuration of the spa's plumbing, especially including whether the spa uses a dedicated-purpose pump for circulation, such that the standby loss of the spa can be reasonably expected to differ as a result. DOE understands that many available features on portable electric spas, such as varying colors of exterior cabinetry or acrylic shell, do not affect energy usage. Therefore, features such as these would not constitute the basis for establishing a distinct basic model.

Also, as explained in section III.E.2 of this NOPR, DOE is proposing in 10 CFR 429.66 that if a basic model is distributed in commerce with multiple covers designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model based on the cover that results in the highest standby loss, except that the manufacturer may choose to identify specific individual combinations of spa and cover as additional basic models.

DOE requests comment on the proposed applicability of the definition of ''basic model'' at 10 CFR 430.2 to portable electric spas.

2. Represented Values

DOE provides requirements for represented values and sampling plans for all covered products in subpart B to part 429. The purpose of a statistical sampling plan is to provide a method to determine represented values of energy- and non-energy-related metrics for each basic model.

DOE is proposing to create a new section at 10 CFR 429.66 for portable electric spas and to require that, for each basic model, a sample of sufficient size must be randomly selected and tested to ensure that any represented value of standby loss or other measure of energy consumption of a basic model for which customers would favor lower values is greater than or equal to the higher of the following two values:

(1) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and $\bar{x}$ is the sample mean, n is the number of samples, and x_i is the maximum of the i^{th} sample;

Or,

(2) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\bar{x}$ is the sample mean, s is the sample standard deviation, n is the number of samples, and $t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with n–1 degrees of freedom (from appendix A of subpart B of part 429).

DOE is also proposing in 10 CFR 429.66 that the represented value of standby loss must be a whole number of watts.

In addition to specifying sampling provisions pertaining to representations of standby loss, DOE is proposing that the represented value of fill volume must be a whole number of gallons that is within 5 gallons of the mean of the fill volumes measured for the units in the sample used to determine the represented value of standby loss. As discussed in section III.D.6 of this NOPR, DOE is proposing a tolerance of 5 gallons on the represented value of fill volume to enable manufacturers to make representations of fill volume values

[31] The definition of ''basic model'' in 10 CFR 430.2 also includes several product-specific paragraphs that are not relevant to portable electric spas.

that are multiples of 10 in marketing materials, consistent with current practice.

Portable electric spas are often available with more than one model of cover, and the characteristics of the cover can significantly affect measured standby loss. DOE is proposing in 10 CFR 429.66 that if a basic model is distributed in commerce with multiple covers designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model based on the cover that results in the highest standby loss, except that the manufacturer may choose to identify specific individual combinations of spa and cover as additional basic models. DOE is also proposing that if a basic model is distributed in commerce with no cover designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model by testing as specified in section 4.1.5.2 of appendix GG to subpart B of part 430.

DOE requests comment on the proposed statistical sampling procedures and representations requirements for portable electric spas.

DOE requests comment on the proposal that represented values be based on testing with the designated cover that results in the highest standby loss; or by testing as specified in section 4.1.5.2 of appendix GG to subpart B of part 430 if there is no designated cover.

F. Representations of Energy Efficiency or Energy Use

Manufacturers of portable electric spas within the scope of the proposed portable electric spa test procedure, if finalized, would be required to use the test procedure proposed in this NOPR when making representations about the energy efficiency or energy use of their products. Specifically, 42 U.S.C. 6293(c) provides that ''no manufacturer . . . may make any representation . . . respecting the energy consumption of such product or cost of energy consumed by such product, unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing.''

If made final, the proposed test procedure would not require manufacturers to test the subject portable electric spas until such time as compliance is required with any future applicable energy conservation standards that are established. However, beginning 180 days after publication of a final rule that adopts a test procedure for portable electric spas, any voluntary representations as to the energy efficiency or energy use of a subject portable electric spa would be required to be based on the DOE test procedure. (42 U.S.C. 6293(c)(2))

G. Test Procedure Costs and Harmonization

1. Test Procedure Costs and Impact

In this NOPR, DOE proposes to establish a test procedure for portable electric spas by incorporating by reference the test methods established in ANSI/APSP/ICC–14 2019, ''American National Standard for Portable Electric Spa Energy Efficiency,'' with certain modifications and additions. This NOPR also contains proposals regarding representation provisions for portable electric spas. The following paragraphs discuss DOE's analysis of testing costs associated with this proposal.

