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Presidential Documents

Title 3—

The President

Proclamation 10692 of December 29, 2023

To Take Certain Actions Under the African Growth and Opportunity Act and for Other Purposes

By the President of the United States of America

A Proclamation

1. In Proclamation 9834 of December 21, 2018, the President determined that the Islamic Republic of Mauritania (Mauritania) was not making continual progress in meeting the requirements described in section 506A(a)(1) of the Trade Act of 1974, as amended (the ''Trade Act''), as added by section 111(a) of the African Growth and Opportunity Act (the ''AGOA'') (title I of Public Law 106–200, 114 Stat. 251, 257–58), 19 U.S.C. 2466a(a)(1). Thus, pursuant to section 506A(a)(3) of the Trade Act (19 U.S.C. 2466a(a)(3)), the President terminated the designation of Mauritania as a beneficiary sub-Saharan African country for purposes of section 506A(a)(1) of the Trade Act.

2. Section 506A(a)(1) of the Trade Act authorizes the President to designate a country listed in section 107 of the AGOA (19 U.S.C. 3706) as a ''beneficiary sub-Saharan African country'' if the President determines that the country meets the eligibility requirements set forth in section 104 of the AGOA (19 U.S.C. 3703), as well as the eligibility criteria set forth in section 502 of the Trade Act (19 U.S.C. 2462).

3. Pursuant to section 506A(a)(1) of the Trade Act, based on actions the Government of Mauritania has taken, I have determined that Mauritania meets the eligibility requirements set forth in section 104 of the AGOA and the eligibility criteria set forth in section 502 of the Trade Act, and I have decided to designate Mauritania as a beneficiary sub-Saharan African country.

4. Section 112(c) of the AGOA, as amended in section 6002(a)(3) of the Africa Investment Incentive Act of 2006 (division D, title VI, Public Law 109–432, 120 Stat. 2922, 3190–93), 19 U.S.C. 3721(c), provides special rules for certain apparel articles imported from ''lesser developed beneficiary sub-Saharan African countries.''

5. I have also determined that Mauritania satisfies the criterion for treatment as a ''lesser developed beneficiary sub-Saharan African country'' under section 112(c) of the AGOA.

6. In Proclamation 7350 of October 2, 2000, the President initially designated the Central African Republic, the Gabonese Republic (Gabon), Republic of Niger (Niger), and the Republic of Uganda (Uganda) as beneficiary sub-Saharan African countries for purposes of section 506A(a)(1) of the Trade Act.

7. Section 506A(a)(3) of the Trade Act provides that the President shall terminate the designation of a country as a beneficiary sub-Saharan African country for purposes of section 506A if the President determines that the country is not meeting the requirements described in section 506A(a)(1) of the Trade Act.

8. Pursuant to section 506A(a)(3) of the Trade Act, I have determined that the Central African Republic, Gabon, Niger, and Uganda do not meet the requirements described in section 506A(a)(1) of the Trade Act. Accordingly,

I have decided to terminate the designations of the Central African Republic, Gabon, Niger, and Uganda as beneficiary sub-Saharan African countries for purposes of section 506A of the Trade Act, effective January 1, 2024.

9. On April 22, 1985, the United States and Israel entered into the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel (USIFTA), which the Congress approved in section 3 of the United States-Israel Free Trade Area Implementation Act of 1985 (the ''USIFTA Implementation Act'') (Public Law 99–47, 99 Stat. 82 (19 U.S.C. 2112 note)). Section 4(b) of the USIFTA Implementation Act provides that, whenever the President determines that it is necessary to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, the President may proclaim such withdrawal, suspension, modification, or continuance of any duty, or such continuance of existing duty-free or excise treatment, or such additional duties, as the President determines to be required or appropriate to carry out the USIFTA. In order to maintain the general level of reciprocal and mutually advantageous concessions with respect to agricultural trade with Israel, on July 27, 2004, the United States entered into an agreement with Israel concerning certain aspects of trade in agricultural products during the period January 1, 2004, through December 31, 2008 (United States-Israel Agreement Concerning Certain Aspects of Trade in Agricultural Products (the ''2004 Agreement'')).

10. In Proclamation 7826 of October 4, 2004, the President determined, pursuant to section 4(b) of the USIFTA Implementation Act and consistent with the 2004 Agreement, that, in order to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, it was necessary to provide duty-free access into the United States through December 31, 2008, for specified quantities of certain agricultural products of Israel. Each year from 2008 through 2022, the United States and Israel entered into agreements to extend the period that the 2004 Agreement was in force for 1-year periods to allow additional time for the two governments to conclude an agreement to replace the 2004 Agreement. To carry out the extension agreements, the President in Proclamations 8334 of December 31, 2008; 8467 of December 23, 2009; 8618 of December 21, 2010; 8770 of December 29, 2011; 8921 of December 20, 2012; 9072 of December 23, 2013; 9223 of December 23, 2014; 9383 of December 21, 2015; 9555 of December 15, 2016; 9687 of December 22, 2017; 9834 of December 21, 2018; 9974 of December 26, 2019; 10128 of December 22, 2020; 10326 of December 23, 2021; and 10509 of December 23, 2022, modified the Harmonized Tariff Schedule of the United States (HTS) to provide duty-free access into the United States for specified quantities of certain agricultural products of Israel, each time for an additional 1-year period. On November 13, 2023, the United States entered into an agreement with Israel to extend the period that the 2004 Agreement is in force for an additional 1-year period, through December 31, 2024, to allow for further negotiations on an agreement to replace the 2004 Agreement. Pursuant to section 4(b) of the USIFTA Implementation Act, I have determined that it is necessary, in order to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, to provide duty-free access into the United States for an additional 1-year period, through the close of December 31, 2024, for specified quantities of certain agricultural products of Israel, as provided in Annex I of this proclamation.

11. Section 604 of the Trade Act, as amended (19 U.S.C. 2483), authorizes the President to embody in the HTS the substance of the relevant provisions of that Act, and of other acts affecting import treatment, and actions taken thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

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

and the laws of the United States of America, including but not limited to section 111(a) of the AGOA, sections 506A(a)(1) and 506A(a)(3) of the Trade Act, section 4(b) of the USIFTA Implementation Act, and section 604 of the Trade Act, as amended, do proclaim that:

(1) Mauritania is designated as a beneficiary sub-Saharan African country for purposes of section 506A of the Trade Act.

(2) In order to reflect this designation in the HTS, general note 16(a) to the HTS is modified by inserting in alphabetical sequence in the list of beneficiary sub-Saharan African countries ''Islamic Republic of Mauritania''.

(3) For purposes of section 112(c) of the AGOA, Mauritania is a lesser developed beneficiary sub-Saharan African country.

(4) In order to provide the tariff treatment intended under section 112(c) of the AGOA, note 2(d) to subchapter XIX of chapter 98 of the HTS is modified by inserting in alphabetical sequence in the list of lesser developed beneficiary sub-Saharan African countries ''Islamic Republic of Mauritania;''.

(5) The designations of the Central African Republic, Gabon, Niger, and Uganda as beneficiary sub-Saharan African countries for purposes of section 506A of the Trade Act are terminated, effective January 1, 2024.

(6) In order to reflect in the HTS that beginning January 1, 2024, the Central African Republic, Gabon, Niger, and Uganda shall no longer be designated as beneficiary sub-Saharan African countries, general note 16(a) to the HTS is modified by deleting ''Central African Republic'', ''Gabonese Republic'', ''Republic of Niger'', and ''Republic of Uganda'' from the list of beneficiary sub-Saharan African countries. Note 7(a) to subchapter II and note 1 to subchapter XIX of chapter 98 of the HTS are each modified by deleting ''Uganda'' from the list of beneficiary countries. Further, note 2(d) to subchapter XIX of chapter 98 of the HTS is modified by deleting ''Central African Republic;'', ''Niger;'', and ''Republic of Uganda;'' from the list of lesser developed beneficiary sub-Saharan African countries.

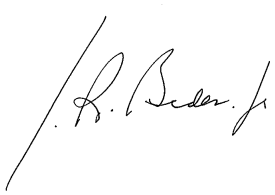
(7) The modifications to the HTS set forth in paragraphs (1) through (6) of this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after January 1, 2024.

(8) In order to implement tariff commitments under the 2004 Agreement through December 31, 2024, the HTS is modified as set forth in Annex I of this proclamation.

(9) The modifications and technical rectifications to the HTS made by Annex I of this proclamation shall enter into effect on the applicable dates set forth in Annex I of this proclamation.

(10) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

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



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ANNEX I

TEMPORARY EXTENSION OF CERTAIN PROVISIONS OF THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to eligible agricultural products of Israel which are entered for consumption, or withdrawn from warehouse for consumption, on or after January 1, 2024, and through the close of December 31, 2024, subchapter VIII of chapter 99 of the Harmonized Tariff Schedule of the United States is hereby modified as follows:

1. U.S. note 1 to such subchapter is modified by striking "December 31, 2023," and by inserting in lieu thereof "December 31, 2024".

2. U.S. note 3 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2024" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "466,000".

3. U.S. note 4 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2024" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "1,304,000".

4. U.S. note 5 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2024" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "1,534,000".

5. U.S. note 6 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2024" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "131,000".

6. U.S. note 7 to such subchapter is modified by adding at the end of the "Applicable time period" column in the table "Calendar year 2024" and by adding at the end of the "Quantity (kg)" column opposite such year the quantity "707,000".

[FR Doc. 2024–00051
Filed 1–3–24; 8:45 am]
Billing code 7020–02–C

Presidential Documents

Proclamation 10693 of December 29, 2023

National Human Trafficking Prevention Month, 2024

By the President of the United States of America

A Proclamation

More than 27 million people around the world endure the abhorrent abuse of human trafficking and forced labor, including thousands of people right here in the United States. It is a threat to global security, public safety, and human dignity. During National Human Trafficking Prevention Month, we reaffirm our commitment to ending these predatory crimes at home and across the globe.

In 2021, I signed an updated National Action Plan to Combat Human Trafficking, outlining my Administration's efforts to prevent trafficking, prosecute perpetrators, and protect survivors. The plan reflects our commitment to standing up for the most vulnerable among us, and it is a foundation for our work to ensure safe, orderly, and humane migration. Federal agencies are today working closely with governments and organizations around the world to address the root causes of trafficking, bring traffickers to justice, and support survivors as they recover and rebuild their lives.

The plan also reflects our commitment to workers' rights and ending forced labor in global supply chains. Two years ago, I signed the bipartisan Uyghur Forced Labor Prevention Act, and we will continue working with global leaders to make sure that American imports are produced without forced labor and that the global economic system offers traffickers no safe harbor. More recently, I issued a first-ever Presidential Memorandum elevating and integrating workers' rights and high labor standards into our Nation's foreign policy priorities, including preventing forced labor and other abuses.

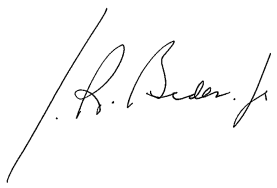
The vast majority of human trafficking victims are women and girls. In 2022, we reauthorized the Violence Against Women Act, which I first wrote as a United States Senator some 30 years ago—this time expanding the jurisdiction of Tribal courts to prosecute non-Native American sex traffickers. The American Rescue Plan also provided tens of thousands of housing vouchers to help people fleeing domestic violence or human trafficking find a safe home and reclaim their lives. As we work to help people disproportionately affected by human trafficking, including members of racial and ethnic minorities, women and girls, the LGBTQI+ community, and migrants, we remain committed to learning from and partnering with survivors to support their recoveries and to recruit their help in better spotting and preventing these too often overlooked crimes.

There is no greater sin than the abuse of power, and human trafficking is among the worst abuses that exist. We must each play a role in ending it; we cannot turn away. This month, we urge every American to learn how to identify the signs of trafficking and to share the National Human Trafficking hotline (888–373–7888)—an important resource to report a tip or to ask for help. Together, we must make sure every human being is free to live a life full of dignity and respect.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 2024 as National Human Trafficking Prevention Month. I call upon businesses, civil society organizations, communities of faith, families, and all Americans to

recognize the vital role we play in combating human trafficking and to observe this month with appropriate programs and activities aimed at preventing all forms of human trafficking.

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



[FR Doc. 2024–00052
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Presidential Documents

Proclamation 10694 of December 29, 2023

National Mentoring Month, 2024

By the President of the United States of America

A Proclamation

During National Mentoring Month, we celebrate the millions of mentors across the country who step up and give their time, care, and hearts to make sure every young person in our Nation has a fair shot at the American Dream.

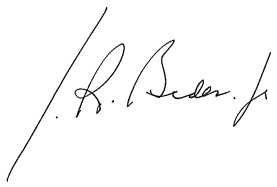
For most young people, a bond or even a conversation with someone who believes in them can make a tremendous difference in their lives, exposing them to new goals, new ideas, and new ways of doing things. Since day one, my Administration has been working to support those kinds of relationships—in schools, in communities, and in the workforce. Through the American Rescue Plan, we secured a historic $130 billion for America's K–12 schools, which helped put more teachers in classrooms and more counselors, social workers, and supportive staff in our schools. States and districts have also used these investments to provide high-quality tutoring and summer and after-school programs for students. Further, it boosted funding for AmeriCorps to expand its service options and hire new mentors to volunteer in our communities. My Administration also launched the National Partnership for Student Success last year, with a goal of recruiting 250,000 adults by the summer of 2025 to encourage, tutor, and coach young people as they chart a path forward. At the same time, working with labor unions, we have made historic investments in pre-apprenticeship and Registered Apprenticeship programs that provide guidance and skills to help young people build meaningful careers. In addition, we created the American Climate Corps—a workforce training and service initiative that will put more than 20,000 Americans to work in clean energy, conservation, and climate resilience jobs.

These programs give young people a chance to connect with others—to discover who they are, what they care about, and how to achieve their dreams. Any one of us can have a positive impact on a young person's life if we take the time to let them know that someone is on their side. Doing so, often has a tremendously powerful impact on a mentor's life as well. During National Mentoring Month, I urge Americans of all ages—friends, neighbors, college students, coaches, employers, community and faith leaders, and everyday people just looking to make a difference—to visit americorps.gov/serve and partnershipstudentsuccess.org to learn more about becoming a mentor or tutor.

The greatness of a nation is measured in part by how it prepares its next generation to succeed. Ours is a great Nation, and together, as mentors, we can each change a young person's life for the better—and with it, help guarantee our country a future of unlimited possibilities.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 2024 as National Mentoring Month. I call upon Americans across the country to observe this month with mentoring, appropriate ceremonies, activities, and programs.

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



[FR Doc. 2024–00053
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Billing code 3395–F4–P

Presidential Documents

Proclamation 10695 of December 29, 2023

National Stalking Awareness Month, 2024

By the President of the United States of America

A Proclamation

During National Stalking Awareness Month, we honor the strength and resilience of the millions of people across this country who have endured stalking. We reaffirm our commitment to building a future where everyone can live free from fear, threats, and abuse.

Stalking at its core is an abuse of power. It affects one in three women and one in six men in their lifetimes. It can happen in person or online; it can be committed by a stranger or someone you know. The fear it sparks can be all-consuming, shattering one's sense of security, safety, and certainty. It can threaten loved ones and even force victims to uproot their lives and move at a moment's notice. It is wrong.

One of my proudest achievements in life was writing and championing the landmark Violence Against Women Act some 30 years ago in the United States Senate. It began to change our culture, bringing these crimes out of the shadows and getting survivors the services and support they needed. Over the years, I worked with courageous advocates to keep expanding protections and boosting access to healing and justice. In 2022, I was proud to sign a reauthorization of the law, increasing investment in prosecution, prevention, and support for survivors of domestic violence, sexual assault, and stalking. The new law also creates a Federal civil cause of action for the non-consensual distribution of intimate images and expands the jurisdiction of Tribal courts to prosecute non-Native American perpetrators of stalking, sexual assault, child abuse, and sex trafficking.

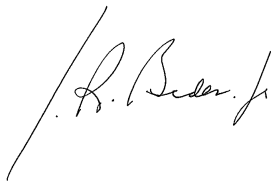
At the same time, we are working to make sure our response keeps pace with technology and protects all Americans from online harassment and cybercrime. In 2022, I created the White House Task Force to Address Online Harassment and Abuse to help stop technology-facilitated gender-based violence. It aims to find new ways to boost accountability, support survivors, and further research the threat. Survivors, parents, educators, advocates, medical and legal professionals, and others have shared their expertise with the task force, which will help inform their work.

This past May, I also released America's first-ever National Plan to End Gender-Based Violence, which tackles the issue on seven fronts—prevention, healing, housing, online safety, the justice system, crisis response, and data. Since the beginning of my Administration, the Department of Justice's Office on Violence Against Women has provided grants to law enforcement, prosecutors, courts, and community organizations to work together to stop stalking and other gender-based crimes. The Department of Housing and Urban Development has provided tens of thousands of emergency housing vouchers to help stalking victims and others find a safe place to rebuild their lives.

Too often, stalking happens in the shadows, hidden from the view of others. This month, we shine a harsh light on these crimes to make clear that this kind of harassment, threat, or unwanted aggressive attention has no place in America. There is so much at stake. Every American deserves to feel safe and protected, have a little peace of mind, and live with dignity and respect.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 2024 as National Stalking Awareness Month. I call on all Americans to speak out against stalking and to support the efforts of advocates, courts, service providers, and law enforcement to help those who are targeted and send the message to perpetrators that these crimes will not go unpunished.

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



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Rules and Regulations

Federal Register
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Thursday, January 4, 2024

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0992]

RIN 1625–AA00

Safety Zone; North Pacific Ocean, Dutch Harbor, AK

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 1 nautical mile radius of the M/V GENIUS STAR XI. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a fire onboard the M/V GENIUS STAR XI. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Western Alaska.

DATES: This rule is effective without actual notice from January 4, 2024 through January 6, 2024. For the purposes of enforcement, actual notice will be used from December 30, 2023 until January 4, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0992 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LT William Mason, Sector Anchorage, AK Waterways Management Division, U.S. Coast Guard; telephone 907–428–4100, email *sectoranchorage@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule under authority in 5 U.S.C. 553(b)(B). This statutory provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM would be impracticable because of the urgent need to establish a safety zone as soon as possible to enhance public safety given the dangers associated with a vessel on fire.

Also, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with a fire onboard the M/V GENIUS STAR XI and the emergency operations taking place.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port, Western Alaska has determined that potential hazards associated with ongoing response activities for a vessel fire will be a safety concern for anyone within a 1 nautical mile radius of the M/V GENIUS STAR XI. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone from the potential hazards created by the vessel fire.

IV. Discussion of the Rule

This rule establishes a safety zone from December 30, 2023 through January 6, 2024. The safety zone will cover all navigable waters within 1 nautical mile of the M/V GENIUS STAR XI within the Captain of the Port Zone Western Alaska in the vicinity of the Port of Dutch Harbor, Alaska. The M/V GENIUS STAR XI, IMO 9622710, is a 410-foot General cargo ship with a white superstructure and a black hull. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while response operations take place for the fire onboard the vessel. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the safety of emergency operators in the vicinity of the M/V GENIUS STAR XI. The small size and short duration of this safety zone combined with anticipated limited vessel traffic is expected to minimally restrict vessel movements. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via available local means about the zone, and the rule will allow vessels to seek permission under certain conditions to enter the zone from the COTP or a designated representative.

B. Impact on Small Entities

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

operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only 8 days based on the response operations for the fire onboard the M/V GENIUS STAR XI and will prohibit entry within 1 nautical mile of the vessel. It is categorically excluded from further review under paragraph L60d of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T17–0992 to read as follows:

§ 165.T17–0992 Safety Zone; North Pacific Ocean, Dutch Harbor, AK.

(a) *Location.* The following is a safety zone: All navigable waters within a 1 nautical mile radius of the M/V GENIUS STAR XI within the Captain of the Port Zone Western Alaska in the vicinity of the Port of Dutch Harbor, Alaska.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard Coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Western Alaska (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative via Marine VHF channel 16 or by calling the USCG Command Center at 907–428–4100. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from December 30, 2023 through January 6, 2024.

Dated: December 30, 2023.

C.A. Culpepper,

Captain, U.S. Coast Guard, Captain of the Port Western Alaska.

[FR Doc. 2024–00004 Filed 1–2–24; 4:15 pm]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R03–OAR–2022–0776; FRL–10292–02–R3]

Outer Continental Shelf Air Regulations; Consistency Update for Maryland

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is updating a portion of the Outer Continental Shelf (OCS) Air Regulations. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (COA), as mandated by the Clean Air Act (CAA). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which Maryland is the designated COA. The State of Maryland's requirements discussed in this document will be incorporated by reference into the Code of Federal Regulations (CFR) and listed in the appendix to the Federal OCS air regulations.

DATES: This final rule is effective on February 5, 2024. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of February 5, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2022–0776. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov,* or at the U.S. Environmental Protection Agency, EPA Region 3 Regional Office, Air and Radiation Division, Four Penn Center, 1600 JFK Blvd., Philadelphia, PA 19103. EPA requests that you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Supplee, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2763. Ms. Supplee can also be reached via electronic mail at *supplee.gwendolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background and Purpose

On September 4, 1992, EPA promulgated 40 CFR part 55 [1] which established requirements to control air pollution from OCS sources in order to attain and maintain Federal and state ambient air quality standards and to comply with the provisions of part C of title I of the CAA. The regulations at 40 CFR part 55 apply to all OCS sources offshore of the states except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the CAA requires that for such sources located within 25 miles of a state's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

On October 19, 2022 (87 FR 63465), EPA published a notice of proposed rulemaking (NPRM) proposing to incorporate various Maryland air pollution control requirements into 40 CFR part 55. Pursuant to 40 CFR 55.12, consistency reviews will occur: (1) At least annually; (2) upon receipt of a Notice of Intent (NOI) under 40 CFR 55.4; or (3) when a state or local agency submits a rule to EPA to be considered for incorporation by reference in 40 CFR part 55. EPA's NPRM was initiated in response to the submittal received by EPA on August 5, 2022, of a NOI, from US Wind, Inc., for the proposed installation of an up to 2-gigawatt offshore wind energy facility located approximately 10 nautical miles off the coast of Maryland. In accordance with 40 CFR 55.5, Maryland is the designated COA for this project. EPA intends to address post-NPRM state amendments in its next annual update consistent with 40 CFR 55.12. This action addresses only those regulations identified for incorporation in NPRM, namely the Maryland regulations that were updated as of July 28, 2022.

EPA reviewed the Maryland Department of the Environment (''MDE'') air rules for inclusion in 40 CFR part 55 in this action to ensure that they are rationally related to the attainment or maintenance of Federal or state ambient air quality standards and compliance with part C of title I of the CAA, that they are not designed expressly to prevent exploration and development of the OCS, and that they are potentially applicable to OCS sources. See 40 CFR 55.1. EPA has also evaluated the rules to ensure they are not arbitrary or capricious. See 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules,[2] and requirements that regulate toxics which are not related to the attainment and maintenance of Federal and state ambient air quality standards.

Section 328(a) of the CAA requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into 40 CFR part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into 40 CFR part 55 that do not conform to all of EPA's state implementation plan (SIP) guidance or certain requirements of the CAA. Consistency updates may result in the inclusion of state or local rules or regulations into 40 CFR part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the CAA for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

The specific requirements of the consistency update and the rationale for EPA's action are explained in the

[1] The reader may refer to the notice of proposed rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792), for further background and information on the OCS regulations.

[2] Each COA which has been delegated the authority to implement and enforce part 55 will use its administrative and procedural rules as onshore. However, in those instances where EPA has not delegated authority to implement and enforce 40 CFR part 55, EPA will use its own administrative and procedural requirements to implement the substantive requirements. See 40 CFR 55.14(c)(4).

October 19, 2022, NPRM. No comments were received on the NPRM.

II. Public Comments and EPA Responses

EPA did not receive any comments on the NPRM. (October 19, 2022, 87 FR 63465).

III. Final Action

EPA is taking final action to incorporate the rules potentially applicable to OCS sources for which the State of Maryland will be the COA. The rules that EPA is taking final action to incorporate are applicable provisions of the Code of Maryland Regulations (COMAR): (1) Chapter 8, Control of Incinerators—COMAR 26.11.08; (2) Chapter 17, Nonattainment Provisions for Major New Sources and Major Modifications General—COMAR 26.11.17; and (3) Chapter 20, Mobile Sources—COMAR 26.11.20, as amended through July 28, 2022. The rules that EPA is taking final action to incorporate will replace the rules identified in the October 19, 2022, NPRM and previously incorporated into ''State of Maryland Requirements Applicable to OCS Sources,'' dated December 6, 2018, which was incorporated by reference into 40 CFR part 55. See 84 FR 34065; July 16, 2019. This action will have no effect on any provisions that were not subject to changes by Maryland and were also previously incorporated by reference into 40 CFR part 55 through EPA's July 16, 2019 (84 FR 34065) final rule.

IV. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of ''State of Maryland Requirements Applicable to OCS Sources,'' dated July 28, 2022, which provides the text of MDE air rules in effect as of July 28, 2022, that would apply to OCS sources and described in Section I of this **SUPPLEMENTARY INFORMATION**. EPA has made, and will continue to make, these materials available through *www.regulations.gov* and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore air pollution control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore. See 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the CAA. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy direction by EPA. For that reason, this action:

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

Additionally, Executive Order 12898 (59 FR 7629, February 16, 1994) 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 (people of color and/or Indigenous peoples) and low-income populations.

EPA believes that this specific action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action simply fulfills EPA's statutory mandate to ensure regulatory consistency between the COA and inner OCS consistent with the stated objectives of CAA section 328(a)(1). Specifically, section 328(a)(1) requires EPA to establish requirements to control air pollution from OCS sources ''to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of [title I of the CAA]'' and, for inner OCS sources (located within 25 miles of the seaward boundary of such states), to establish requirements that are ''the same as would be applicable if the source were located in the COA.'' This section of the Act also states that ''the Administrator shall update such requirements as necessary to maintain consistency with onshore regulations and this chapter.'' As noted in the preamble, compliance with this requirement limits EPA's discretion in deciding what will be incorporated into 40 CFR part 55.

From the time of EPA's last consistency update for Maryland (84 FR 34065, July 16, 2019) to the publication of the NPRM (87 FR 63465, October 19, 2022), state regulations relevant to the OCS had minor amendments. This action incorporates into the CFR those minor updates to state regulations, which are already effective onshore, to ensure regulatory consistency with the COA as mandated by CAA section 328(a)(1). This is a routine and ministerial consistency update that does not directly affect any human health or environmental conditions in the State of Maryland. In addition, EPA provided for meaningful public involvement on this rule through the notice and comment process, through which EPA received no comments. This rule was in addition to the State-level notice and comment process held by Maryland.

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance 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, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 4, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).).

This action does not impose any new information collection burden under the Paper Reduction Act (PRA). See 44 U.S.C. 3501. The Office of Management and Budget (OMB) has previously approved the information collection activities contained in the existing regulations at 40 CFR part 55 and, by extension, this update to part 55, and has assigned OMB control number 2060–0249. [3] This action does not impose a new information burden under PRA because this action only updates the state rules that are incorporated by reference into 40 CFR part 55, appendix A.

List of Subjects in 40 CFR Part 55

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

Adam Ortiz,

Regional Administrator, Region III.

Part 55 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 55—OUTER CONTINENTAL SHELF AIR REGULATIONS

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (42 U.S.C. 7401 *et seq.*) as amended by Pub. L. 101–549.

■ 2. Section 55.14 is amended by revising paragraph (e)(10)(i)(A) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(e) * * *

(10) * * *

(i) * * *

(A) State of Maryland Requirements Applicable to OCS Sources, July 28, 2022.

* * * * *

■ 3. Appendix A to part 55 is amended by revising paragraph (a)(1) under the heading ''Maryland'' to read as follows:

Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State

* * * * *

Maryland

(a) * * *

(1) The following State of Maryland requirements are applicable to OCS Sources, July 28, 2022, State of Maryland—Department of the Environment.

The following sections of Code of Maryland Regulations (COMAR) Title 26 Subtitle 11:

COMAR 26.11.01—General Administrative Provisions (Effective as of December 6, 2018)

COMAR 26.11.02—Permits, Approvals, and Registrations (Effective as of February 12, 2018)

COMAR 26.11.03—Permits, Approvals, and Registration—Title V Permits (Effective as of November 12, 2010)

COMAR 26.11.05—Air Pollution Episode System (Effective as of November 12, 2010)

COMAR 26.11.06—General Emission Standards, Prohibitions, and Restrictions (Effective as of July 02, 2013)

COMAR 26.11.07—Open Fires (Effective as of November 12, 2010)

COMAR 26.11.08—Control of Incinerators (Effective as of May 4, 2020)

COMAR 26.11.09—Control of Fuel-Burning Equipment, Stationary Internal Combustion Engines and Certain Fuel-Burning Installations (Effective as of December 6, 2018)

COMAR 26.11.13—Control of Gasoline and Volatile Organic Compound Storage and Handling (Effective as of July 21, 2014)

COMAR 26.11.15—Toxic Air Pollutants (Effective as of November 12, 2010)

COMAR 26.11.16—Procedures Related to Requirements for Toxic Air Pollutants (Effective as of November 12, 2010)

COMAR 26.11.17—Nonattainment Provisions for Major New Sources and Major Modifications (Effective as of December 30, 2019)

COMAR 26.11.19—Volatile Organic Compounds from Specific Processes (Effective as of September 28, 2015)

COMAR 26.11.20—Mobile Sources (Effective as of February 7, 2022)

COMAR 26.11.26—Conformity (Effective as of November 12, 2010)

COMAR 26.11.35—Volatile Organic Compounds from Adhesives and Sealants (Effective as of November 12, 2010)

COMAR 26.11.36—Distributed Generation (Effective as of February 12, 2018)

COMAR 26.11.39—Architectural and Industrial Maintenance (AIM) Coatings (Effective as of April 2016)

* * * * *

[FR Doc. 2023–28839 Filed 1–3–24; 8:45 am]

BILLING CODE 6560–50–P

[3] OMB's approval of the information collection requirement (ICR) can be viewed at *www.reginfo.gov.*

Notices

Federal Register
Vol. 89, No. 3
Thursday, January 4, 2024

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Notice of Request for Extension or Renewal of a Currently Approved Information Collection

AGENCY: U.S. Department of Agriculture.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Office of the Assistant Secretary for Civil Rights to request a renewal to a currently approved information collection for race, ethnicity, and gender along with comments.

DATES: Comments on this notice must be received by March 4, 2024 to be assured of consideration.

ADDRESSES: The Office of the Assistant Secretary for Civil Rights invites interested persons to submit comments on this notice. Comments may be submitted by one of the following methods:

Federal eRulemaking Portal: This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions on the eRulemaking Portal submitting comments.

U.S. Mail, including CD–ROMs, etc.: Send to U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250.

Hand or courier-delivered submittals: Deliver to 1400 Independence Avenue, Washington, DC 20250.

Instructions: All items submitted by U.S. mail or electronic mail must include the Agency name, Office of the Assistant Secretary for Civil Rights. Comments received in response to this docket will be made available for public inspection and posted without changes, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, please contact the Office of the Assistant Secretary for Civil Rights at 1400 Independence Avenue SW, DC 20250 between 8 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Contact Winona Scott, Acting Executive Director, Center for Civil Rights Operations, Office of the Assistant Secretary for Civil Rights, U.S. Department of Agriculture, 1400 Independence Avenue SW, Washington, DC 20250, (202) 720–3808.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), this notice announces the intention of the Office of the Assistant Secretary for Civil Rights to request approval for an existing collection in use without an Office of Management and Budget (OMB) control number.

Title: Race, Ethnicity and Gender Data Collection.

OMB Number: OMB No. 0503–0019.

Expiration Date of Approval: March 31, 2024.

Type of Request: Extension and renewal of a currently approved information collection.

Abstract: This data collection is necessary to implement sections 14006 and 14007 of the Food, Conservation, and Energy Act of 2008, 7 U.S.C. 8701 (hereafter referred to as the 2008 Farm Bill). Section 14006 of the 2008 Farm Bill establishes a requirement for the Department of Agriculture (USDA) to annually compile application and participation rate data regarding socially disadvantaged farmers or ranchers by computing for each program of the USDA that serves agriculture producers and landowners (a) raw numbers of applicants and participants by race, ethnicity, and gender subject to appropriate privacy protections, as determined by the Secretary of Agriculture; and (b) the application and participation rate, by race, ethnicity and gender, as a percentage of the total participation rate of all agricultural producers and landowners for each county and state in the United States. Pursuant to the authority in section 14006, the agencies of USDA are to collect the data and transmit it to the Secretary of Agriculture. Section 14007 requires USDA to use the data collected in the conduct of oversight and evaluation of civil rights compliance.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2 minutes per response.

Respondents: Producers, applicants.

Estimated Number of Respondents: 2,011,250.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 67,041.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of 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. Comments may be sent by any of the following methods:

- *Email:* Send comments to *ccro@usda.gov.*
- *U.S. Mail:* Winona Scott, Acting Executive Director, Center for Civil Rights Operations, Office of the Assistant Secretary for Civil Rights, U.S. Department of Agriculture, 1400 Independence Ave. SW, Washington, DC 20250.

All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record.

Penny Brown Reynolds,

Deputy Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights.

[FR Doc. 2023–28949 Filed 1–3–24; 8:45 am]

BILLING CODE 3410–9R–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–898]

Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Heze Huayi Chemical Co., Ltd. (Heze Huayi) and Juancheng Kangtai Chemical Co., Ltd. (Kangtai) sold chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (China) at less than normal value during the period of review (POR) June 1, 2021, through May 31, 2022.

DATES: Applicable January 4, 2024.

FOR FURTHER INFORMATION CONTACT: Sean Carey, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3964.

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2023, Commerce published its *Preliminary Results.*[1] For events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

Scope of the Order

The products covered by the order are chlorinated isos, which are derivatives of cyanuric acid, described as chlorinated s-triazine triones. A full description of the scope of the Order is contained in the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised by interested parties in briefs are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is provided in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our review of the record, and comments received from interested parties regarding our *Preliminary Results,* we made two changes to the Romanian surrogate values (SVs) for chlorine and brokerage and handling charges.[3]

Separate Rate Eligibility

In the *Preliminary Results,* we found that Heze Huayi and Kangtai demonstrated their eligibility for separate rates.[4] As we received no information or interested party arguments to the contrary since the issuance of the *Preliminary Results,* we continue to find that Heze Huayi and Kangtai are each eligible for a separate rate.

China-Wide Entity

Commerce's policy regarding the conditional review of the China-wide entity applies to this administrative review.[5] Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity, we did not review the entity in this segment of the proceeding. Thus, the China-wide entity's rate (*i.e.,* 285.63 percent)[6] did not change.

Final Results of Review

Commerce determines that the following weighted-average dumping margins exists for Heze Huayi and Kangtai for the period of June 1, 2021, through May 31, 2022:

Exporter	Weight-average dumping margin (percent)
Heze Huayi Chemical Co., Ltd ...	50.27
Juancheng Kangtai Chemical Co., Ltd	73.84

Disclosure

We intend to disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For the individually-examined respondent in this review which has a final weighted-average dumping margin that is not zero or *de minimis* (*i.e.,* less than 0.5 percent), we will calculate importer- (or customer-) specific per-unit duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's (or customer's) examined sales to the total sales quantity associated with those sales, in accordance with 19 CFR 351.212(b)(1).[7] We will also calculate (estimated) *ad valorem* importer-specific assessment rates with which to determine whether the per-unit assessment rates are *de minimis.* Where either a respondent's weighted-average dumping margin is zero or *de minimis,* or an importer- (or customer-) specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.[8]

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[1] *See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Administrative Review; 2021–2022,* 88 FR 43271 (July 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Chlorinated Isocynaurates from the People's Republic of China; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Issues and Decision Memorandum for further discussion.