As discussed previously, DOE proposes to incorporate by reference the test method contained in certain applicable Sections of ANSI/APSP/ICC–14 2019 as the basis for the portable electric spas test procedure. DOE also proposes modifications and additions to ANSI/APSP/ICC–14 2019 to ensure repeatability, reproducibility, and representativeness of test results. These proposals are discussed in sections III.D.1 through III.D.11 of this NOPR.

Because DOE's proposed test procedure would largely be consistent with the current industry test method ANSI/APSP/ICC–14 2019, DOE has tentatively determined that the proposal in this NOPR is unlikely to significantly increase burden in comparison to performing testing consistent with ANSI/APSP/ICC–14 2019. In the following paragraphs, DOE estimates the testing costs associated with the proposed test procedure for portable electric spas.

By adopting industry standards, DOE has tentatively determined that the proposals included in this NOPR would establish a DOE test procedure that is reasonably designed to produce test results which reflect energy efficiency and energy use of portable electric spas during a representative average use cycle and that would not be unduly burdensome for manufacturers to conduct. DOE is presenting its estimates for the costs associated with testing products consistent with the requirements of the proposed test procedure, as would be required to certify compliance with any future energy conservation standard.

DOE estimates the per-test cost for third-party laboratory testing of portable electric spas according to the current industry consensus test procedure ANSI/APSP/ICC–14 2019 to be $5,000 for standard and inflatable spas, $9,000 for exercise spas, and $11,000 for combination spas. DOE estimates the per-test cost for third-party lab testing according to the proposed DOE test procedure to be $5,150 for standard and inflatable spas, $9,150 for exercise spas, and $11,150 for combination spas. This slight increase between the estimates for ANSI/APSP/ICC–14 2019 and the proposed DOE test procedure is due to the potential that some testing labs may be required to install conditioning equipment to comply with the proposed lower ambient temperature requirement. DOE estimates the cost of such equipment to be approximately $150.[32]

DOE notes that the testing burden per manufacturer will vary depending on current testing practices. ANSI/APSP/ICC–14 2019 is the generally accepted industry test procedure. As such, many manufacturers are already testing to ANSI/APSP/ICC–14 2019 for certification in California and other regulated markets.

DOE requests comment on its estimates of the costs associated with performing testing according to the test procedure proposals in this NOPR. DOE requests comment on its tentative determination that the proposed DOE test procedure, if finalized, would not be unduly burdensome for manufacturers to conduct.

2. Harmonization With Industry Standards

DOE's established practice is to adopt relevant industry standards as DOE test procedures unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that product during a representative average use cycle or period of use. Section 8(c) of appendix A of 10 CFR part 430, subpart C. In cases where the industry standard does not meet EPCA's statutory criteria for test procedures, DOE will make modifications through the rulemaking process to these standards for the DOE test procedure.

The industry standard DOE proposes to incorporate by reference via

[32] DOE engaged in correspondence with multiple third-party test labs, and with portable electric spa manufacturers. The costs above reflect DOE's high end estimates of potential testing costs. DOE researched the cost of conditioning systems that may be required for test labs to purchase for adapting current test chambers to comply with the DOE proposed test procedure, and the cost of their installation. DOE amortized the combined cost of purchase and installation per spa such that the upgrade costs to a test lab would be recovered in one calendar year.

amendments described in this notice is discussed in further detail in section III.D.1 of this document.

DOE requests comments on the benefits and burdens of the proposed updates and additions to the industry standard referenced in the test procedure for portable electric spas.

H. Compliance Date

If DOE amends a test procedure, EPCA prescribes that all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with that amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) To the extent the test procedure proposed in this document is required only for the evaluation and issuance of efficiency standards, use of the test procedure, if finalized, would not be required until the compliance date of such standards. Section 8(e) of appendix A, 10 CFR part 430, subpart C.

If DOE were to publish a new test procedure, EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action does not constitute a ''significant regulatory action'' under section 3(f) of E.O. 12866. Accordingly, this proposed action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

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

The following sections detail DOE's IRFA for this test procedure rulemaking.

1. Description of Reasons Why Action Is Being Considered

Portable electric spas are factory-built hot tubs or spas that are intended for the immersion of people in heated, temperature-controlled water that is circulated in a closed system. Currently, portable electric spas are not subject to DOE test procedures or energy conservation standards. DOE is publishing this NOPR in accordance with the statutory authority in EPCA. In this NOPR, DOE is proposing to establish a new test procedure for portable electric spas.

2. Objective of, and Legal Basis for, Rule

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [33] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain products, referred to as ''covered products.'' In addition to specifying a list of consumer products that are covered products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products.