[4] *See Preliminary Results,* 88 FR 43272.

[5] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[6] For an explanation on the derivation of the China-wide rate, *see Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China,* 70 FR 24502, 24505 (May 10, 2005).

[7] *See Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review,* 75 FR 70208, 70211 (November 17, 2010), and accompanying Issues and Decision Memorandum at Comment 3.

[8] *See* 19 CFR 351.106(c)(2).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) for the exporters listed above, the cash deposit rate will be the rate established in the final results of this review (except, if the rate is zero or *de minimis,* a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed China and non-China exporters not listed above that have separate rates, the cash deposit rate will continue to be the existing producer/exporter-specific rate published for the most recent period; (3) for all China exporters of subject merchandise that have not been found to be eligible for a separate rate, the cash deposit rate will be the China-wide rate of 285.63 percent; and (4) for all non-China exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the China exporter(s) that supplied that non-China exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties and/or countervailing duties has occurred and the subsequent assessment of double antidumping duties, and/or increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order (APO)

This notice also serves as a reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 28, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–28998 Filed 1–3–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–841]

Mattresses From Thailand: Notice of Court Decision Not in Harmony With the Final Determination of Antidumping Investigation; Notice of Amended Final Determination; Notice of Amended Order, in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On December 22, 2023, the U.S. Court of International Trade (CIT) issued its final judgment in *Brooklyn Bedding LLC* v. *United States,* Court No. 21–00285 sustaining the U.S. Department of Commerce's (Commerce) first final results of redetermination pertaining to the antidumping duty (AD) investigation of mattresses from Thailand covering the period of investigation January 1, 2019, through December 31, 2019. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's final determination in the investigation, and Commerce is amending the final determination and the resulting AD order with respect to the dumping margins assigned to Saffron Living Co., Ltd. (Saffron) and all other producers and exporters of subject merchandise.

DATES: Applicable January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Paola Aleman Ordaz, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-4031.

SUPPLEMENTARY INFORMATION:

Background

On March 25, 2021, Commerce published in the **Federal Register** its final determination in the AD investigation of mattresses from Thailand.[1] Commerce subsequently published in the **Federal Register** the AD order on mattresses from Thailand.[2]

The petitioners[3] appealed Commerce's *Final Determination.* On July 20, 2023, the CIT remanded the *Final Determination* to Commerce.[4] Specifically, the CIT remanded Commerce to: (1) undertake verification of Saffron in accordance with section 782(i)(1) of the Tariff Act of 1930, as amended (the Act), insofar as Commerce continued to rely upon the company's data; and (2) explain why Commerce departed from its practice of applying the transactions disregarded and/or major unput rules or, alternatively, to apply either or both of those rules.[5]

In its final results of redetermination, issued on September 18, 2023, Commerce applied adverse facts available (AFA) to Saffron because the company withdrew from the remand proceeding, and thus, Commerce could neither verify Saffron's sales or cost data, nor apply the transactions disregarded and/or major input rules to its data.[6] As a result, Commerce

[1] *See Mattresses from Thailand: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 15928 (March 25, 2021) (*Final Determination*), and accompanying Issues and Decision Memorandum (IDM).

[2] *See Mattresses from Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia,* 86 FR 26460 (May 14, 2021) (*Order*).

[3] The petitioners are: Brooklyn Bedding; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Kolcraft Enterprises, Inc.; Leggett & Platt, Incorporated; the International Brotherhood of Teamsters; and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (USW) (collectively, the petitioners).

[4] *See Brooklyn Bedding, LLC.* v. *United States,* Court No. 21–00285, Slip Op. 23–107 (CIT July 20, 2023).

[5] *Id.* at 12 and 14.

[6] *See Final Results of Redetermination Pursuant to Court Remand, Brooklyn Bedding LLC, et al.* v.

assigned Saffron the highest dumping margin alleged in the petition, as AFA (*i.e.,* 763.28 percent).[7] Moreover, in the absence of a calculated estimated weighted-average dumping margin on the record of the proceeding,[8] Commerce recalculated the all-others rate by averaging the dumping margins alleged in the Petition,[9] and assigned the recalculated rate of 572.56 percent to all other producers and exporters of subject merchandise, consistent with section 735(c)(5)(B) of the Act [10] and Commerce's practice.[11] The CIT sustained Commerce's *Final Remand*.[12]

Timken Notice

In its decision in *Timken,*[13] as clarified by *Diamond Sawblades,*[14] the U.S. Court of Appeals for the Federal Circuit held that, pursuant to sections 516A(c) and (e) of the Act, Commerce must publish notice of a court decision that is not ''in harmony'' with a determination of Commerce and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's December 22, 2023, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Determination* and *Order.* Thus, this notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Determination

Because there is now a final court judgment, Commerce is amending its *Final Determination* with respect to Saffron and all other producers and exporters of subject merchandise as follows:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Saffron Living Co., Ltd	763.28
All Others	572.56

Amended AD Order, in Part

As a result of this amended final determination, Commerce is hereby amending the *Order* to revise the dumping margins assigned to Saffron and all-other producers and exporters of subject merchandise, as noted above.

Cash Deposit Requirements

Because Saffron does not have a superseding cash deposit rate, *i.e.,* there have been no final results published in a subsequent administrative review of Saffron,[15] and because of the change to the rate assigned to all other producers and exporters of subject merchandise, Commerce will issue revised cash deposit instructions to U.S. Customs and Border Protection.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: December 29, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

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United States, Court No. 21–00285, Slip Op. 23–107 (CIT July 20, 2023), dated September 18, 2023 (*Final Remand*), at 11.

[7] *Id.* at 8–9.

[8] *Id.* at 12.

[9] *See* Brooklyn Bedding LLC's Letter, ''Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam: Antidumping and Countervailing Duty Petitions,'' dated March 31, 2020 (Petition).

[10] *See Final Remand* at 12.

[11] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying IDM at Comment 2.

[12] *See Brooklyn Bedding, LLC.* v. *United States,* Court No. 21–00285, Slip Op. 23–189 (CIT December 22, 2023).

[13] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[14] *See Diamond Sawblades Manufacturers Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[15] Commerce rescinded the first AD administrative review of Saffron. *See Mattresses from Thailand: Final Results and Rescission of the Antidumping Duty Administrative Review; 2020–2022,* 88 FR 85224 (December 7, 2023).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Shenzhen Sungold Solar Co., Ltd. (Sungold), and the companies which Commerce preliminarily granted separate rates, did not sell subject merchandise at prices below normal value (NV) during the period December 1, 2021, through November 30, 2022, the period of review (POR). Commerce also preliminarily determines that certain companies do not qualify for a separate rate, and that it is appropriate to rescind this review with respect to 10 companies because all requests to review these companies were timely withdrawn. In addition, Commerce intends to rescind this review with respect to certain companies that did not ship subject merchandise during the POR. Interested parties are invited to comment on these preliminary results of the review.

DATES: Applicable January 4, 2024.

FOR FURTHER INFORMATION CONTACT: Dakota Potts or Paola Aleman Ordaz, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0223, or (202) 482–4031, respectively.

SUPPLEMENTARY INFORMATION:

Background

In response to review requests from multiple parties, on February 2, 2023, Commerce initiated an administrative review of the antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China) with respect to 68 companies/company groupings for the period December 1, 2021, through November 30, 2022.[1]

On April 20, 2023, Commerce selected two exporters to individually examine as mandatory respondents, Yingli [2] and Shenzhen Glory Industries Co., Ltd. (Shenzhen Glory).[3] Shenzhen Glory timely withdrew its request for review, and no other party requested a

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 7060, 7062–63 (February 2, 2023).

[2] Yingli refers to the following companies which Commerce has treated as a single entity: (1) Shenzhen Yingli New Energy Resources Co., Ltd.; (2) Baoding Jiasheng Photovoltaic Technology Co. Ltd.; (3) Baoding Tianwei Yingli New Energy Resources Co., Ltd.; (4) Beijing Tianneng Yingli New Energy Resources Co., Ltd.; (5) Hainan Yingli New Energy Resources Co., Ltd.; (6) Hengshui Yingli New Energy Resources Co., Ltd.; (7) Lixian Yingli New Energy Resources Co., Ltd.; (8) Tianjin Yingli New Energy Resources Co., Ltd.; and (9) Yingli Energy (China) Company Limited.

[3] *See* Memorandum, ''Respondent Selection,'' dated April 20, 2023.

review of Shenzhen Glory.[4] Therefore, Commerce selected Sungold as an additional mandatory respondent on May 1, 2023.[5] On September 8, 2023, Commerce also selected Anji DaSol Solar Energy Science & Technology Co., Ltd. (Anji DaSol) as a mandatory respondent.[6] However, Anji DaSol declined to participate in this review.

On August 30, 2023, Commerce extended the time limit for issuing the preliminary result of this review until December 29, 2023.[7]

For details regarding the events that occurred subsequent to the initiation of the review, *see* the Preliminary Decision Memorandum.[8]

Scope of the Order [9]

The merchandise covered by the *Order* is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.[10] Merchandise covered by this *Order* is currently classified under subheadings 8501.71.0000, 8501.72.1000, 8501.72.2000, 8501.72.3000, 8501.72.9000, 8501.80.1000, 8501.80.2000, 8501.80.3000, 8501.80.9000, 8507.20.8010, 8507.20.8031, 8507.20.8041, 8507.20.8061, 8507.20.8091, 8541.42.0010, and 8541.43.0010 of the Harmonized Tariff Schedule of the United States (HTSUS).[11] Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the *Order* is dispositive.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if all parties that requested the review withdraw their requests within 90 days of the date of publication of the notice of initiation of the requested review. All parties timely withdrew their requests for an administrative review, and thus, Commerce is rescinding its review of the following companies: (1) Jinko Solar Technology Sdn. Bhd.; (2) Jinko Solar (Malaysia) Sdn. Bhd.; (3) Jinkosolar Middle East DMCC; (4) Shenzhen Glory; (5) Boviet Solar Technology Co., Ltd.; (6) CSI Solar Power Group Co., Ltd.; (7) New East Solar Energy Cambodia Co., Ltd.; (8) Vina Cell Technology Company Limited; (9) Vina Solar Technology Company Limited; and (10) Canadian Solar Manufacturing, Inc.

Intent To Rescind Administrative Review in Part

Based on record evidence obtained from U.S. Customs and Border Protection (CBP), we preliminarily determine that there are no suspended entries during the POR for the companies listed in Appendix II, all of which have existing separate rates.[12] In the absence of any suspended entries of subject merchandise from these companies during the POR, Commerce intends to rescind its review of these companies in the final results of this review.

Commerce also intends to rescind this review with respect to Red Sun Energy Long An Company Limited. *See* the Preliminary Decision Memorandum for details.

Companies Not Reviewed

Based on record evidence obtained from CBP, we preliminarily determine that there are no suspended entries during the POR for the companies listed in Appendix III, all of which currently do not have a separate rate.[13] In the absence of any suspended entries of subject merchandise from these companies during the POR, and based on the fact that these companies do not have a separate rate and are part of the China-wide entity, which is not under review as no parties requested a review of the entity, we are not conducting a review of these companies.

Preliminary Determination of No Shipments

Trina Solar (Changzhou) Science and Technology Co., Ltd. (Trina Solar Changzhou) and Jinko Solar,[14] claimed that they did not ship subject merchandise during the POR. However, entry data obtained from CBP appear to contradict those claims.[15] Additionally, the American Alliance for Solar Manufacturing (the petitioner) placed Datamyne data on the record which it claims shows that Jinko Solar may have shipped subject merchandise during the POR.

After analyzing the information on the record, we preliminarily determine that there is no evidence that Trina Solar Changzhou or Jinko Solar failed to properly report entries of their subject merchandise.[16] If our determination remains unchanged in the final results of this review, we will instruct CBP to liquidate entries of subject merchandise during the POR that were recorded under the company-specific case numbers for Trina Solar Changzhou or Jinko Solar at the China-wide rate.

Application of Facts Available With Adverse Inferences

Sungold's solar cell suppliers failed to provide factors of production (FOP) data for use in calculating the weighted-average dumping margin of Sungold. Because the solar cells suppliers are interested parties, and they declined to provide requested information, that information is not on the record. Consequently, we have preliminarily applied partial facts available with adverse inferences in place of the missing FOP data, pursuant to sections 776(a)(1), (2)(A)–(C), and 776(b) of the Tariff Act of 1930, as amended (the Act). For details regarding this preliminary determination, *see* the Preliminary Decision Memorandum.

Separate Rates

We have preliminarily determined that the companies listed in the table in the ''Preliminary Results of Review'' section of this notice below demonstrated that they qualified for a separate rate but the companies listed in Appendix IV have not done so. Consequently, we have preliminarily

[4] *See* Shenzhen Glory's Letter, ''Withdrawal of Request for Administrative Review,'' dated April 21, 2023.

[5] *See* Memorandum, ''Respondent Selection,'' dated May 1, 2023.

[6] *See* Memorandum, ''Respondent Selection,'' dated September 8, 2023.

[7] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated August 30, 2023.

[8] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[9] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012) (*Order*).

[10] For a complete description of the scope of the order, *see* Issues Decision Memorandum.

[11] During the POR, solar cells and modules were primarily classified under HTSUS subheadings 8541.40.6015 and 8541.40.6025. These two categories were updated to USHTS subheadings 8541.42.0010 and 8541.43.0010 in 2022.

[12] *See* Preliminary Decision Memorandum.

[13] *Id.*

[14] Jinko Solar refers to the following companies which Commerce has previously treated as a single entity: Jinko Solar Import and Export Co., Ltd.; Jinko Solar Co., Ltd.; Jinko Solar Technology (Haining) Co., Ltd.; Yuhuan Jinko Solar Co., Ltd.; Zhejiang Jinko Solar Co., Ltd.; Jiangsu Jinko Tiansheng Solar Co., Ltd. ; JinkoSolar (Chuzhou) Co., Ltd.; JinkoSolar (Yiwu) Co., Ltd.; and JinkoSolar (Shangrao) Co., Ltd.

[15] *See* Preliminary Decision Memorandum.

[16] *Id.*

treated the companies listed in Appendix IV as part of the China-wide entity. Because no party requested a review of the China-wide entity, the entity's dumping margin is 238.95 percent [17] and not subject to change.[18] For additional information regarding Commerce's preliminary separate rate determinations, *see* the Preliminary Decision Memorandum.

Dumping Margins for Separate Rate Companies

The statute and Commerce's regulations do not address what dumping margin to apply to respondents that are not selected for individual examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the dumping margin for respondents that are not individually examined in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* dumping margins, and any dumping margins determined entirely {on the basis of facts available}.'' When the weighted-average dumping margins established for all individually examined respondents are zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act permits Commerce to ''use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.'' Consistent with Commerce's practice,[19] we preliminarily determine that a reasonable method would be to assign a dumping margin to the non-individually examined separate rate companies equal to the zero percent preliminary dumping margin calculated for Sungold. For additional information,*see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this administrative review in accordance with section 751(a)(1)(B) of the Act. In determining Sungold's dumping margin, we calculated export prices in accordance with section 772 of the Act. Because Commerce previously determined that China is a non-market economy country,[20] within the meaning of section 771(18) of the Act, we calculated normal value in accordance with section 773(c) of the Act.

For a full description of the methodology underlying the preliminary results of this review, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Preliminary Results of Review

We are assigning the following dumping margins to the firms listed below for the period December 1, 2021, through November 30, 2022:

Exporter	Weighted-average dumping margin (percent)
Shenzhen Sungold Solar Co., Ltd	0.00
Review-Specific Average Rate Applicable to the Following Companies	
BYD (Shangluo) Industrial Co., Ltd	0.00
Hongkong Hello Tech Energy Co., Ltd	0.00
Trina Solar Co., Ltd	0.00
Trina Solar Science & Technology (Thailand) Ltd	0.00
Zhejiang Aiko Solar Energy Technology Co., Ltd	0.00

Disclosure

Commerce intends to disclose to parties to the proceeding the calculations performed for these preliminary results of review to interested parties within five days after public announcement of the preliminary results or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register** in accordance with 19 CFR 351.224(b).

Public Comment

Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of these preliminary results of review in the **Federal Register**.[21] Interested parties may file rebuttal briefs, that are limited to the issues raised in case briefs, not later than five days after the

[17] The China-wide entity rate was last changed in the first administrative review of this proceeding and has been the applicable rate for the entity in each subsequent review, including the most recently completed review. *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012–2013,* 80 FR 40998, 41002 (July 14, 2015) (*Solar Cells from China AR1 Final*); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020,* 87 FR 38379, 38381 (June 28, 2022).

[18] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[19] *See Wooden Cabinet and Vanities and Components Thereof From the People's Republic of China: Final Results and Partial Rescission of the Antidumping Duty Administrative Review; 2019–2021,* 87 FR 67674 (November 9, 2022), and accompanying Issues and Decision Memorandum at Comment 5.

[20] *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination,* 82 FR 50858, 50861 (November 2, 2017) (citing Memorandum, ''China's Status as a Non-Market Economy,'' dated October 26, 2017), unchanged in *Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 83 FR 9282 (March 5, 2018).

[21] *See* 19 CFR 351.309(c)(ii).

date for filing case briefs.[22] Interested parties who submit case or rebuttal briefs must submit: (1) a table of contents listing each issue discussed in the brief; and (2) a table of authorities.[23]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[24] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[25]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request for a hearing to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically via ACCESS, within 30 days after the date of publication of this notice in the **Federal Register**. Requests for a hearing should contain: (1) the requesting party's name, address, and telephone number; (2) the number of individuals associated with the requesting party that will attend the hearing and whether any of those individuals is a foreign national; and (3) a list of the issues the party intends to discuss at the hearing. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled hearing date.

[22] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[23] *See* 19 351.309(c)(2) and (d)(2).

[24] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[25] *See APO and Final Service Rule.*

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[26] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the notice 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).

Where a respondent's weighted average dumping margin is zero percent or *de minimis,* or an importer/customer-specific *ad valorem* assessment rate is zero percent or *de minimis,* Commerce's practice is to instruct CBP to liquidate the appropriate entries without regard to dumping duties.[27] Thus, if Commerce continues to calculate a weighted-average dumping margin of zero percent for Sungold in the final results of this review, it will instruct CBP to liquidate entries of Sungold's subject merchandise during the POR without regard to antidumping duties.

However, if Sungold's final weighted-average dumping margin is not zero percent or *de minimis* (*i.e.,* less than 0.5 percent), Commerce intends to calculate importer/customer-specific assessment rates [28] by dividing the total amount of dumping for reviewed sales to the importer/customer by the total quantity of those sales. Commerce will calculate an estimated *ad valorem* importer/customer-specific assessment rate to determine whether the per-unit assessment rate is *de minimis;* however, it will instruct CBP to apply the per-unit assessment rate.[29]

Commerce will base the assessment rate of the respondents that were not selected for individual examination that qualify for a separate rate on the weighted-average dumping margin that it calculates for Sungold in the final results of this review.[30]

Pursuant to a refinement of its practice, Commerce will instruct CBP to liquidate entries of Sungold's subject merchandise for which sales were not reported in the U.S. sales database at the dumping margin assigned to the China-wide entity.[31]

Additionally, we intend to instruct CBP to liquidate entries of subject merchandise during the POR that were recorded under the company-specific case numbers for Trina Solar Changzhou or Jinko Solar at the China-wide rate.

Cash Deposit Requirements

The following cash deposit requirements will be in effect for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on, or after, the date of publication of the notice of the final results of this administrative review in the **Federal Register**, as provided for by section 751(a)(2)(C) of the Act: (1) for the exporters listed in the table in the ''Preliminary Results of Review'' section of this notice above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review for the exporter (except, if the dumping margin is *de minimis* (*i.e.,* less than 0.5 percent), then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed Chinese and non-Chinese exporters that are not listed in the rate table in the final results of review that have separate rates, the cash deposit rate will continue to be the exporter's existing cash deposit rate; (3) for all China exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin assigned to the China-wide entity, which is 238.95 percent, and (4) for all non-China exporters of subject merchandise that do not have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin applicable to the China

[26] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification*).

[27] *See Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2014–2015,* 81 FR 29528 (May 12, 2016), and accompanying Issues and Decision Memorandum at 10–11, unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2014–2015,* 81 FR 54042 (August 15, 2016).

[28] *See* 19 CFR 351.212(b)(1).

[29] *See Final Modification,* 77 FR 8103.

[30] *See NME Assessment of Dumping Duties,* for a full discussion of this practice.

[31] *See Solar Cells from China AR1 Final,* 80 FR 41002.

exporter(s) that supplied that non-China exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties and/or countervailing duties has occurred, and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213 and 351.221(b)(4).

Dated: December 28, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

Appendix II

Companies for Which Commerce Intends To Rescind the Review

1. Canadian Solar International Limited; Canadian Solar Manufacturing (Changshu) Inc.; Canadian Solar Manufacturing (Luoyang) Inc.; CSI Cells Co., Ltd.; CSI Solar Co., Ltd.; and CSI Solar Manufacturing (Fu Ning) Co., Ltd.
2. Chint Solar (Hong Kong) Company Limited; Chint Solar (Jiuquan) Co., Ltd.; Chint Solar (Zhejiang) Co., Ltd.; and Chint New Energy Technology (Haining) Co., Ltd.
3. JA Solar Technology Yangzhou Co., Ltd.
4. Jiawei Solarchina Co., Ltd.
5. JingAo Solar Co., Ltd.
6. Longi Solar Technology Co. Ltd.
7. Risen Energy Co. Ltd.; Risen Energy (Changzhou) Co., Ltd.; Risen (Wuhai) New Energy Co., Ltd.; Zhejiang Twinsel Electronic Technology Co., Ltd.; Risen (Luoyang) New Energy Co., Ltd.; Jiujiang Shengchao Xinye Technology Co., Ltd.; Jiujiang Shengzhao Xinye Trade Co., Ltd.; Ruichang Branch, Risen Energy (HongKong) Co., Ltd.; and Risen Energy (YIWU) Co., Ltd.
8. Shanghai BYD Co., Ltd.
9. Shanghai JA Solar Technology Co., Ltd.
10. Shenzhen Topray Solar Co., Ltd.
11. Wuxi Tianran Photovoltaic Co., Ltd.
12. Xiamen Yiyusheng Solar Co., Ltd.

Appendix III

Companies Not Reviewed

1. Renesola Jiangsu Ltd.
2. BYD H.K. Co., Ltd.
3. CSI Modules (DaFeng) Co., Ltd.
4. De-Tech Trading Limited HK
5. Hengdian Group DMEGC Magnetics Co. Ltd.
6. JA Solar Co., Ltd.
7. Jiawei Solarchina (Shenzhen) Co., Ltd.
8. Lightway Green New Energy Co., Ltd.
9. Longi (HK) Trading Ltd.
10. Ningbo ETDZ Holdings, Ltd.
11. Ningbo Qixin Solar Electrical Appliance Co., Ltd.
12. ReneSola Zhejiang Ltd.
13. Shanghai Nimble Co., Ltd.
14. Sumec Hardware & Tools Co., Ltd.
15. Suntech Power Co., Ltd.
16. Taizhou BD Trade Co., Ltd.
17. tenKsolar (Shanghai) Co., Ltd.
18. Trina Solar Energy Development PTE Ltd.
19. Jinko Solar International Limited
20. Luoyang Suntech Power Co., Ltd.
21. Trina Solar (Singapore) Science and Technology Pte. Ltd.
22. Yingli Green Energy International Trading Company Limited
23. Trina Solar Energy Development Company Limited
24. Changzhou Trina Hezhong Photoelectric Co., Ltd.
25. Changzhou Trina Solar Energy Co., Ltd.
26. Changzhou Trina Solar Yabang Energy Co., Ltd.
27. Hubei Trina Solar Energy Co., Ltd.
28. Trina Solar (Hefei) Science and Technology Co., Ltd.
29. Turpan Trina Solar Energy Co., Ltd.
30. Yancheng Trina Guoneng Photovoltaic Technology Co., Ltd.
31. Yancheng Trina Solar Energy Technology Co., Ltd.

Appendix IV

Companies Preliminarily Determined To Be Part of the China-Wide Entity

1. Anji DaSol Solar Energy Science & Technology Co., Ltd.
2. Maodi Solar Technology (Dongguan) Co., Ltd.
3. Shenzhen Yingli New Energy Resources Co., Ltd.; Baoding Jiasheng Photovoltaic Technology Co. Ltd.; Baoding Tianwei Yingli New Energy Resources Co., Ltd.; (4) Beijing Tianneng Yingli New Energy Resources Co., Ltd.; Hainan Yingli New Energy Resources Co., Ltd.; Hengshui Yingli New Energy Resources Co., Ltd.; Lixian Yingli New Energy Resources Co., Ltd.; Tianjin Yingli New Energy Resources Co., Ltd.; and Yingli Energy (China) Company Limited.
4. Wuxi Suntech Power Co., Ltd.

[FR Doc. 2023–28999 Filed 1–3–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–821]

Utility Scale Wind Towers From Malaysia: Preliminary Results of Antidumping Duty Administrative Review, 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S Department of Commerce (Commerce) preliminarily determines that the sole producer or exporter subject to this administrative review made sales of subject merchandise at below normal value (NV). The period of review (POR) is October 13, 2021, through November 30, 2022. Interested parties are invited to comment on these preliminary results.

DATES: Applicable January 4, 2024.

FOR FURTHER INFORMATION CONTACT: Nicolas Mayora, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3053.

SUPPLEMENTARY INFORMATION:

Background

On December 6, 2021, Commerce published in the **Federal Register** the antidumping duty order on utility scale wind towers (wind towers) from Malaysia.[1] On December 1, 2022, we published in the **Federal Register** a notice of opportunity to request an administrative review of the *Order*.[2] On February 2, 2023, based on timely requests for an administrative review, in accordance with 19 CFR 351.221(c)(1)(i), Commerce initiated the administrative review covering one company,[3] CS Wind Malaysia Sdn Bhd

[1] *See Utility Scale Wind Towers from India and Malaysia: Antidumping Duty Orders,* 86 FR 69014 (December 6, 2021) (*Order*).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 87 FR 73752 (December 1, 2022).

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 7060 (February 2, 2023).

and its parent company, CS Wind Corporation, (collectively, CS Wind).[4]

On August 17, 2023, Commerce extended the time limit for completing the preliminary results of this review until December 28, 2023.[5] For a complete description of the events between the initiation of this review and these preliminary results, *see* the Preliminary Decision Memorandum.[6]

Scope of the Order

The merchandise covered by the scope of this *Order* are wind towers from Malaysia. Merchandise covered by this order is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7308.20.0020 or 8502.31.0000. Wind towers of iron or steel are classified under HTSUS 7308.20.0020 when imported separately as a tower or tower section(s). Wind towers may be classified under HTSUS 8502.31.0000 when imported as combination goods with a wind turbine (*i.e.,* accompanying nacelles or rotor blades). While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

A complete description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.[7]

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). We calculated export prices in accordance with sections 772(a) of the Act. We calculated NV in accordance with section 773(e) of the Act. For a full description of the methodology underlying these preliminary results, *see* the Preliminary Decision Memorandum. *See* the appendix for a complete list of topics discussed in the Preliminary Decision Memorandum.

The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum is available at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Preliminary Results of the Review

Commerce preliminarily determines that the following weighted-average dumping margins exist during the period October 13, 2021, through November 30, 2022:

Exporter or producer	Estimated weighted-average dumping margin (percent)
CS Wind Corporation/CS Wind Malaysia Sdn Bhd	25.92

Verification

Commerce received a timely request from the Wind Tower Trade Coalition (the petitioner) to verify the information submitted in this administrative review, pursuant to 19 CFR 307(b)(1)(iv).[8] Commerce does not intend to verify the information submitted by the mandatory respondent in the course of this administrative review because we conducted a verification of CS Wind in the underlying investigation.[9]

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after public announcement of the preliminary results.[10] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[11] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[12] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[13] As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[14] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[15]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants and if any participant is a foreign national; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Assessment Rates

Upon issuance of the final results of this administrative review, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[16] If a respondent's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates

[4] In the less-than-fair-value (LTFV) investigation of scale wind towers from Malaysia, Commerce determined that CS Wind Malaysia Sdn Bhd and CS Wind Corporation are a single entity. *See Utility Scale Wind Towers from Malaysia: Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination,* 86 FR 27828 (May 24, 2021), unchanged in *Utility Scale Wind Towers from Malaysia: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 56894 (October 13, 2021).

[5] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review; 2019–2021,'' dated August 17, 2023.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Utility Scale Wind Towers from Malaysia; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* Preliminary Decision Memorandum at ''Scope of the *Order*.''

[8] *See* Petitioner's Letter, ''Request for Verification,'' dated May 15, 2023.

[9] *See Utility Scale Wind Towers from Malaysia: Final Affirmative Determination of Sales at Less Than Fair Value,* 86 FR 56894 (October 13, 2021).

[10] *See* 19 CFR 351.224(b).

[11] See 19 CFR 351.309(c)(1)(ii).

[12] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Procedures*).

[13] *See* 19 351.309(c)(2) and (d)(2).

[14] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[15] *See APO and Service Procedures.*

[16] *See* 19 CFR 351.212(b)(1).

based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We intend to instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis.* Where an importer-specific assessment rate is zero or *de minimis* in the final results of this review, we intend to instruct CBP to liquidate the appropriate entries without regard to antidumping duties in accordance with 19 CFR 351.106(c)(2). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review and for future deposits of estimated duties, where applicable.[17]

In accordance with Commerce's ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by CS Wind for which it did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[18]

We intend to issue instructions to CBP no earlier than 35 days after the publication date 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 effective upon publication in the **Federal Register** of the notice of final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the company listed in the final results of this review will be equal to the weighted-average dumping margin established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior segment of the proceeding, 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) the cash deposit rate for all other producers or exporters will continue to be 0.00 percent, the all-others rate established in the LTFV investigation, adjusted for the export-subsidy rate in the companion countervailing duty investigation.[19] The cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during 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.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 19 CFR 351.221(b)(4).

Dated: December 28, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–28997 Filed 1–3–24; 8:45 am]

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[17] *See* section 751(a)(2)(C) of the Act.

[18] For a full description of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[19] *See Order,* 86 FR at 69015.

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

National Construction Safety Team Advisory Committee Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Construction Safety Team (NCST) Advisory Committee (Committee) will hold an open meeting in-person and via web conference on Wednesday, March 6, 2024, from 9 a.m. to 5 p.m. eastern time, and on Thursday, March 7, 2024, from 9 a.m. to 5 p.m. eastern time. The primary purposes of this meeting are to update the Committee on the progress of the NCST investigation focused on the impacts of Hurricane Maria in Puerto Rico, progress of the NCST investigation focused on the Champlain Towers South partial building collapse that occurred in Surfside, Florida, the implementation of recommendations from previous investigations, and receive responses to the Committee's 2023 recommendations. The final agenda will be posted on the NIST website at *https://www.nist.gov/topics/disaster-failure-studies/national-construction-safety-team-ncst/advisory-committee-meetings.*

DATES: The NCST Advisory Committee will meet on Wednesday, March 6, 2024, from 9 a.m. to 5 p.m. eastern time, and on Thursday, March 7, 2024, from 9 a.m. to 5 p.m. eastern time. The meeting will be open to the public.

ADDRESSES: The meeting will be held in person in the Heritage Room of the Administration Building, NIST, 100 Bureau Drive, Gaithersburg, Maryland 20899 and via web conference. For instructions on how to attend and/or participate in the meeting, please see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Tanya Brown-Giammanco, Disaster and Failure Studies Program, Engineering Laboratory, NIST. Tanya Brown-Giammanco's email address is *Tanya.Brown-Giammanco@nist.gov* and her phone number is (301) 975–2822.

SUPPLEMENTARY INFORMATION: The Committee was established pursuant to section 11 of the NCST Act (Pub. L. 107–231, codified at 15 U.S.C. 7301 *et seq.*). The Committee is currently composed of five members, appointed by the Director of NIST, who were selected on the basis of established records of distinguished service in their

professional community and their knowledge of issues affecting the National Construction Safety Teams. The Committee advises the Director of NIST on carrying out the NCST Act; reviews the procedures developed for conducting investigations; and reviews the reports issued documenting investigations. Background information on the NCST Act and information on the NCST Advisory Committee is available at *https://www.nist.gov/topics/disaster-failure-studies/national-construction-safety-team-ncst/advisory-committee.*

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. app., notice is hereby given that the NCST Advisory Committee will meet on Wednesday, March 6, 2024, from 9 a.m. to 5 p.m. eastern time, and on Thursday, March 7, 2024, from 9 a.m. to 5 p.m. eastern time. The meeting will be open to the public and will be held in person and via web conference. Interested members of the public will be able to participate in the meeting from remote locations. The primary purposes of this meeting are to update the Committee on the progress of the NCST investigation focused on the impacts of Hurricane Maria in Puerto Rico, progress of the NCST investigation focused on the Champlain Towers South partial building collapse that occurred in Surfside, Florida, the implementation of recommendations from previous investigations, and receive responses to the Committee's 2023 recommendations. The agenda may change to accommodate Committee business. The final agenda will be posted on the NIST website at *https://www.nist.gov/topics/disaster-failure-studies/national-construction-safety-team-ncst/advisory-committee-meetings.*

Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Committee's agenda for this meeting are invited to request a place on the agenda. Approximately twenty minutes will be reserved for public comments and speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received. Questions from the public will not be considered during this period. All those wishing to speak must submit their request by email to the attention of Tina Faecke at *tina.faecke@nist.gov* by 5 p.m. eastern time, Friday, February 23, 2024. Any member of the public is also permitted to file a written statement with the advisory committee; speakers who wish to expand upon their oral statements, those who wish to speak but cannot be accommodated on the agenda, and those who are unable to attend are invited to submit written statements electronically by email to *disaster@nist.gov.*

All visitors to the NIST site are required to pre-register to be admitted. Anyone wishing to attend this meeting in-person or via web conference must register by 5 p.m. eastern time, Friday, February 23, 2024, to attend. Please submit your full name, the organization you represent (if applicable), email address, and phone number to Tina Faecke at *tina.faecke@nist.gov*. Non-U.S. citizens must submit additional information; please contact Tina Faecke at *tina.faecke@nist.gov*. For participants attending in person, please note that Federal agencies, including NIST, can only accept a State issued driver's license or identification card for access to Federal facilities if such license or identification card is issued by a State that is compliant with the REAL ID Act of 2005 (Pub. L. 109–13), or by a State that has an extension for REAL ID compliance. NIST currently accepts other forms of Federal-issued identification in lieu of a State-issued driver's license. For detailed information please contact Tina Faecke or visit: *http://www.nist.gov/public_affairs/visitor/.*

Tamiko Ford,

NIST Executive Secretariat.

[FR Doc. 2023–28548 Filed 1–3–24; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD618]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Scientific and Statistical Committee Informational meeting will be held.

DATES: The meeting will be held on Friday, January 19, 2024, from 8 a.m. to 12 p.m., Alaska time.

ADDRESSES: The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/3032.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Suite 400, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Nicole Watson, Council staff; phone: (907) 271–2809; email: *Nicole.watson@noaa.gov.* For technical support, please contact our admin Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Friday, January 19, 2024

The SSC will meet to receive staff presentations on the Cook Inlet Salmon Stock Assessment and Fishery Evaluation (SAFE) report. In the presentation from NOAA, the SSC will receive proposed stock definitions, tier assignments, status determination criteria, and harvest specifications, which the SSC is tasked with recommending in February 2024 for the Federal fishery of Cook Inlet salmon stocks. The meeting is informational, to orient SSC members in their review of the SAFE report in advance of the February 2024 meeting. No decisions will be made at the informational meeting. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/3032* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/3032.* The meeting will be recorded and a link to the recording will be posted on the eAgenda once the meeting concludes.