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. Specifically, EPCA provides that DOE may, in accordance with certain requirements, prescribe test procedures for any consumer product classified as a covered product under section 6292(b). (42 U.S.C. 6293(b)(1)(B)) EPCA requires that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

3. Description and Estimate of Small Entities Regulated

DOE uses the Small Business Administration (''SBA'') small business size standards to determine whether manufacturers qualify as ''small businesses,'' which are listed by the North American Industry Classification

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

System (''NAICS'').[34] The SBA considers a business entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121.

Portable electric spa manufacturers, who produce the products covered by this rule, are classified under NAICS code 333414, ''Heating Equipment (except Warm Air Furnaces) Manufacturing.'' In 13 CFR 121.201, the SBA sets a threshold of 500 employees or fewer for an entity to be considered as a small business for this category. This employee threshold includes all employees in a business's parent company and any other subsidiaries.

DOE reviewed the test procedure proposed in this NOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The Department conducted a focused inquiry into small business manufacturers of the products covered by this rulemaking. DOE used publicly available information to identify potential small businesses that manufacture portable electric spas domestically. DOE identified manufacturers using MAEDbS and web searches. Additionally, DOE used publicly-available information and subscription-based market research tools (*e.g.,* reports from Dun & Bradstreet [35]). As a result of this inquiry, DOE identified a total of 28 companies that are manufacturers of portable electric spas in the United States. DOE screened out companies that do not meet the definition of a ''small business'' or are foreign-owned and operated. Of these, DOE identified 14 potential small businesses.

4. Description and Estimate of Compliance Requirements

In this NOPR, DOE proposes to establish a test procedure for portable electric spas in a new appendix GG to subpart B of part 430. DOE proposes to incorporate by reference the test methods established in ANSI/APSP/ICC–14 2019, ''American National Standard for Portable Electric Spa Energy Efficiency,'' with certain exceptions and additions. The proposed test method produces a measure (''standby loss'') of the energy consumption of portable electric spas that represents the average power consumed by the spa, normalized to a standard temperature difference between the ambient air and the water in the spa, while the cover is on and the product is operating in its default operation mode.

DOE's proposed test procedure would be largely consistent with the current industry consensus test method ANSI/APSP/ICC–14 2019. As such DOE anticipates the proposal in this NOPR to be unlikely to significantly increase burden given that DOE is referencing the prevailing industry test procedure. Furthermore, compliance with the proposed test procedure would not be required until compliance is required with any energy conservation standards DOE establishes for portable electric spas or if a manufacturer chooses to make voluntary representations.

DOE recognizes that energy conservation standards related to portable electric spas may be proposed or promulgated in the future and manufacturers would then be required to test all covered products in accordance with the proposed test procedure once compliance with any standard is required. Therefore, DOE is presenting the estimated maximum costs associated with testing consistent with the requirements of the test procedure, as would be required to comply with any future energy conservation standards for portable electric spas.

DOE understands that most portable electric spa manufacturers elect to test units at a third-party testing facility. DOE estimates that the per basic model test costs for third-party lab testing to be $5,150 for standard and inflatable spas, $9,150 for exercise spas, and $11,150 for combination spas. Also, DOE estimates the impacts based on estimated basic model counts and company revenue. Table IV.1 summarizes DOE's estimates for the identified small businesses. On average, testing costs represent less than 1 percent of annual revenue for a typical small business.

TABLE IV.1—ESTIMATED TESTING BURDEN FOR SMALL, DOMESTIC MANUFACTURERS

Manufacturer	Estimated testing burden (2022$mm)	Annual revenue (2022$mm)	Percent of annual revenue (%)
Manufacturer A	0.08	51.4	0.2
Manufacturer B	0.01	10.3	0.1
Manufacturer C	0.06	29.6	0.2
Manufacturer D	0.03	0.600	4.3
Manufacturer E	0.01	111	0.0
Manufacturer F	0.14	62.0	0.2
Manufacturer G	0.17	27.0	0.7
Manufacturer H	0.06	20.0	0.3
Manufacturer I	0.07	7.52	1.0
Manufacturer J	0.02	23.7	0.1
Manufacturer K	0.02	40.0	0.1
Manufacturer L	0.05	12.7	0.4
Manufacturer M	0.03	7.73	0.4
Manufacturer N	0.01	2.19	0.5

DOE requests comment on the number of small businesses DOE identified. DOE also requests comment on the potential cost estimates for each small business identified.