Public Comment

Public comment letters will be accepted in advance of the meeting and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/3032.*

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

Dated: December 29, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28986 Filed 1–3–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD620]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Committee via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Monday, January 22, 2024, at 12:30 p.m.

ADDRESSES: Webinar registration URL information: *https://attendee.gotowebinar.com/register/4886213617172870485.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Groundfish Committee will meet to receive recommendations from the Recreational Advisory Panel, and discuss and develop recommendations to the Council on fishing year 2024 recreational measures for Georges Bank cod, Gulf of Maine cod and Gulf of Maine haddock. They will receive an update on the Atlantic Cod Transition Plan as well as an update on the Amendment 23 Review Metrics from the Plan Development Team (PDT). They will also receive an overview of the Council's groundfish priorities for 2024. Other business may be discussed as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 29, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28979 Filed 1–3–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD617]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold an online meeting, which is open to the public.

DATES: The online meeting will be held Monday, Thursday, and Friday, January 22, 25, and 26, 2024 from 8 a.m. to 12 p.m. Pacific time, or until business is completed on each day.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *https://www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Kit Dahl, Staff Officer, Pacific Council; telephone: (503) 820–2422.

SUPPLEMENTARY INFORMATION: The purpose of this online meeting is for the HMSMT to discuss and consider preparation of reports it will submit to the Pacific Council at its March 2024 meeting. A particular focus will be a report detailing its proposal for an HMS Roadmap workshop, building on the proposal it submitted to the Pacific Council at its November 2023 meeting. Other HMS items on the Pacific Council's March agenda are the National Marine Fisheries Service Report and International Management. The HMSMT may also discuss other agenda items such as those on ecosystem management.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

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

Dated: December 29, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28982 Filed 1–3–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD614]

Fisheries of the Caribbean; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 84 Data Workshop for U.S. Caribbean Yellowtail Snapper and Stoplight Parrotfish.

SUMMARY: The SEDAR 84 assessment process of U.S. Caribbean yellowtail snapper and stoplight parrotfish will

consist of a Data Workshop, and a series of assessment webinars, and a Review Workshop.

DATES: The SEDAR 84 Data Workshop will be held from 8:30 a.m. on January 23, 2024, until 6 p.m. on January 25, 2024. The meeting sessions will be on January 23, 8:30 a.m. to 6 p.m., January 24, from 8:30 a.m. to 6 p.m., and January 25, from 8:30 a.m. to 6 p.m. All times are AST. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The SEDAR 84 Data Workshop will be held at the Verdanza Hotel, 8020 Tartak Street, Isla Verde, Puerto Rico, 00979.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; phone: (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data/Assessment Workshop, and (2) a series of webinars. The product of the Data/Assessment Workshop is a report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses, and describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Data Workshop are as follows:

An assessment data set and associated documentation will be developed during the workshop. Participants will evaluate proposed data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to the workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 29, 2023.

Diane M. DeJames-Daly,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28985 Filed 1–3–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24–265–000.
Applicants: LA Storage, LLC.
Description: § 4(d) Rate Filing: Filing of Negotiated Rate, Conforming IW Agreements to be effective 1/1/2024.
Filed Date: 12/27/23.
Accession Number: 20231227–5174.
Comment Date: 5 p.m. ET 1/8/24.

Docket Numbers: RP24–266–000.
Applicants: Trunkline Gas Company, LLC.
Description: § 4(d) Rate Filing: Non-Conforming NRA with BP Energy Company to be effective 1/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5068.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–267–000.
Applicants: Trunkline Gas Company, LLC.
Description: § 4(d) Rate Filing: Non-Conforming List Update—BP Energy to be effective 1/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5073.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–268–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: § 4(d) Rate Filing: 12.28.23 Negotiated Rates—Emera Energy Services, Inc. R–2715–91 to be effective 1/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5080.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–269–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Negotiated Rate Agreement Update (SoCal Jan 24) to be effective 1/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5112.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–270–000.
Applicants: Southern Natural Gas Company, L.L.C.
Description: § 4(d) Rate Filing: Remove Expired Negotiated Rate Agreement (Texican) to be effective 2/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5135.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–271–000.
Applicants: Texas Eastern Transmission, LP.
Description: § 4(d) Rate Filing: TETLP EPC FEB 2024 FILING to be effective 2/1/2024.
Filed Date: 12/28/23.
Accession Number: 20231228–5161.
Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: RP24–272–000.
Applicants: Algonquin Gas Transmission, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Yankee Gas to Emera Energy eff 12–29–23 to be effective 12/29/2023.
Filed Date: 12/28/23.
Accession Number: 20231228–5177.
Comment Date: 5 p.m. ET 1/9/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206

of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28980 Filed 1–3–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–764–000]

GB Arthur Kill Storage 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 GB Arthur Kill Storage 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 January 17, 2024.

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.

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Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28990 Filed 1–3–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–750–000]

Town Hill Energy Storage 1 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 Town Hill Energy Storage 1 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 January 17, 2024.

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

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Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28988 Filed 1–3–24; 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 exempt wholesale generator filings:

Docket Numbers: EG24–63–000.

Applicants: Escalante Solar, LLC.

Description: Escalante Solar, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 12/28/23.

Accession Number: 20231228–5153.

Comment Date: 5 p.m. ET 1/18/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1276–017; ER10–1287–016; ER10–1292–015; ER10–1303–015; ER10–1319–017; ER10–1353–017; ER18–1183–008; ER18–1184–008; ER23–1411–002.

Applicants: Newport Solar LLC, Delta Solar Power II, LLC, Delta Solar Power I, LLC, Dearborn Industrial Generation, L.L.C., CMS Generation Michigan Power, LLC, Genesee Power Station Limited Partnership, CMS Energy Resource Management Company, Grayling Generation Station Limited Partnership, Consumers Energy Company.

Description: Triennial Market Power Analysis for Central Region of Consumers Energy Company, et al.

Filed Date: 12/27/23.

Accession Number: 20231227–5282.

Comment Date: 5 p.m. ET 2/26/24.

Docket Numbers: ER24–765–000.

Applicants: Consolidated Edison Company of New York, Inc.

Description: § 205(d) Rate Filing: PASNY RY 2 12–2023 to be effective 1/1/2024.

Filed Date: 12/27/23.

Accession Number: 20231227–5262.

Comment Date: 5 p.m. ET 1/17/24.

Docket Numbers: ER24–766–000.

Applicants: Viridon California LLC.

Description: Baseline eTariff Filing: Formula Rate Baseline to be effective 2/27/2024.

Filed Date: 12/28/23.

Accession Number: 20231228–5108.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–767–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Initial Filing of Service Agreement Nos. 918, 919, and 920 to be effective 12/1/2023.

Filed Date: 12/28/23.

Accession Number: 20231228–5160.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–768–000.

Applicants: Duke Energy Progress, LLC.

Description: § 205(d) Rate Filing: Revised Depreciation Rates in Rate Schedule No. 199 to be effective 10/1/2023.

Filed Date: 12/28/23.

Accession Number: 20231228–5166.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–769–000.

Applicants: New England Power Pool Participants Committee.

Description: § 205(d) Rate Filing: Jan 2024 Membership Filing to be effective 1/1/2024.

Filed Date: 12/28/23.

Accession Number: 20231228–5190.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–770–000.

Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: ATSI submits Revised Interconnection Agreement, Service Agreement No. 3992 to be effective 2/27/2024.

Filed Date: 12/28/23.

Accession Number: 20231228–5236.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–771–000.

Applicants: Viridon New England LLC.

Description: Viridon New England LLC submits Request for authorization to utilize certain incentive rate treatments.

Filed Date: 12/26/23.

Accession Number: 20231226–5184.

Comment Date: 5 p.m. ET 1/16/24.

Docket Numbers: ER24–772–000.

Applicants: Duke Energy Carolinas, LLC.

Description: § 205(d) Rate Filing: Wholesale Contract Revisions to Rate Schedule No. 336 to be effective 1/1/2024.

Filed Date: 12/28/23.

Accession Number: 20231228–5256.

Comment Date: 5 p.m. ET 1/18/24.

Docket Numbers: ER24–773–000.

Applicants: Escalante Solar, LLC.

Description: Baseline eTariff Filing: Escalante Solar LLC MBR Application Filing to be effective 1/1/2024.

Filed Date: 12/28/23.

Accession Number: 20231228–5293.

Comment Date: 5 p.m. ET 1/18/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28984 Filed 1–3–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–31–000]

Texas Eastern Transmission, LP; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on December 18, 2023, Texas Eastern Transmission, LP (Texas Eastern), 915 North Eldridge Parkway, Suite 1100, Houston, Texas 77079, filed in the above referenced docket, a prior notice request pursuant to sections 157.205 and 157.208 of the Commission's regulations under the Natural Gas Act (NGA), and Texas Eastern's blanket certificate issued in Docket No. CP82–535–000, for authorization to replace a segment of its Line 2 in Union and Middlesex Counties, New Jersey (Rahway River Line 2 Pipeline Replacement Project or Project). Specifically, Texas Eastern proposes to: (1) install an approximately 1,260-foot segment of 20-inch-diameter via horizontal directional drill, (2) conventionally install approximately 460 feet of 20-inch-diameter pipeline to tie into Texas Eastern's existing Line 2, and (3) abandon in-place approximately 1,875 feet of Line 2. Texas Eastern states that the Project is designed to ensure the continued safe operation of Texas Eastern's pipeline facilities. Texas Eastern further asserts that the Project will have no impact on the certificated capacity of its system and there will be no abandonment or reduction in service to any of its customers as a result of the Project. Texas Eastern estimates the cost of the Project to be approximately $18.7 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*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. Public access to records formerly available in the Commission's physical Public Reference Room, which was located at the Commission's headquarters, 888 First Street NE, Washington, DC 20426, are now available via the Commission's website. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to Arthur Diestel, Director, Regulatory, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642, by telephone at (713) 627–5116, by fax at (713) 627–5947, or by email at *arthur.diestel@enbridge.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5 p.m. eastern time on February 26, 2024. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is February 26, 2024. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is February 26, 2024. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before February 26, 2024. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–31–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–31–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Arthur Diestel, Director, Regulatory, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, Texas 77251–1642 or by email at *arthur.diestel@enbridge.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28987 Filed 1–3–24; 8:45 am]

BILLING CODE 6717–01–P

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–762–000]

Elevate Renewables F7, 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 Elevate Renewables F7, 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 January 17, 2024.

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.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including

landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 28, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28983 Filed 1–3–24; 8:45 am]

BILLING CODE 6717–01–P

FARM CREDIT ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10 a.m., Thursday, January 11, 2024.

PLACE: You may observe this meeting in person at 1501 Farm Credit Drive, McLean, Virginia 22102–5090, or virtually. If you would like to observe, at least 24 hours in advance, visit *FCA.gov,* select ''Newsroom,'' then select ''Events.'' From there, access the linked ''Instructions for board meeting visitors'' and complete the described registration process.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The following matters will be considered:

- Approval of Minutes for December 14, 2023
- Office of Inspector General Year-in-Review Report

CONTACT PERSON FOR MORE INFORMATION: If you need more information or assistance for accessibility reasons, or have questions, contact Ashley Waldron, Secretary to the Board. Telephone: 703–883–4009. TTY: 703–883–4056.

Ashley Waldron,

Secretary to the Board.

[FR Doc. 2024–00017 Filed 1–2–24; 11:15 am]

BILLING CODE 6705–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 19, 2024.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *The John W. Waller Revocable Trust, Paula J. Ray, trustee, both of Leasburg, Missouri; John T. Waller, Timothy S. Waller, and Matthew J. Waller, all of Sullivan, Missouri; and Cody J. Waller, Bourbon, Missouri;* a group acting in concert, to retain voting shares of St. Clair Bancshares, Inc., and thereby indirectly retain voting shares of Farmers and Merchants Bank of St. Clair, both of St. Clair, Missouri.

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198–0001. Comments can also be sent electronically to *KCApplicationComments@kc.frb.org:*

1. *Ryan Sullivan and Bryan Adams, both of Mission Hills, Kansas;* to form the Sullivan/Adams control group, a group acting in concert, to acquire voting shares of Orrick Financial Corporation, and thereby indirectly acquire voting shares of The Bank of Orrick, both of Orrick, Missouri.

2. *Charles Garrett, Tulsa, Oklahoma, as investment adviser to the NBC Bancshares Subtrust of the Drummond Family Trust dated 10/1/21;* to become a member of the Drummond Family group, a group acting in concert, to retain voting shares of N.B.C. Bancshares in Pawhuska, Inc., and thereby indirectly retain voting shares of Blue Sky Bank, both of Pawhuska, Oklahoma.

3. *Robert Gregory Kidd, Crystal Bay, Nevada;* to acquire voting shares of Vast Holdings, Inc, and thereby indirectly acquire voting shares of Vast Bank, N.A., both of Tulsa, Oklahoma.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–28965 Filed 1–3–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than February 5, 2024.

A. Federal Reserve Bank of Cleveland (Nadine M. Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44114–2566. Comments can also be sent electronically to *comments.applications@clev.frb.org:*

1. *Main Street Financial Services Corp., Wheeling, West Virginia;* to acquire Wayne Savings Bancshares Inc., and thereby indirectly acquire Wayne Savings Community Bank, both of Wooster, Ohio.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414. Comments can also be sent electronically to *Comments.applications@chi.frb.org:*

1. *First Busey Corporation, Champaign, Illinois;* to merge with Merchants and Manufacturers Bank Corporation, Channahon, Illinois, and thereby indirectly acquire Merchants and Manufacturers Bank, Joliet, Illinois.

C. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Old National Bancorp, Evansville, Indiana;* to merge with CapStar Financial Holdings, Inc., and thereby indirectly acquire CapStar Bank, both of Nashville, Tennessee.

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–28966 Filed 1–3–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Update to the Health Resources and Services Administration-Supported Women's Preventive Services Guidelines Relating to Screening for Urinary Incontinence

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: A **Federal Register** notice published on September 29, 2023, detailed and sought public comment on recommendations under development by the Women's Preventive Services Initiative (WPSI), regarding updates to the HRSA-supported Women's Preventive Services Guidelines (Guidelines). The proposed updates specifically related to Screening for Urinary Incontinence. WPSI convenes health professionals to develop draft recommendations for HRSA's consideration. Two public comments were received and considered as detailed below. On December 28, 2023, HRSA accepted as final WPSI's recommended updates to the Screening for Urinary Incontinence guideline. Under applicable law, non-grandfathered group health plans and health insurance issuers offering non-grandfathered group and individual health insurance coverage must include coverage, without cost sharing, for certain preventive services, including those provided for in the HRSA-supported Guidelines. The Departments of Labor, Health and Human Services, and the Treasury have previously issued regulations describing how group health plans and health insurance issuers apply the coverage requirements. Please see *https://www.hrsa.gov/womens-guidelines* for additional information.

FOR FURTHER INFORMATION CONTACT: Kimberly Sherman, HRSA, Maternal and Child Health Bureau, telephone: (301) 443–8283, email: *wellwomancare@hrsa.gov.*

SUPPLEMENTARY INFORMATION: Under the Patient Protection and Affordable Care Act, Public Law 111–148, the preventive care and screenings set forth in the Guidelines are required to be covered without cost-sharing by certain group health plans and health insurance issuers. HRSA established the Guidelines in 2011 based on expert recommendations by the Institute of Medicine, now known as the National Academy of Medicine, developed under a contract with the Department of Health and Human Services. Since 2016, HRSA has funded cooperative agreements with the American College of Obstetricians and Gynecologists for the Women's Preventive Services Initiative (WPSI) to convene a coalition representing clinicians, academics, and consumer-focused health professional organizations to conduct a rigorous review of current scientific evidence, solicit and consider public input, and make recommendations to HRSA regarding updates to the Guidelines to improve adult women's health across the lifespan. HRSA then determines whether to support, in whole or in part, the recommended updates to the Guidelines.

WPSI includes an Advisory Panel and two expert committees, the Multidisciplinary Steering Committee and the Dissemination and Implementation Steering Committee, which are comprised of a broad coalition of organizational representatives who are experts in disease prevention and women's health issues. With oversight by the Advisory Panel, and with input from the Multidisciplinary Steering Committee, WPSI examines the evidence to develop new (and update existing) recommendations for women's preventive services. WPSI's Dissemination and Implementation Steering Committee takes HRSA-approved recommendations and disseminates them through the development of implementation tools and resources for both patients and practitioners.

WPSI bases its recommended updates to the Guidelines on review and synthesis of existing clinical guidelines and new scientific evidence, following the National Academy of Medicine standards for establishing foundations for and rating strengths of recommendations, articulation of recommendations, and external reviews. Additionally, HRSA requires that WPSI incorporate processes to assure opportunity for public comment, including participation by patients and consumers, in the development of the updated Guidelines.

WPSI proposed and HRSA has accepted recommended updates to the Guideline relating to Screening for Urinary Incontinence, which now reads, ''The Women's Preventive Services Initiative recommends screening women for urinary incontinence annually. Screening should assess whether women experience urinary incontinence and whether it impacts their activities and quality of life. If indicated, facilitating further evaluation and treatment is recommended.''

Discussion of Recommended Updated Guideline Relating to Screening for Urinary Incontinence: WPSI recommended minor updates to the previous Guideline language. The first change is removal of the word ''ideally'' from the second sentence, for clarity. Removal of the word ''ideally'' does not substantively change the Guideline. The second change is in the final sentence, changing the word ''referring'' to ''facilitating'' to reflect that clinicians in practice, after screening for urinary incontinence, may decide to treat or manage urinary incontinence as part of standard primary care services or refer to specialists if specialist care is needed. The change in language from ''referring'' to ''facilitating'' does not substantively change the Guideline. Lastly, WPSI recommended minor editorial revisions to the language of the Guideline, for clarity. These minor editorial revisions have no substantive effect on the Guideline.