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

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

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small

[34] Available at: *www.sba.gov/document/support-table-size-standards.*

[35] Dun & Bradstreet reports are available at: *app.dnbhoovers.comI* (last accessed September 1, 2021).

businesses that would result from DOE's proposed test procedure, if finalized. In reviewing alternatives to the proposed test procedure, DOE considered the option of not establishing a Federal test procedure for portable electric spas. While not establishing a test procedure would reduce the burden on small businesses, DOE must use test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s)) Because establishing a test procedure for portable electric spas is necessary prior to establishing energy conservation standards, DOE tentatively concludes that establishing the test procedure, as proposed in this NOPR, supports DOE's authority to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A))

The Department has tentatively determined that there are no better alternatives than the test procedure proposed in this NOPR, in terms of both meeting the agency's objectives and reducing burden. Additionally, manufacturers subject to DOE's test procedures may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act of 1995

Although no energy conservation standards have been established for portable electric spas as of the publication of this NOPR, manufacturers of portable electric spas would need to certify to DOE that their products comply with any potential future applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including portable electric spas. (*See* generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOE is not proposing certification or reporting requirements for portable electric spas in this NOPR. Instead, DOE may consider proposals to establish certification requirements and reporting for portable electric spas under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this NOPR, DOE proposes a test procedure that it expects will be used to develop and implement future energy conservation standards for portable electric spas. DOE has determined that this proposed rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, appendix A to subpart D, sections A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State,

local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.energy.gov/gc/office-general-counsel.* DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

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

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

The proposed regulatory action to establish a test procedure for measuring the energy efficiency of portable electric spas is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

The proposed test procedure for portable electric spas would incorporate testing methods contained in certain sections of the following commercial standard: Pool & Hot Tub Alliance ANSI/APSP/ICC–14 2019, ''American National Standard for Portable Electric Spa Energy Efficiency''. DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review). DOE will consult with both the Attorney General and the Chairman of the FTC concerning the impact of this test procedure on competition, prior to prescribing a final rule.

M. Description of Materials Incorporated by Reference

In this NOPR, DOE proposes to incorporate by reference ANSI/APSP/ICC–14 2019. The proposed incorporated test standard measures standby loss as the average power required to maintain the spa's water at a ready-to-use temperature for 72 hours, while the spa sits covered in a controlled-temperature environment. Specifically, this NOPR proposes to incorporate significant portions of section 3, ''Definitions'', section 5, ''Test Methods'', and appendix A, ''Minimum Chamber Requirements''.

Copies of ANSI/APSP/ICC–14 2019 may be purchased from the Pool & Hot Tub Alliance, 2111 Eisenhower Avenue, Suite 500, Alexandria, VA 22314 (*www.phta.org*), or by going to

webstore.ansi.org/Standards/APSP/ansiapspicc142019.

V. Public Participation

A. Participation in the Webinar

The time and date of the webinar meeting are listed in the **DATES** section at the beginning of this document. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: *www.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=79.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this proposed rule, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the webinar. Such persons may submit to *ApplianceStandardsQuestions@ee.doe.gov.* Persons who wish to speak should include with their request a computer file in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

C. Conduct of the Webinar

DOE will designate a DOE official to preside at the webinar/public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the webinar/public meeting. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the webinar/public meeting and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The webinar will be conducted in an informal, conference style. DOE will present a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the webinar/public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the webinar/public meeting.

A transcript of the webinar will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this proposed rule. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule.[36] Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

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

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

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

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

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted

[36] DOE has historically provided a 75-day comment period for test procedure NOPRs pursuant to the North American Free Trade Agreement, U.S.-Canada-Mexico (''NAFTA''), Dec. 17, 1992, 32 I.L.M. 289 (1993); the North American Free Trade Agreement Implementation Act, Public Law 103–182, 107 Stat. 2057 (1993) (codified as amended at 10 U.S.C.A. 2576) (1993) (''NAFTA Implementation Act''); and Executive Order 12889, ''Implementation of the North American Free Trade Agreement,'' 58 FR 69681 (Dec. 30, 1993). However, on July 1, 2020, the Agreement between the United States of America, the United Mexican States, and the United Canadian States (''USMCA''), Nov. 30, 2018, 134 Stat. 11 (*i.e.,* the successor to NAFTA), went into effect, and Congress's action in replacing NAFTA through the USMCA Implementation Act, 19 U.S.C. 4501 *et seq.* (2020), implies the repeal of E.O. 12889 and its 75-day comment period requirement for technical regulations. Thus, the controlling laws are EPCA and the USMCA Implementation Act. Consistent with EPCA's public comment period requirements for consumer products, the USMCA only requires a minimum comment period of 60 days. Consequently, DOE now provides a 60-day public comment period for test procedure NOPRs.