A **Federal Register** notice published on September 29, 2023, sought public comment on these proposed updates (88 FR 67318).[1] WPSI considered all public comments as part of its deliberative

[1] *See https://www.federalregister.gov/documents/2023/09/29/2023-21514/notice-of-request-for-public-comments-on-a-draft-recommendation-to-update-the-hrsa-supported-womens.*

process and provided the comments to HRSA for its consideration. Two respondents provided comments during the public comment period. One commenter suggested improving reimbursement by including billing codes for screening and counseling. This comment falls outside the scope of the Guidelines. The other commenter suggested adding the word ''co-morbidities'' to a WPSI list of potential research topics. This comment was not accepted as it does not address the recommendation itself, but rather supporting materials.

After consideration of public comment, WPSI submitted the recommended updates for Screening for Urinary Incontinence as detailed above. On December 28, 2023, the HRSA Administrator accepted WPSI's recommendations and, as such, updated the Women's Preventive Services Guidelines. Non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage must cover without cost-sharing the services and screenings listed on the updated Women's Preventive Services Guidelines for plan years (in the individual market, policy years) that begin 1 year after this date. Thus, for most plans, this update will take effect for purposes of the Section 2713 coverage requirement in 2025. Additional information regarding the Women's Preventive Services Guidelines can be accessed at the following link: *https://www.hrsa.gov/womens-guidelines.*

Authority: Section 2713(a)(4) of the Public Health Service Act, 42 U.S.C. 300gg–13(a)(4).

Carole Johnson,

Administrator.

[FR Doc. 2023–28970 Filed 1–3–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Vaccine Injury Compensation Program; List of Petitions Received

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the Program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

FOR FURTHER INFORMATION CONTACT: For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Clerk of Court, United States Court of Federal Claims, 717 Madison Place NW, Washington, DC 20005, (202) 357–6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08W–25A, Rockville, Maryland 20857; 1–800–338–2382, or visit our website at: *http://www.hrsa.gov/vaccinecompensation/index.html.*

SUPPLEMENTARY INFORMATION: The Program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of title XXI of the PHS Act, 42 U.S.C. 300aa–10 *et seq.,* provides that those seeking compensation are to file a petition with the United States Court of Federal Claims and to serve a copy of the petition to the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the table) set forth at 42 CFR 100.3. This table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the table and for conditions that are manifested outside the time periods specified in the table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa–12(b)(2), requires that ''[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the **Federal Register**.'' Set forth below is a list of petitions received by HRSA on November 1, 2023, through November 30, 2023. This list provides the name of the petitioner, city, and state of vaccination (if unknown then the city and state of the person or attorney filing the claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master ''shall afford all interested persons an opportunity to submit relevant, written information'' relating to the following:

1. The existence of evidence ''that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition,'' and

2. Any allegation in a petition that the petitioner either:

a. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by'' one of the vaccines referred to in the table, or

b. ''[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine'' referred to in the table.

In accordance with section 2112(b)(2), all interested persons may submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the United States Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Health Systems Bureau, 5600 Fishers Lane, 08W–25A, Rockville, Maryland 20857. The Court's caption (*Petitioner's Name* v. *Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply

to information required for purposes of carrying out the Program.

Carole Johnson,

Administrator.

List of Petitions Filed

1. Liza McAtee-Paxton, Lemon Grove, California, Court of Federal Claims No: 23–1898V
2. William Bryan, Louisville, Mississippi, Court of Federal Claims No: 23–1929V
3. Denise McClintock, Waynesboro, Pennsylvania, Court of Federal Claims No: 23–1935V
4. Laura Promer, Birmingham, Alabama, Court of Federal Claims No: 23–1938V
5. Sheri Lynn Lewis, San Bernardino, California, Court of Federal Claims No: 23–1939V
6. Michael Cummings, Saint Petersburg, Florida, Court of Federal Claims No: 23–1940V
7. Hannah Howerton, Boston, Massachusetts, Court of Federal Claims No: 23–1941V
8. Christina Frankos on behalf of M.F., Tampa, Florida, Court of Federal Claims No: 23–1946V
9. Patricia Primrose, Augusta, Georgia, Court of Federal Claims No: 23–1949V
10. Cheryl Lynn Jones, Fremont, Ohio, Court of Federal Claims No: 23–1950V
11. William Wickham, Windham, Maine, Court of Federal Claims No: 23–1951V
12. Morgan McCoy, Mequon, Wisconsin, Court of Federal Claims No: 23–1954V
13. Jesusa Sanchez, Rockaway Park, New York, Court of Federal Claims No: 23–1955V
14. Jackie Jackson, Dresher, Pennsylvania, Court of Federal Claims No: 23–1956V
15. Janice Paquette, Farmingdale, New York, Court of Federal Claims No: 23–1957V
16. Clyde Smith, Spring Valley, New York, Court of Federal Claims No: 23–1958V
17. Joel Cohn, Coral Springs, Florida, Court of Federal Claims No: 23–1959V
18. Amy Poulos, Pinehurst, North Carolina, Court of Federal Claims No: 23–1960V
19. Timothy P. Cope, Pittsburgh, Pennsylvania, Court of Federal Claims No: 23–1961V
20. John M. Decker, Ashburn, Virginia, Court of Federal Claims No: 23–1962V
21. Larry Yawn, Canal Winchester, Ohio, Court of Federal Claims No: 23–1964V
22. Scott Beinlich, Ephrata, Pennsylvania, Court of Federal Claims No: 23–1968V
23. Patrick Brown, Wauwatosa, Wisconsin, Court of Federal Claims No: 23–1970V
24. Mickie Lowe, Boston, Massachusetts, Court of Federal Claims No: 23–1973V
25. Margaret Williams, Harvey, Louisiana, Court of Federal Claims No: 23–1974V
26. Erin Materkowski, Wood River, Illinois, Court of Federal Claims No: 23–1976V
27. Michael Montagnino, Clermont, Florida, Court of Federal Claims No: 23–1977V
28. Abigail Lever, Barre, Vermont, Court of Federal Claims No: 23–1978V
29. Christopher Fox, Peru, Illinois, Court of Federal Claims No: 23–1979V
30. Ana Roma Santos, Concord/Walnut Creek, California, Court of Federal Claims No: 23–1980V
31. Bridget Hart on behalf of B. H., Jackson, Tennessee, Court of Federal Claims No: 23–1981V
32. Timothy Severson, Woodruff, Wisconsin, Court of Federal Claims No: 23–1982V
33. Christina Lane, Dale City, Virginia, Court of Federal Claims No: 23–1988V
34. Tierra Cole, Petersburg, Virginia, Court of Federal Claims No: 23–1990V
35. Kristi Norcross, Boston, Massachusetts, Court of Federal Claims No: 23–1991V
36. Melissa Brady, Dresher, Pennsylvania, Court of Federal Claims No: 23–1992V
37. Mattie Stearns, Carpentersville, Illinois, Court of Federal Claims No: 23–1995V
38. Maureen Cummings, Sarasota, Florida, Court of Federal Claims No: 23–2003V
39. Carmen Scalesci, Staten Island, New York, Court of Federal Claims No: 23–2004V
40. Chrissy Hudson, Blacklick, Ohio, Court of Federal Claims No: 23–2005V
41. Doug Meece, Walton, Kentucky, Court of Federal Claims No: 23–2006V
42. Jennifer B. Bolognesi, Durham, North Carolina, Court of Federal Claims No: 23–2007V
43. Mary Curry, Glasgow, Kentucky, Court of Federal Claims No: 23–2008V
44. Linda M. Moyd-Hills, Beaufort, South Carolina, Court of Federal Claims No: 23–2009V
45. Valerie Snaman Stout, District Heights, Maryland, Court of Federal Claims No: 23–2010V
46. Tyler McCormick, Cape May, New Jersey, Court of Federal Claims No: 23–2011V
47. Ricky Carter, San Antonio, Texas, Court of Federal Claims No: 23–2012V
48. Jacky Kwong, Atlanta, Georgia, Court of Federal Claims No: 23–2013V
49. Charles Eller, Warrenton, Missouri, Court of Federal Claims No: 23–2014V
50. Shannon Callahan on behalf of R.K., Phoenix, Arizona, Court of Federal Claims No: 23–2015V
51. Clarence Peacock, Griffith, Indiana, Court of Federal Claims No: 23–2016V
52. Paul Hinsch, Waterford, Connecticut, Court of Federal Claims No: 23–2017V
53. Gail Sears, Niagara Falls, New York, Court of Federal Claims No: 23–2018V
54. Chris Strickland and Kirsten Strickland on behalf of E.S., Phoenix, Arizona, Court of Federal Claims No: 23–2019V
55. Nancy St. Clair-Lytle, Hinckley, Minnesota, Court of Federal Claims No: 23–2020V
56. Eva Trivino-Acuna, Sugar Land, Texas, Court of Federal Claims No: 23–2022V
57. Candice Matthews, Jeffersonville, Indiana, Court of Federal Claims No: 23–2023V
58. Delby Pool, Sarasota, Florida, Court of Federal Claims No: 23–2024V
59. Lynne Congdon, Swiftwater, Pennsylvania, Court of Federal Claims No: 23–2025V
60. Linda J. Smith, Red Wing, Minnesota, Court of Federal Claims No: 23–2029V
61. Jerome Fredericks, Bishop, California, Court of Federal Claims No: 23–2030V
62. Ashley Barber, Boston, Massachusetts, Court of Federal Claims No: 23–2031V
63. Alyson Fincke, East Islip, New York, Court of Federal Claims No: 23–2033V
64. Beth A. George, Charleston, West Virginia, Court of Federal Claims No: 23–2034V
65. Erica Ayers on behalf of G.A., Granger, Indiana, Court of Federal Claims No: 23–2037V
66. Sarah Schwob, Silver Spring, Maryland, Court of Federal Claims No: 23–2038V
67. Christina Valentine, Minneapolis, Minnesota, Court of Federal Claims No: 23–2041V
68. Lindell Ellis, Morganville, New Jersey, Court of Federal Claims No: 23–2043V
69. Timothy Holt, Columbia, Tennessee, Court of Federal Claims No: 23–2044V
70. Lorraine Frierson on behalf of Terry Frierson, Deceased, East Greenbush, Nebraska, Court of Federal Claims No: 23–2046V
71. Lisa Starita, Long Beach, Mississippi, Court of Federal Claims No: 23–2048V
72. Carroll Simmons, Boston, Massachusetts, Court of Federal Claims No: 23–2049V
73. Donna Fogelstrom, Fort Smith, Arkansas, Court of Federal Claims No: 23–2050V
74. Patricia Cravotta, Queens, New York, Court of Federal Claims No: 23–2051V
75. Rebecca Aguilar, Bradenton, Florida, Court of Federal Claims No: 23–2052V
76. Rhonda Bruxvoort, Dresher, Pennsylvania, Court of Federal Claims No: 23–2053V
77. Abdikhaliq Abdi, Edina, Minnesota, Court of Federal Claims No: 23–2054V
78. Tracie Powers on behalf of N.S., Deceased, Columbia, South Carolina, Court of Federal Claims No: 23–2055V
79. Timothy S. Budzon and Kimberly Budzon on behalf of A.T.B., Huntsville, Alabama, Court of Federal Claims No: 23–2056V

[FR Doc. 2023–28971 Filed 1–3–24; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Behavioral and Social Research Networks.

Date: February 29, 2024.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carmen Moten, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7703, *cmoten@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28957 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Learning, Memory and Decision Neuroscience.

Date: January 17, 2024.

Time: 1:00 p.m. to 4:00 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: Roger Janz, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402–8515, *janzr2@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, 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: December 27, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28953 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; K76 Beeson Review.

Date: March 7, 2024.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Gianina Ramona Dumitrescu, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 4193–C, Bethesda, MD 20892, 301–827–0696, *dumitrescurg@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28959 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Health Equity and Cost AD/ADRD.

Date: March 5, 2024.

Time: 11:00 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carmen Moten, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7703, *cmoten@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28956 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; REDI R25 Review Panel.

Date: March 8, 2024.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan Tadeu Rebustini, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 100, Bethesda, MD 20892, (301) 555–1212, *ivan.rebustini@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28960 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; REDI Small Business Review Panel.

Date: March 15, 2024.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ivan Tadeu Rebustini, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 100, Bethesda, MD 20892, (301) 555–1212, *ivan.rebustini@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28954 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Behavioral and Social Research on Immigration and Aging.

Date: March 7–8, 2024.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carmen Moten, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7703, *cmoten@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28955 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Social and Behavioral Determinants of Health in AD/ADRD and Disparities.

Date: February 27, 2024.

Time: 10:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Carmen Moten, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7703, *cmoten@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 28, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28958 Filed 1–3–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0587]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number 1625–0018

AGENCY: Coast Guard, DHS.

ACTION: Thirty-Day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting an extension of its approval for the following collection of information: 1625–0018, Official Logbook; without change. Our ICR describes the information we seek to

collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: You may submit comments to the Coast Guard and OIRA on or before February 3, 2023.

ADDRESSES: Comments to the Coast Guard should be submitted using the Federal eRulemaking Portal at *https://www.regulations.gov.* Search for docket number [USCG–2023–0587]. Written comments and recommendations to OIRA for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

A copy of the ICR is available through the docket on the internet at *https://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–6P), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2703 MARTIN LUTHER KING JR. AVE. SE, STOP 7710, WASHINGTON, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: A.L. Craig, Office of Privacy Management, telephone 202–475–3528, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. 3501 *et seq.,* chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) the practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2023–0587], and must be received by January 22, 2024.

Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments to the Coast Guard will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions to the Coast Guard in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). For more about privacy and submissions to OIRA in response to this document, see the *https://www.reginfo.gov,* comment-submission web page. OIRA posts its decisions on ICRs online at *https://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0018.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (88 FR 65186, September 21, 2023) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments. Accordingly, no changes have been made to the Collection.

Information Collection Request

Title: Official Logbook.

OMB Control Number: 1625–0018.

Summary: The Official Logbook contains information about the voyage, the vessel's crew, drills, watches, and operations conducted during the voyage. Official Logbook entries identify particulars of the voyage, including the name of the ship, official number, port of registry, tonnage, names and merchant mariner credential numbers of the master and crew, the nature of the voyage, and class of ship. In addition, it also contains entries for the vessel's drafts, maintenance of watertight integrity of the ship, drills and inspections, crew list and report of character, a summary of laws applicable to Official Logbooks, and miscellaneous entries.

Need: 46 U.S.C. 11301, 11302, 11303, and 11304 require applicable merchant vessels to maintain an Official Logbook. The Official Logbook contains information about the vessel, voyage, crew, and watch. Lack of these particulars would make it difficult for a seaman to verify vessel employment and wages, and for the Coast Guard to verify compliance with laws and regulations concerning vessel operations and safety procedures. The Official Logbook serves as an official record of recordable events transpiring at sea such as births, deaths, marriages, disciplinary actions, etc. Absent the Official Logbook, there would be no official civil record of these events. The courts accept log entries as proof that the logged event occurred. If this information was not collected, the Coast Guard's commercial vessel safety program would be negatively impacted, as there would be no official record of U.S. merchant vessel voyages. Similarly, those seeking to prove that an event required to be logged occurred would not have an official record available.

Forms: CG–706B, Official Logbook.

Respondents: Shipping companies.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden remains at 1,750 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. *et seq.,* chapter 35, as amended.

Dated: November 30, 2023.

Kathleen Claffie,

Chief, Office of Privacy Management, U.S. Coast Guard.

[FR Doc. 2023–28304 Filed 1–3–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AZ_FRN_MO4500175817]

Notice of Temporary Closure of Selected Public Lands in Pinal County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of temporary closure.

SUMMARY: Notice is hereby given that a closure to all public use and entry is in effect on certain public lands administered by the Lower Sonoran Field Office, to provide for public health and safety during the construction of the Goldfield Recreation Area.

DATES: The temporary closure will be in effect for 2 years from 12:01 a.m., February 5, 2024, or until the completion of construction, whichever is sooner.

ADDRESSES: The BLM will post closure signs at main entry points to this area. This closure order will be posted in the Lower Sonoran Field Office. Maps of the affected area and other documents associated with this closure are available at the Lower Sonoran Field Office, 2020 E Bell Road, Phoenix, AZ 85022, and online at *https://eplanning.blm.gov/eplanning-ui/project/2023216/510.*

FOR FURTHER INFORMATION CONTACT: Tyler Lindsey, Lower Sonoran Field Office Manager, telephone: (623) 580–5500, email: *tlindsey@blm.gov;* or Raul Menchaca, District Chief Ranger, telephone: (623) 580–5500, email: *rmenchaca@blm.gov;* 2020 E Bell Rd., Phoenix, AZ 85022. 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: This closure affects public lands in the Goldfield Recreation Area, northeast of Apache Junction in Pinal County, Arizona. The legal description of the affected public lands is:

Goldfield Recreation Area

Gila & Salt River Meridian, Arizona

T. 1 N., R. 8 E.,
Sec. 1, lots 30 thru 34, and lots 36, 39, and 40, and cancelled M.S. No. 1130, and portions of cancelled M.S. No. 3886;
Sec. 2, All, excepting Patent No. 02–99–0008;
Sec. 3, lot 216 and cancelled M.S. No. 4598;
Sec. 10, N½N¼,
Sec. 11, W½NW¼, that portion lying northerly of State Route 88.

The area described contains 1,091.97 acres, more or less.

The closure is necessary to protect public health and address safety risks while constructing Goldfield Recreation Area facilities and infrastructure. The construction of the Goldfield Recreation Area is in conformance with the Apache Junction Goldfield Recreation Area Final Environmental Assessment (DOI–BLM–AZ–P020–2023–0002–EA; *https://eplanning.blm.gov/eplanning-ui/project/2023216/510*) and Decision Record. Under the authority of section 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1733(a)), 43 CFR 8360.0–7, and 43 CFR 8364.1, the BLM will enforce the following closure within the Goldfield Recreation Area.

Closure: The Goldfield Recreation Area is temporarily closed to all public use and entry.

Exemptions: The temporary closures do not apply to Federal, State, and local officers and employees in the performance of their official duties; members of organized rescue or firefighting forces in the performance of their official duties; and persons with written authorization from the BLM.

Enforcement: Any person who violates the temporary closures may be tried before a United States magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Arizona law.