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

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

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

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

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on its proposal for the scope of the test procedure to include all products that meet the definition of portable electric spa. DOE requests comment on whether any additional products should be included within the scope of the DOE test procedure. DOE requests comment on whether any products that meet the definition of portable electric spa should be excluded from the scope of the DOE test procedure, and, if so, on what basis.

(2) DOE requests comment on whether the definitions for the categories of portable spas proposed in section 3 of appendix GG (*i.e.,* ''standard spa'', ''exercise spa'', ''combination spa'', and ''inflatable spa'') adequately delineate the categories of portable electric spas and whether any additional or different categories are warranted.

(3) DOE requests comment on whether there are portable electric spas used for special purposes, such as those operated for medical treatment or physical therapy, that should be excluded from the scope of the DOE test procedure or tested in a different manner. If so, DOE requests comment on the method to determine the spas to exclude or test differently.

(4) DOE requests comment on its tentative determination not to propose a minimum or maximum size to limit the scope of the DOE test procedure.

(5) DOE requests comment on whether it is necessary to measure standby mode or off mode energy consumption in the DOE test procedure.

(6) DOE requests comment on its proposal to use standby loss, equivalent to the normalized standby power as defined by ANSI/APSP/ICC–14 2019, as the performance-based metric for representing the energy use of portable electric spas.

(7) DOE requests comment on its proposed definition for ''standby loss'' in section 3.9 of appendix GG.

(8) DOE requests comment and data on the representative operation of spas when in use with the cover removed, including typical frequency and duration of use, operation of jets or other features, and number of users. DOE also requests comment on how usage varies across spa types.

(9) DOE requests comment on any test methods that measure the operation of spas when in use with the cover removed.

(10) DOE requests comment on its proposal to adopt specific sections of ANSI/APSP/ICC–14 2019 in DOE's proposed test procedure for portable electric spas.

(11) DOE requests comment on whether any of the sections of ANSI/APSP/ICC–14 2019 that DOE is proposing to exclude from the proposed DOE test procedure should be included in the DOE test procedure.

(12) DOE requests comment on its determination that, rounded to the nearest degree, 56 °F is a nationally representative ambient air temperature applicable to testing portable electric spas.

(13) DOE requests comment on its proposal to specify an ambient air temperature of 56.0 ± 3.0 °F during testing. If commenters recommend a different ambient temperature, DOE requests data demonstrating the representativeness of that ambient temperature.

(14) DOE requests comment on its tentative determination that the specifications regarding chamber internal dimensions, air flow, and chamber insulation in appendix A to ANSI/APSP/ICC–14 2019 are appropriate for testing portable electric spas and would produce test results that reflect representative consumer use and would not be unduly burdensome to require for testing.

(15) DOE requests comment on the proposed chamber requirements in section 4.1.1 of appendix GG and whether any alternate or additional requirements are needed.

(16) DOE seeks comment on its tentative determination, based on review of portable electric spa user manuals, that the most representative installation of a portable electric spa is to be installed directly on concrete with no insulation between that surface and the spa.

(17) DOE requests comment on its proposal to specify installing the portable electric spa directly on the chamber floor without any insulation between the spa and the floor.

(18) DOE seeks comment on its presumption that a consumer would be likely to install insulation and/or wood if insulation and/or wood were to be included with the portable electric spa and specified by the installation instructions to be installed for use, and that in such cases, testing with the insulation and/or wood provided would produce test results that are representative of consumer use.

(19) DOE requests comment on the availability of concrete floors or slabs within test facilities and on whether any test chamber floor alternatives, such as

solid or perforated steel or aluminum floors, would represent portable electric spa operation when installed on concrete floors or slabs.

(20) DOE requests comment on the proposed hierarchy for specifying voltage and maximum amperage for portable electric spas that have multiple options for voltage and/or amperage. DOE requests comment on any cases for which the proposed language would not make clear the voltage and/or maximum amperage to be used during testing.

(21) DOE requests comment on the proposals to exclude from incorporation by reference the definitions of ''fill volume'' and ''rated volume'' in ANSI/APSP/ICC–14 2019, to define a new term for ''fill volume,'' and to specify new filling instructions in appendix GG.

(22) DOE requests comment on its proposal to specify a tolerance of ±0.125 inches on the defined fill level.

(23) DOE requests comment on whether any other tolerances on fill level, such as ±0.0625 inches or ±0.25 inches would be more appropriate than ±0.125 inches.

(24) DOE requests comment on its proposal to allow represented values of fill volume to be within 5 gallons of the mean fill volume measured for the sample of the basic model.

(25) DOE requests comment on its proposed requirements for testing a portable electric spa that does not have a cover designated for use by the spa manufacturer.

(26) DOE requests comment on whether manufacturers would ever designate a portable electric spa model to be used without a cover, or designate a ''no cover'' option. If so, DOE requests comment on how such a spa should be tested to determine the highest standby loss (*e.g.,* should it be tested with a 6 mil plastic cover, or tested with no cover).

(27) DOE requests comment on the proposal to require that ambient air temperature be measured above the center of the portable electric spa.

(28) DOE requests comment on its proposed requirement that water temperature settings must not be adjusted between the start of the stabilizing period and the end of the test period.

(29) DOE requests comment on its proposal to state explicitly that each individual water temperature measurement taken during the stabilization period and test period must meet the applicable water temperature requirements.

(30) DOE requests comment on the proposed standby loss calculations, including the method used to calculate normalized temperature differences based on the midpoint of the allowable temperature ranges. DOE requests comment on its assertion that normalizing standby loss to the midpoint of the allowable temperature ranges would produce test results that are more representative than normalizing standby loss to the minimum expected temperature difference between the allowable ranges.

(31) DOE requests comment on the proposed applicability of the definition of ''basic model'' at 10 CFR 430.2 to portable electric spas.

(32) DOE requests comment on the proposed statistical sampling procedures and representations requirements for portable electric spas.

(33) DOE requests comment on the proposal that represented values be based on testing with the designated cover that results in the highest standby loss; or by testing as specified in section 4.1.5.2 of appendix GG to subpart B of part 430 if there is no designated cover.

(34) DOE requests comment on its estimates of the costs associated with performing testing according to the test procedure proposals in this NOPR. DOE requests comment on its tentative determination that the proposed DOE test procedure, if finalized, would not be unduly burdensome for manufacturers to conduct.

(35) DOE requests comments on the benefits and burdens of the proposed updates and additions to industry standards referenced in the test procedure for portable electric spas.

(36) DOE requests comment on the number of small businesses DOE identified. DOE also requests comment on the potential cost estimates for each small business identified.

(37) Additionally, DOE welcomes comments on other issues relevant to the conduct of this rulemaking that may not specifically be identified in this document.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and request for comment.

List of Subjects

10 CFR Part 429

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

10 CFR Part 430

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

Signing Authority

This document of the Department of Energy was signed on October 3, 2022, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 4, 2022.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Section 429.68 is added to read as follows:

§ 429.68 Portable electric spas.

(a) *Determination of represented values.* Manufacturers must determine the represented values for each basic model of portable electric spas by testing in conjunction with the following provisions.

(1) *Spa Covers.*

(i) If a basic model is distributed in commerce with multiple covers designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model based on the cover that results in the highest standby loss, except that the manufacturer may choose to identify

specific individual combinations of spa and cover as additional basic models.

(ii) If a basic model is distributed in commerce with no cover designated by the spa manufacturer for use with the basic model, a manufacturer must determine all represented values for that basic model by testing as specified in section 4.1.5.2 of appendix GG to subpart B of part 430.

(2) *General sampling requirements.* The sampling requirements of § 429.11 are applicable to portable electric spas; and

(3) *Units to be tested.* For each basic model of portable electric spas, a sample of sufficient size must be randomly selected and tested to ensure that any representation of standby loss or other measure of energy consumption of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

(i) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

and $\overline{X}$ is the sample mean, n is the number of samples, and x_i is the i^{th} sample;

Or,

(ii) The upper 95 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{0.95}\left(\frac{s}{\sqrt{n}}\right)$$

and $\overline{X}$ is the sample mean, s is the sample standard deviation, n is the number of samples, and $t_{0.95}$ is the t statistic for a 95 percent one-tailed confidence interval with n-1 degrees of freedom (from appendix A to subpart B of this part).

(4) *Standby loss represented value.* The represented value of standby loss must be a whole number of watts.

(5) *Fill volume represented value.* The represented value of fill volume of a basic model must be a whole number of gallons that is within 5 gallons of the mean of the fill volumes measured for the units in the sample selected as described in paragraph (a)(3) of this section.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

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

■ 4. Section 430.3 is amended by:

■ a. Redesignating paragraphs (v) through (w) as paragraphs (w) through (x); and

■ b. Adding a new paragraph (v).

The addition reads as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(v) *PHTA.* Pool & Hot Tub Alliance, 2111 Eisenhower Avenue, Suite 500, Alexandria, VA 22314, *www.phta.org.*

(1) ANSI/APSP/ICC–14 2019 (''ANSI/APSP/ICC–14 2019''), American National Standard for Portable Electric Spa Energy Efficiency, IBR approved for appendix GG to subpart B of this part.