Effect of Closure: The entire area encompassed by the legal description as described in this notice and in the time period as described in this notice are temporarily closed to all public use, including pedestrians and vehicles, unless specifically excepted as described above.

(Authority: 43 CFR 8364.1)

Tyler Lindsey,

Lower Sonoran Field Manager.

[FR Doc. 2023–29001 Filed 1–3–24; 8:45 am]

BILLING CODE 4331–12–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–253 and 731–TA–132, 252, 271, 273, 532–534, and 536 (Fifth Review)]

Circular Welded Pipe and Tube From Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing duty order on circular welded pipe and tube from Turkey and the antidumping duty orders on circular welded pipe and tube from India, Mexico, South Korea, Taiwan, Thailand, and Turkey would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission further determines that revocation of the antidumping duty order on circular welded pipe and tube from Brazil would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

Background

The Commission instituted these reviews on January 3, 2023 (88 FR 107) and determined on April 10, 2023 that it would conduct full reviews (88 FR 23687, April 18, 2023). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 16, 2023 (88 FR 39475).

Since one interested party requested cancellation of the hearing in the event that no other interested party requested to appear and no other parties submitted a request to appear at the hearing, the public hearing in connection with the reviews, originally scheduled for

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioner Rhonda K. Schmidtlein determines that revocation of the countervailing duty order on circular welded pipe and tube from Turkey and the antidumping duty orders on circular welded pipe and tube from Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

October 26, 2023, was cancelled (88 FR 73378, October 25, 2023).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 28, 2023. The views of the Commission are contained in USITC Publication 5481 (December 2023), entitled *Circular Welded Pipe and Tube from Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey: Investigation Nos. 701–TA–253 and 731–TA–132, 252, 271, 273, 532–534, and 536 (Fifth Review).*

By order of the Commission.

Issued: December 28, 2023.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2023–28961 Filed 1–3–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0112]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Reciprocity Questionnaire

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on October 26, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until February 5, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Gwen Cates, PSD, by email at *Gwen.Cates@atf.gov* or telephone at 202–648–9434.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0112. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *Title of the Form/Collection:* Reciprocity Questionnaire.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 8620.59.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Individuals or households.

Abstract: The Reciprocity Questionnaire (ATF F 8620.59) is used to determine if a candidate for federal or contractor employment at ATF has a previously completed background investigation and/or a polygraph examination from another federal agency, and whether the candidate is currently the subject of any investigation being conducted by the candidate's current employer. Information Collection (IC) OMB 1140–0112 is being revised due to material changes to the form, such as chart consolidation, new questions added, question removal and renumbering, updated instructions to include information relating to current investigations being conducted on the applicant/candidate by their current employer, and amendment of the Paper Reduction Act to correspond with updated instructions.

5. *Obligation to Respond:* The obligation to respond is voluntary.

6. *Total Estimated Number of Respondents:* 2,000 respondents.

7. *Estimated Time per Respondent:* 10 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 333 hours.

10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: December 29, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–28974 Filed 1–3–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0096]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Environmental Information

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice (DOJ), will be submitting the following information

collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on October 26, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until February 5, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Shawn Stevens, ATF-FELC by email at *FELC@atf.gov* or by telephone at 304–616–4400.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0096. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.

2. *Title of the Form/Collection:* Environmental Information.

3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 5000.29. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Private Sector—businesses for or not for profit institutions.

Abstract: The National Environmental Policy Act, 42 U.S.C. chapter 55, authorizes the execution of ATF Form 5000.29, during the application process, to ensure compliance.

5. *Obligation to Respond:* The obligation to respond is voluntary.

6. *Total Estimated Number of Respondents:* 680 respondents.

7. *Estimated Time per Respondent:* 30 minutes.

8. *Frequency:* Once annually.

9. *Total Estimated Annual Time Burden:* 340 hours.

10. *Total Estimated Annual Other Costs Burden:* The estimated annual cost associated is $448.80 (680 respondents × $0.66 postal rate) to mail the form as part application.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: December 29, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–28972 Filed 1–3–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0109]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Informant Agreement

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on October 26, 2023, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until February 5, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, contact: Renee Reid, Office of Field Operations, Special Operations Division: *Renee.Reid@atf.gov,* 202–280–9334.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1140–0109. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a previously approved collection.
2. *Title of the Form/Collection:* Information Agreement.
3. *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* ATF Form 3252.2. *Component:* ATF, U.S. DOJ.
4. *Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public:* Individuals or households. ATF will use the information to verify the identity of the individual (personal identifiable information). Respondents include members of the public who provide useful and credible information to ATF regarding felonious criminal activities, and from whom ATF expects or intends to obtain additional useful and credible information regarding such activities in the future.
5. *Obligation To Respond:* The obligation to respond is voluntary.
6. *Total Estimated Number of Respondents:* 2,000 respondents.
7. *Estimated Time per Respondent:* 6 minutes.
8. *Frequency:* Once annually.
9. *Total Estimated Annual Time Burden:* 200 hours.
10. *Total Estimated Annual Other Costs Burden:* $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC 20530.

Dated: December 29, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–28973 Filed 1–3–24; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On December 29, 2023, the United States lodged a proposed modified consent decree with the United States District Court for the District of New Hampshire for public notice and comment, in a lawsuit entitled *United States* v. *State of New Hampshire and New Hampshire Fish and Game Department,* Civil Action No. 1:18–cv–00996–PB.

The United States filed a complaint in this action under sections 301(a), 309(b), and 504 of the Clean Water Act (''CWA''), 33 U.S.C. 1311(a), 1319(b), 1364, against the State of New Hampshire and the New Hampshire Fish and Game Department (''NHF&G''), in connection with discharges of pollutants from the Powder Mill State Fish Hatchery, in New Durham, New Hampshire (the ''Hatchery''). The Hatchery is owned by the State and operated by NHF&G. The Complaint asserts two claims for injunctive relief. The first claim alleges that the State and NHF&G violated a National Pollutant Discharge Elimination System permit (Permit No. NH0000710; the ''Permit''), issued by EPA under section 402 of the CWA, 33 U.S.C. 1342, by exceeding its narrative and numeric discharge limits for total phosphorus and pH, in violation of CWA section 309(b), 33 U.S.C. 1319(b). The second claim alleges that such discharges have caused or contributed to contamination, eutrophication, and the growth of toxic cyanobacteria in the Merrymeeting River and its impoundments, known as Marsh, Jones, and Downing Ponds, which poses an imminent and substantial endangerment to human health and welfare, in violation of CWA section 504, 33 U.S.C. 1364. The United States filed its complaint as Plaintiff-Intervenor in an action initiated by CLF against Defendants NHF&G, the Executive Director of NHF&G, and Commissioners of the New Hampshire Fish and Game Commission. CLF's complaint asserts claims similar to those of the United States, under the citizen-suit provision of the CWA, 33 U.S.C. 1365(a).

The original consent decree resolved the claims in CLF's and the United States' complaints. The modified Decree retains most of the original decree's provisions, including the requirement that NHF&G achieve compliance with the CWA and its Permit by the end of 2025, but allows NHF&G to do so through means other than those required by the original decree, based on a study showing that such other means could be more technically feasible and cost effective. All parties to the original decree have signed the modified Decree.

Publication of this notice opens a period for public comment on the proposed modified Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *State of New Hampshire and New Hampshire Fish and Game Department,* D.J. Ref. No. 90–5–1–1–12466. All comments must be submitted no later than 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, DC 20044–7611.

During the public comment period, the Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* Paper copies of the consent decree are available upon written request and payment of reproduction costs. Such requests and payments should be addressed to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

With each such request, please enclose a check or money order for $12.50 (25 cents per page reproduction cost) per paper copy, payable to the United States Treasury.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–29000 Filed 1–3–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of the Worker's Compensation Programs

[OMB Control No. 1240–0008]

Proposed Revision of Information Collection; Rehabilitation Action Report (OWCP–44)

AGENCY: Division of Federal Employees' Longshore and Harbor Workers' Compensation, (OWCP/DFELHWC), Office of Workers' Compensation, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance request for comment to provide the general public and Federal agencies with an opportunity to comment on proposed collections of information in accordance with the Paperwork Reduction Act of 1995. This request helps to ensure that: requested data can be provided in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the impact of collection requirements on respondents can be properly assessed. Currently, the OWCP/DFELHWC is soliciting comments on the information collection for the Rehabilitation Action Report, OWCP–44.

DATES: All comments must be received on or before March 4, 2024.

ADDRESSES: You may submit comment as follows. Please note that late, untimely filed comments will not be considered.

Electronic Submissions: Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for [OWCP/DFELHWC–1240–0008]. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket, with no changes. Because your comment will be made public, you are 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 your or anyone else's Social Security number or confidential business information.
- If your comment includes confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission.

Written/Paper Submissions: Submit written/paper submissions in the following way:

- *Mail/Hand Delivery:* Mail or visit DOL–OWCP/DFELHWC, Office of Workers' Compensation Programs, Division of Federal Employees' Longshore and Harbor Workers' Compensation, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3323, Washington, DC 20210.
- OWCP/DFELHWC will post your comment as well as any attachments, except for information submitted and marked as confidential, in the docket at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anjanette Suggs, Office of Workers' Compensation Programs, Division of Federal Employees Longshore, and Harbor Workers' Compensation, OWCP/DFELHWC, at *suggs.anjanette@dol.gov* (email); (202) 354–9660 (voice).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA) and the Longshore and Harbor Workers' Compensation Act (LHWCA). These acts provide vocational rehabilitation services to eligible workers with disabilities. Section 8104(a) of the FECA and section 939(c) of the LHWCA provide that eligible injured workers are to be furnished vocational rehabilitation services, and section 8111(b) of the FECA and section 908(g) of the LHWCA provide that persons undergoing such vocational rehabilitation receive maintenance allowances as additional compensation. Form OWCP–44 is used to provide prompt notification of key events in the vocational rehabilitation process that may require OWCP action related to claims and benefits. This information may be used to decide if maintenance allowances should continue to be paid.

II. Desired Focus of Comments

OWCP is soliciting comments concerning the proposed information collection (ICR) related to the Rehabilitation Action Report, OWCP–44. OWCP/DFELHWC is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information has practical utility;
- Evaluate the accuracy of OWCP/DFELHWC's estimate of the burden related to the information collection, including the validity of the methodology and assumptions used in the estimate;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the information collection 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.

Background documents related to this information collection request are available at *https://regulations.gov* and at DOL–OWCP/DFELHWC located at located at 200 Constitution Avenue NW, Room S–3323, Washington, DC 20210. Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION** section of this notice.

III. Current Actions

This information collection request concerns the Rehabilitation Action Report, OWCP–44. OWCP/DFELHWC has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting this information collection request from the previous information collection request.

Type of Review: Revision of a currently approved collection.

Agency: Office of Workers' Compensation Programs, Division of Federal Employees' Longshore, and Harbor Workers' Compensation, OWCP/DFELHWC.

OMB Number: 1240–0008.

Affected Public: Not-for-profit institutions, Businesses or other for-profits.

Number of Respondents: 6,136.

Frequency: On Occasion.

Number of Responses: 6,136.

Annual Burden Hours: 0.17 hours.

Annual Respondent or Recordkeeper Cost: $0.

OWCP Form OWCP–44, Rehabilitation Action Report.

Comments submitted in response to this notice will be summarized in the request for Office of Management and Budget approval of the proposed information collection request; they will become a matter of public record and will be available at *https://www.reginfo.gov.*

Anjanette Suggs,

Certifying Officer.

[FR Doc. 2023–28967 Filed 1–3–24; 8:45 am]

BILLING CODE 4510–CH–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–255; NRC–2023–0198]

Holtec Decommissioning International, LLC, and Holtec Palisades, LLC; Palisades Nuclear Plant; Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued an exemption in response to a request from Holtec Decommissioning International, LLC (HDI), an indirect wholly owned subsidiary of Holtec International, that would allow HDI and Holtec Palisades, LLC, to reduce the required level of primary offsite liability insurance from $450 million to $100 million and to eliminate the requirement to carry secondary financial protection for the Palisades Nuclear Plant.

DATES: The exemption was issued on December 22, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0198 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0198. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tanya E. Hood, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1387, email: *Tanya.Hood@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: December 28, 2023.

For the Nuclear Regulatory Commission.

Tanya E. Hood,

Project Manager, Reactor Decommissioning Branch, Division of Decommissioning, Uranium Recovery and Waste Programs, Office of Nuclear Material Safety and Safeguards.

Attachment—Exemption

Nuclear Regulatory Commission

Docket No. 50–255

Holtec Decommissioning International, LLC, and Holtec Palisades, LLC; Palisades Nuclear Plant Exemption

I. Background

By letter dated October 19, 2017 (Agencywide Documents Access and Management System Accession No. ML17292A032), Entergy Nuclear Operations, Inc. (ENOI) certified to the U.S. Nuclear Regulatory Commission (NRC, or Commission) that it planned to permanently cease power operations at the Palisades Nuclear Plant (Palisades) no later than May 31, 2022. On May 20, 2022, ENOI permanently ceased power operations at Palisades, and by letter dated June 13, 2022 (ML22164A067), ENOI certified to the NRC that the fuel was permanently removed from the Palisades reactor vessel and placed in the spent fuel pool (SFP) on June 10, 2022. Accordingly, pursuant to paragraphs 50.82(a)(2) of title 10 of the *Code of Federal Regulations* (10 CFR), the 10 CFR part 50 renewed facility operating license for Palisades no longer authorizes operation of the reactor or emplacement or retention of fuel in the reactor vessel. The facility is still authorized to possess, and store irradiated (*i.e.,* spent) nuclear fuel. Palisades spent fuel is currently stored in the SFP and in dry cask storage at the independent spent fuel storage installation (ISFSI).

II. Request/Action

By letter dated October 26, 2022 (ML22299A059), Holtec Decommissioning International, LLC (HDI), one of the licensees of Palisades and an indirect wholly owned subsidiary of Holtec International (Holtec), requested an exemption on behalf of Holtec Palisades, LLC, the other Palisades licensee, from 10 CFR 140.11(a)(4) concerning offsite primary and secondary liability insurance. HDI and Holtec Palisades, LLC, are hereafter collectively referred to as the licensee. The exemption from 10 CFR 140.11(a)(4) would permit the licensee to reduce the required level of primary offsite liability insurance from $450 million to $100 million and to eliminate the requirement to carry secondary financial protection for Palisades.

The regulation at 10 CFR 140.11(a)(4) requires licensees to have and maintain primary financial protection in an amount of $450 million. In addition, licensees are required to participate in an industry retrospective rating plan (secondary financial protection) that commits licensees to pay into an insurance pool to be used for damages that may exceed primary insurance coverage. Participation in the industry retrospective rating plan will subject the licensee to deferred premium charges up to a maximum total deferred premium of $131,056,000 with respect to any nuclear incident at any operating nuclear power plant and up to a maximum annual deferred premium of $20,496,000 per incident.

Many of the accident scenarios postulated in the updated safety analysis reports for operating power reactors involve failures or malfunctions of systems, which could affect the fuel in the reactor core and, in the most severe postulated accidents, would involve the release of large quantities of fission products. With the permanent cessation of power operations at Palisades and the permanent removal of the fuel from the reactor vessel, many accidents are no longer possible. Similarly, the associated risk of offsite liability damages that would require insurance or indemnification is commensurately lower for permanently shutdown and defueled plants. Therefore, the licensee requested an exemption from 10 CFR 140.11(a)(4) to permit a reduction in primary offsite liability insurance and to withdraw from participation in the industry retrospective rating plan.

III. Discussion

Pursuant to 10 CFR 140.8, ''Specific exemptions,'' the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in 10 CFR part 140 when the exemptions are authorized by law and are otherwise in the public interest. The NRC staff has reviewed the

licensee's request for an exemption from 10 CFR 140.11(a)(4) and has concluded that the requested exemption is authorized by law and is otherwise in the public interest.

The Price Anderson Act of 1957 (PAA) requires that nuclear power reactor licensees have insurance to compensate the public for damages arising from a nuclear incident. Specifically, the PAA requires licensees of facilities with a ''rated capacity of 100,000 electrical kilowatts or more'' to maintain the maximum amount of primary offsite liability insurance commercially available (currently $450 million) and a specified amount of secondary insurance coverage (currently up to $131,056,000 per reactor). In the event of an accident causing offsite damages in excess of $450 million, each licensee would be assessed a prorated share of the excess damages, up to $131,056,000 per reactor, for a total of approximately $13 billion per nuclear incident. The NRC's regulations at 10 CFR 140.11(a)(4) implement these PAA insurance requirements and set forth the amount of primary and secondary insurance each power reactor licensee must have.

As noted above, the PAA requirements with respect to primary and secondary insurance and the implementing regulations at 10 CFR 140.11(a)(4) apply to licensees of facilities with a ''rated capacity of 100,000 electrical kilowatts or more.'' In accordance with 10 CFR 50.82(a)(2), the license for a power reactor no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel upon the docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel. Therefore, the reactor cannot be used to generate power.

Accordingly, a reactor that is undergoing decommissioning has no ''rated capacity.'' Therefore, the NRC may take the reactor licensee out of the category of reactor licensees that are required to maintain the maximum available insurance and to participate in the secondary retrospective insurance pool.

The financial protection limits of 10 CFR 140.11(a)(4) were established to require licensees to maintain sufficient insurance, as specified under the PAA, to satisfy liability claims by members of the public for personal injury, property damage, and the legal cost associated with lawsuits as the result of a nuclear accident at an operating reactor with a rated capacity of 100,000 kilowatts electric or greater. Therefore, the insurance levels established by this regulation, as required by the PAA, were associated with the risks and potential consequences of an accident at an operating reactor with a rated capacity of 100,000 kilowatts electric or greater.

The legal and associated technical basis for granting exemptions from 10 CFR part 140 is set forth in SECY–93–127, ''Financial Protection Required of Licensees of Large Nuclear Power Plants During Decommissioning,'' dated May 10, 1993 (ML12257A628). The legal analysis underlying SECY–93–127 concluded that, upon a technical finding that lesser potential hazards exist after permanent cessation of power operations (and the reactor having no ''rated capacity''), the Commission has the discretion under the PAA to reduce the amount of insurance required of a licensee undergoing decommissioning.