(2) [Reserved]

* * * * *

■ 5. Section 430.23 is amended by adding a new paragraph (hh) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(hh) *Portable electric spas.*

(1) Measure the standby loss in watts and the fill volume in gallons of a portable electric spa, in accordance with appendix GG to this subpart.

(2) [Reserved].

■ 6. Add Appendix GG to subpart B of part 430 to read as follows:

Appendix GG to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Portable Electric Spas

Note: Beginning [*date 180 days after date of publication of a final rule in the* ***Federal Register***], all representations of energy efficiency and energy use of portable electric spas, including those made on marketing materials and product labels, must be made in accordance with this test procedure.

1. Incorporation by reference.

DOE incorporated by reference in § 430.3, the entire standard for ANSI/APSP/ICC–14 2019. However, only enumerated provisions of ANSI/APSP/ICC–14 2019, as listed in this section 1 are required. To the extent there is a conflict between the terms or provisions of a referenced industry standard and the CFR, the CFR provisions control. Non-enumerated provisions of ANSI/APSP/ICC–14 2019 are specifically excluded.

1.1 ANSI/APSP/ICC–14 2019:

(a) Section 3—Definitions (excluding the definitions for *cover, specified; fill volume; rated volume;* and *standby mode*), as specified in section 3 of this appendix;

(b) Section 5—Test Method (excluding Sections 5.1, 5.2, 5.5.2, 5.5.4, 5.5.5, and 5.7), as specified in section 4 of this appendix;

(c) Appendix A—Minimum Chamber Requirements (excluding section titled *Chamber floor*), as specified in section 4.1.1 of this appendix.

1.2 Reserved.

2. Scope

This appendix provides the test procedure for measuring the standby loss in watts and the fill volume in gallons of portable electric spas.

3. Definitions

3.1. Section 3, Definitions, of ANSI/APSP/ICC–14 2019 applies to this test procedure. In case of conflicting terms between ANSI/APSP/ICC–14 2019 and DOE's definitions in this appendix or in § 430.2, DOE's definitions take priority.

3.2. Combination spa means a portable electric spa with two separate and distinct reservoirs, where—

(a) One reservoir is an exercise spa;

(b) The second reservoir is a standard spa; and

(c) Each reservoir has an independent water temperature setting control.

3.3. Exercise spa means a variant of a portable electric spa in which the design and construction includes specific features and equipment to produce a water flow intended to allow recreational physical activity including, but not limited to, swimming in place. An exercise spa is also known as a swim spa.

3.4. Exercise spa portion means the reservoir of a combination spa that is an exercise spa.

3.5. Fill volume means the volume of water held by the portable electric spa when it is filled as specified in section 4.1.4 of this appendix.

3.6. Inflatable spa means a portable electric spa where the structure is collapsible and is designed to be filled with air to form the body of the spa.

3.7. Standard spa means a portable electric spa that is not an inflatable spa, an exercise spa, or the exercise spa portion of a combination spa.

3.8. Standard spa portion means the reservoir of a combination spa that is a standard spa.

3.9. Standby loss means the mean normalized power required to operate the portable electric spa in default operation mode with the cover on, as calculated in section 4.3 of this appendix.

4. Test Method

Determine the standby loss in watts and fill volume in gallons for portable electric spas in accordance with Section 5, *Test Method,* of ANSI/APSP/ICC–14 2019, except as follows.

4.1. Test Setup

4.1.1. Chamber

Install the portable electric spa in a chamber satisfying the requirements specified for *Chamber internal dimensions, Air flow,* and *Chamber insulation* in appendix A, *Minimum Chamber Requirements,* to ANSI/APSP/ICC–14 2019.

4.1.2. Chamber Floor

Install the portable electric spa directly on a level concrete floor or slab.

If insulation and/or plywood is shipped with the spa, and the manufacturer's instructions specify that insulation and/or plywood be installed under the spa for normal use, install the minimum amount of insulation and/or plywood between the floor and the spa that is specified by the manufacturer's installation instructions.

Otherwise, install no insulation or plywood between the floor and the spa.

4.1.3. Electrical Supply Voltage and Amperage Configuration

If the portable electric spa can be installed or configured with multiple options of voltage, maximum amperage, or both, use the option specified in the following paragraphs.

(a) Use the as-shipped configuration, if such a configuration is provided.

(b) If no configuration is provided in the as-shipped condition, use the option specified in the manufacturer's instructions as the recommended configuration for normal consumer use.

(c) If no configuration is provided in the as-shipped condition and the manufacturer's instructions do not provide a recommended configuration for normal consumer use, use the maximum voltage specified in the manufacturer's installation instructions and maximum amperage that the manufacturer's installation instructions specify for use with the maximum voltage.

4.1.4. Fill Volume

Follow the manufacturer's instructions for filling the portable electric spa with water, connecting and/or priming the pump(s), and starting up the spa. After verifying that the spa is operating normally and that all water lines are filled, power off the spa and adjust the fill level as needed to meet the following specifications before starting the test.

If the manufacturer's instructions specify a single fill level, fill to that level with a tolerance of ±0.125 inches.

If the manufacturer's instructions specify a range of fill levels and not a single fill level, fill to the middle of that range with a tolerance of ±0.125 inches.

If the manufacturer's instructions do not specify a fill level or range of fill levels, fill to the halfway point between the bottom of the skimmer opening and the top of the skimmer opening with a tolerance of ±0.125 inches.

If the manufacturer's instructions do not specify a fill level or range of fill levels, and there is no wall skimmer, fill to 6.0 inches ±0.125 inches below the overflow level of the spa.

Measure the volume of water added to the spa with a water meter while filling the spa. Measure any water removed from the spa using a water meter, graduated container, or scale, each with an accuracy of ±2 percent of the quantity measured. The fill volume is the volume of water held by the spa when the spa is filled as specified above.

4.1.5. Spa Cover

4.1.5.1. Cover Is Designated by the Spa Manufacturer

Install the spa cover following the manufacturer's instructions.

4.1.5.2. No Cover Is Designated by the Spa Manufacturer

If no cover is designated by the spa manufacturer for use with the spa, cover the portable electric spa with a single layer of 6 mil thickness (0.006 inches; 0.15 mm) plastic film. Cut the plastic to cover the entire top surface of the spa and extend over the edge of the spa approximately 6 inches below the top surface of the spa. Use fasteners or weights to keep the plastic in place during the test, but do not seal the edges of the plastic to the spa (by using tape, for example).

4.1.6. Ambient Temperature Measurement Location

The ambient air temperature measurement point specified in Section 5.6.3 of ANSI/APSP/ICC–14 2019 must be located above the center of the spa.

4.2. Test Conditions and Conduct

4.2.1. Ambient Air Temperature

Maintain the ambient air temperature at 56.0 ± 3.0 °F for the duration of the test. This requirement applies to each individual ambient air temperature measurement taken for the duration of the stabilization period and test period.

4.2.2. Water Temperature Settings

Adjust the spa water temperature settings to meet the applicable temperature requirements in Section 5.6.1 of ANSI/APSP/ICC–14 2019. The spa water temperature settings must not be adjusted between the start of the stabilizing period specified in Section 5.6.1 of ANSI/APSP/ICC–14 2019 and the end of the test period specified in Section 5.6.4.7 of ANSI/APSP/ICC–14 2019.

4.2.3. Water Temperature Requirements

Each individual water temperature measurement taken during the stabilization period and test period must meet the applicable water temperature requirements specified in Section 5.6.1 of ANSI/APSP/ICC–14 2019.

4.3. Standby Loss Calculation

Calculate standby loss in watts by calculating the measured standby loss using Equation 1 of this appendix, calculating the measured temperature difference using Equation 2 of this appendix, and normalizing the standby loss using Equation 3 of this appendix. Use the standby loss calculated in Equation 3 as the standby loss value for the test.

Equation 1

$$SL_{meas} = \frac{E}{t}$$

Equation 2

$$\Delta T_{meas} = T_{water\ avg} - T_{air\ avg}$$

Equation 3

$$SL = SL_{meas} \times \frac{\Delta T_{std}}{\Delta T_{meas}}$$

Where:

SL_{meas} = Measured standby loss (watts)

E = Total energy use during the test (watt-hours)

t = Length of test (hours)

ΔT_{meas} = Measured temperature difference (°F)

$T_{water\ avg}$ = Average water temperature during test (°F)

$T_{air\ avg}$ = Average air temperature during test (°F)

SL = Standby loss (W)

ΔT_{std} = Normalized temperature difference (°F), as follows:

46.0 °F for all inflatable spas, standard spas, standard spa portions of a combination spa, exercise spas, and exercise spa portions of a combination spa tested to a minimum water temperature of 100 °F; or

31.0 °F for all exercise spas or exercise spa portions of a combination spa tested to a minimum water temperature of 85 °F.

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