As a technical matter, the fact that a reactor has permanently ceased power operations is not itself determinative as to whether a licensee may cease providing the offsite liability coverage required by the PAA and 10 CFR 140.11(a)(4). In light of the presence of freshly discharged irradiated fuel in the SFP at a recently shutdown reactor, the potential for an offsite radiological release from a zirconium fire with consequences comparable in some respects to an operating reactor accident remains. That risk is very low at the time of reactor shutdown because of design provisions that prevent a significant reduction in coolant inventory in the SFP under normal and accident conditions and becomes no longer credible once the continual reduction in decay heat provides ample time to restore coolant inventory and permits air cooling in a drained SFP.

After that time, the probability of a large offsite radiological release from a zirconium fire is negligible for permanently shutdown reactors, but the SFP is still operational and an inventory of radioactive materials still exists onsite. Therefore, an evaluation of the potential for offsite damage is necessary to determine the appropriate level of offsite insurance post shutdown in accordance with the Commission's discretionary authority under the PAA to establish an appropriate level of required financial protection for such permanently shutdown facilities.

The NRC staff has conducted an evaluation and concluded that, aside from the handling, storage, and transportation of spent fuel and radioactive materials for a permanently shutdown and defueled reactor, no reasonably conceivable potential accident exists that could cause significant offsite damage. During normal power reactor operations, the forced flow of water through the reactor coolant system (RCS) removes heat generated by the reactor. The RCS transfers this heat away from the reactor core by converting reactor feedwater to steam which then flows to the main turbine generator to produce electricity. Most of the accident scenarios postulated for operating power reactors involve failures or malfunctions of systems that could affect the fuel in the reactor core, which in the most severe postulated accidents, would involve the release of large quantities of fission products. With the permanent cessation of reactor operations at Palisades and the permanent removal of the fuel from the reactor core, such accidents are no longer possible. The reactor, RCS, and supporting systems no longer operate and have no function related to the storage of the irradiated fuel. Therefore, postulated accidents involving failure or malfunction of the reactor, RCS, or supporting systems are no longer applicable.

During reactor decommissioning, the principal radiological risks are associated with the storage of spent fuel onsite. On a case-by-case basis, licensees undergoing decommissioning have been granted permission to reduce the required amount of primary offsite liability insurance coverage from $450 million to $100 million and to withdraw from the secondary insurance pool. One of the technical criteria for granting the exemption is that the possibility of a design-basis event that could cause significant offsite damage has been significantly reduced.

The NRC staff performed an evaluation of the design-basis accidents (DBAs) for Palisades being permanently defueled as part of SECY–23–0043, ''Request by Holtec Decommissioning International, LLC for Exemptions from Certain Emergency Planning Requirements for Palisades Nuclear Plant,'' dated May 15, 2023 (ML23054A179). The licensee has stated, and the NRC staff agrees, that while spent fuel remains in the SFP, the only postulated DBAs that would remain applicable to Palisades in the permanently defueled condition that could contribute a significant dose is a fuel handling accident (FHA) in the Fuel Handling Building, where the SFP is located; a liquid waste incident; a waste gas incident and a postulated cask drop accident. For completeness, the NRC staff also evaluated the applicability of other DBAs documented in the Palisades Updated Final Safety Analysis Report (UFSAR) (ML21125A344) to ensure that these accidents would not have consequences that could potentially exceed the 10

CFR 50.67 dose limits and Regulatory Guide 1.183, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' dose acceptance criteria or approach the U.S. Environmental Protection Agency (EPA) early phase protective action guides (PAGs).

The NRC staff previously approved the revised DBA radiological consequence analyses in License Amendment No. 272, ''Palisades Nuclear Plant—Issuance of Amendment No. 272 Re: Permanently Defueled Technical Specifications (EPID L–2021–LLA–0099),'' dated May 13, 2022 (ML22039A198). As documented in the NRC's safety evaluation for License Amendment No. 272, the NRC staff determined that 17 days is the amount of time needed for decay to meet the EPA early phase PAG limit of 1 rem total effective dose equivalent (TEDE) at the exclusion area boundary (EAB). In using the same assumptions, except for decay time, the licensee's dose analysis for an FHA with 60 days of decay in the SFP results in a dose of 0.014 rem TEDE at the EAB. This result meets the 6.3 rem acceptance criteria of RG 1.183 at the EAB and low population zone. In addition, it also meets the EPA early phase PAG criterion of 1 rem TEDE and below 10 percent EPA PAG threshold for declaration of a site area emergency.

The licensee has determined that after a decay time of at least 60 days after shutdown, the FHA doses would decrease to a level that would not warrant protective actions under the EPA early phase PAG framework, notwithstanding meeting the dose limit requirements under 10 CFR 50.67 and dose acceptance criteria under Regulatory Guide 1.183. The NRC staff notes that the doses from an FHA are dominated by the isotope Iodine-131. Palisades permanently ceased power operations on May 20, 2022. After over a year of decay, the thyroid dose from an FHA would be negligible. The only isotope remaining in significant amounts, among those postulated to be released in a design-basis FHA, would be Krypton-85. Since Krypton-85 primarily decays by beta emission, the calculated skin dose from an FHA release would make an insignificant contribution to the total effective dose equivalent, which is the parameter of interest in the determination of the EPA early phase PAGs for sheltering or evacuation. Therefore, the NRC staff concludes that the dose consequences from an FHA for the permanently shutdown Palisades facility would not approach the EPA early phase PAG criterion.

The NRC staff reviewed the consequences of an FHA, liquid waste incident, waste gas incident, and postulated cask drop accident in detail during the review of previously approved license amendment requests and exemptions from various emergency planning requirements for Palisades and found them to be acceptable. Since this technical information has not changed in relation to this exemption request, the NRC staff relied on these previous conclusions to conduct portions of the review for this exemption request. The NRC staff notes that while the licensee continues to rely on the information from previously approved licensing actions, the calculated doses would be expected to be lower when this exemption is implemented due to additional decay time beyond the time assumed in the previously approved actions. Therefore, any offsite consequence from a design-basis radiological release is highly unlikely and, therefore, a significant amount of offsite liability insurance coverage is not required.

The only beyond design-basis event that has the potential to lead to a significant radiological release at a permanently shutdown and defueled reactor is a zirconium fire. The zirconium fire scenario is a postulated, but highly unlikely, accident scenario that involves the loss of water inventory from the SFP resulting in a significant heatup of the spent fuel and culminating in substantial zirconium cladding oxidation and fuel damage. The probability of a zirconium fire scenario is related to the decay heat of the irradiated fuel stored in the SFP. Therefore, the risks from a zirconium fire scenario continue to decrease as a function of the time that Palisades has been permanently shutdown.

The licensee performed an analysis demonstrating that 12 months after Palisades permanently shut down, the spent fuel stored in the SFP will have decayed to the extent that the requested exemption may be implemented at Palisades. Given Palisades' permanent shutdown date was May 20, 2022, and the fuel decay time of 12 months, May 31, 2023, terminates the period during which the spent fuel could heat-up to clad ignition temperature within 10 hours under adiabatic conditions. This analysis, ''Holtec Spent Fuel Pool Calculation,'' dated July 8, 2022, [non-public], was submitted as Attachment 1 by the licensee in support of the letter dated July 11, 2022 (ML22192A134), in which the licensee requested exemptions from specific portions of 10 CFR 50.47 and appendix E to 10 CFR part 50 for the Palisades license. The analysis determined the decay time necessary to ensure a minimum of 10 hours is available before the fuel cladding temperature of the hottest fuel assembly in the SFP reaches 900 °C. This 10-hour minimum threshold provides sufficient time for the licensee to take mitigative actions, and, if necessary, for offsite agencies to take appropriate action to protect the health and safety of the public if fuel and cladding oxidation occurs in air.

The NRC staff reviewed the licensee's calculation to verify that important physical properties of materials were within acceptable ranges and that the results were accurate. The NRC staff determined that the physical properties of materials were appropriate in the licensee's calculations related to SFP heatup considerations for Palisades. Therefore, the NRC staff found that 12 months after permanent cessation of power operations, more than 10 hours would be available before a significant offsite release could begin. The NRC staff concluded that the adiabatic heatup calculation provided an acceptable method for determining the minimum time available for deployment of mitigation equipment and, if necessary, implementing measures under a comprehensive general emergency plan. In this regard, one technical criterion for relieving decommissioning reactor licensees from the insurance obligations applicable to an operating reactor is a finding that the heat generated by the SFP has decayed to the point where the possibility of a zirconium fire is highly unlikely.

This was addressed in SECY–93–127, where the NRC staff concluded that there was a low likelihood and reduced short-term public health consequences of a zirconium fire once a decommissioning plant's spent fuel has sufficiently decayed. In its Staff Requirements Memorandum, ''Financial Protection Required of Licensees of Large Nuclear Power Plants during Decommissioning,'' dated July 13, 1993 (ML003760936), the Commission approved a policy that authorized, through the exemption process, withdrawal from participation in the secondary insurance layer and a reduction in commercial liability insurance coverage to $100 million when a licensee is able to demonstrate that the spent fuel could be air-cooled if the SFP was drained of water.

The NRC staff has used this technical criterion to grant similar exemptions to other decommissioning reactors (*e.g.,* Pilgrim Nuclear Power Station, published in the **Federal Register** on January 14, 2020 (85 FR 1827); Three Mile Island Nuclear Station, Unit 1,

published in the **Federal Register** on March 26, 2021 (86 FR 14472); and Duane Arnold Energy Center, published in the **Federal Register** on May 18, 2021 (86 FR 26961)). Additional discussions of other decommissioning reactor licensees that have received exemptions to reduce their primary insurance level to $100 million are provided in SECY–96–256, ''Changes to the Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors, 10 CFR 50.54(w) and 10 CFR 140.11,'' dated December 17, 1996 (ML15062A483). These prior exemptions were based on the licensee demonstrating that the SFP could be air-cooled consistent with the technical criterion discussed above.

In the exemption request dated October 26, 2022, the licensee compared the Palisades fuel storage parameters with those used in NRC generic evaluations of fuel cooling included in NUREG/CR–6451, ''A Safety and Regulatory Assessment of Generic BWR [Boiling-Water Reactor] and PWR [Pressurized-Water Reactor] Permanently Shutdown Nuclear Power Plants,'' dated August 1997 (ML082260098). The analysis described in NUREG/CR–6451 determined that natural air circulation would adequately cool fuel that has decayed for 17 months after operation in a typical PWR. The licensee compared the post-shutdown fuel storage conditions with those assumed for the analysis presented in NUREG/CR–6451.

The licensee found that the Palisades fuel storage configuration is smaller than the values modeled in NUREG/CR–6451. However, these differences are considered to be conservatively offset by the lower power density of the Palisades fuel assemblies, substantially larger downcomer areas for improved buoyancy driven air flow and natural circulation, and the fewer number of fuel assemblies that are stored in the fuel racks as compared to the NUREG/CR–6451 PWR model. Therefore, the cooling air flow should be comparable.

In SECY–00–0145, ''Integrated Rulemaking Plan for Nuclear Power Plant Decommissioning,'' dated June 28, 2000, and SECY–01–0100, ''Policy Issues Related to Safeguards, Insurance, and Emergency Preparedness Regulations at Decommissioning Nuclear Power Plants Storing Fuel in Spent Fuel Pools,'' dated June 4, 2001 (ML003721626 and ML011450420, respectively), the NRC staff discussed additional information concerning SFP zirconium fire risks at decommissioning reactors and associated implications for offsite insurance. Analyzing when the spent fuel stored in the SFP is capable of adequate air-cooling is one measure that demonstrates when the probability of a zirconium fire would be exceedingly low.

The NRC staff has determined that the licensee's proposed reduction in primary offsite liability coverage to a level of $100 million and the licensee's proposed withdrawal from participation in the secondary insurance pool for offsite financial protection are consistent with the policy established in SECY–93–127 and subsequent insurance considerations resulting from zirconium fire risks, as discussed in SECY–00–0145 and SECY–01–0100. The NRC has previously determined in SECY–00–0145 that the minimum offsite financial protection requirement may be reduced to $100 million and that secondary insurance is not required once it is determined that the spent fuel in the SFP is no longer thermal-hydraulically capable of sustaining a zirconium fire based on a plant-specific analysis. The NRC staff also notes that similar exemptions from these insurance requirements have been granted to other permanently shutdown and defueled power reactors upon satisfactory demonstration that zirconium fire risk from the irradiated fuel stored in the SFP is of negligible concern.

A. The Exemption Is Authorized by Law

The PAA and its implementing regulations in 10 CFR 140.11(a)(4) require licensees of nuclear reactors that have a rated capacity of 100,000 kilowatts electric or more to have and maintain $450 million in primary financial protection and to participate in a secondary retrospective insurance pool. In accordance with 10 CFR 140.8, the Commission may grant exemptions from the regulations in 10 CFR part 140 as the Commission determines are authorized by law. The legal and associated technical basis for granting exemptions from 10 CFR part 140 are set forth in SECY–93–127. The legal analysis underlying SECY–93–127 concluded that, upon a technical finding that lesser potential hazards exist after permanent cessation of operations, the Commission has the discretion under the PAA to reduce the amount of insurance required of a licensee undergoing decommissioning.

Based on its review of the exemption request, the NRC staff concludes that the technical criteria for relieving Holtec Palisades and HDI from their existing primary and secondary insurance obligations have been met. As explained above, the NRC staff has concluded that no reasonably conceivable DBA exists that could cause an offsite release greater than the EPA PAGs and, therefore, that any offsite consequence from a design-basis radiological release is highly unlikely and the need for a significant amount of offsite liability insurance coverage is unwarranted. Additionally, the NRC staff determined that, after 12 months decay, the fuel stored in the Palisades SFP will be capable of being adequately cooled by air in the highly unlikely event of pool drainage. Moreover, in the highly unlikely beyond DBA scenario where the SFP water inventory is lost in such a manner that all methods of heat removal from the spent fuel are no longer available, the NRC staff has determined that at least 10 hours would be available and is sufficient time to support deployment of mitigation equipment, consistent with plant conditions, to prevent the zirconium cladding from reaching a point of rapid oxidation. Therefore, the NRC staff concludes that the fuel stored in the Palisades SFP will have decayed sufficiently by the requested effective date for the exemption of 12 months after permanent cessation of power operations to support a reduction in the required insurance consistent with SECY–00–0145.

The NRC staff has determined that granting the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, Section 170, or other laws, as amended, which require licensees to maintain adequate financial protection. Accordingly, consistent with the legal standard presented in SECY–93–127, under which decommissioning reactor licensees may be relieved of the requirements to carry the maximum amount of insurance available and to participate in the secondary retrospective premium pool where there is sufficient technical justification, the NRC staff concludes that the requested exemption is authorized by law.

B. The Exemption Is Otherwise in the Public Interest

The financial protection limits of 10 CFR 140.11 were established to require licensees to maintain sufficient offsite liability insurance to ensure adequate funding for offsite liability claims following an accident at an operating reactor. However, the regulation does not consider the reduced potential for and consequence of nuclear incidents at permanently shutdown and decommissioning reactors.

The basis provided in SECY–93–127, SECY–00–0145, and SECY–01–0100 allows licensees of decommissioning plants to reduce their primary offsite liability insurance and to withdraw

from participation in the retrospective rating pool for deferred premium charges. As discussed in these documents, once the zirconium fire concern is determined to be negligible, possible accident scenario risks at permanently shutdown and defueled reactors are greatly reduced when compared to the risks at operating reactors and the associated potential for offsite financial liabilities from an accident are commensurately less. The licensee analyzed and the NRC staff confirmed that the risks of accidents that could result in an offsite radiological release are minimal, which justifies the proposed reductions in offsite primary liability insurance and withdrawal from participation in the secondary retrospective rating pool for deferred premium charges.

Additionally, participation in the secondary retrospective rating pool could potentially have adverse consequences on the safe and timely completion of decommissioning. If a nuclear incident sufficient to trigger the secondary insurance layer occurred at another nuclear power plant, the licensee could incur financial liability of up to $131,056,000. However, because Palisades is permanently shutdown, it cannot produce revenue from electricity generation sales to cover such a liability. Therefore, such liability if subsequently incurred could significantly affect the ability of the facility to conduct and complete timely radiological decontamination and decommissioning activities. In addition, as SECY–93–127 concluded, the shared financial risk exposure to the licensee is greatly disproportionate to the radiological risk posed by Palisades when compared to operating reactors. The reduced overall risk to the public at decommissioning power plants does not warrant that the licensee be required to carry full operating reactor insurance coverage after the requisite spent fuel cooling period has elapsed following final reactor shutdown.

The licensee's proposed financial protection limits will maintain a level of liability insurance coverage commensurate with the risk to the public. These changes are consistent with previous NRC policy as discussed in SECY–00–0145 and exemptions approved for other decommissioning reactors. Therefore, the underlying purpose of the regulations will not be adversely affected by the reductions in insurance coverage. Accordingly, an exemption from participation in the secondary insurance pool and a reduction in the primary insurance to $100 million, a value more in line with the potential consequences of accidents, would be in the public interest in that this ensures that there will be adequate funds to address any of those consequences and helps to ensure the safe and timely decommissioning of the reactor.

Therefore, the NRC staff has concluded that an exemption from 10 CFR 140.11(a)(4), which would permit Holtec Palisades and HDI to lower the Palisades primary insurance levels and to withdraw from the secondary retrospective premium pool at the requested effective date of 12 months after permanent cessation of power operations, is in the public interest.

C. Environmental Considerations

The NRC's approval of an exemption from insurance or indemnity requirements belongs to a category of actions that the Commission, by rule or regulation, has declared to be a categorical exclusion after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment. Specifically, the exemption is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement in accordance with 10 CFR 51.22(c)(25).

Under 10 CFR 51.22(c)(25), granting of an exemption from the requirements of any regulation of Chapter I to 10 CFR is a categorical exclusion provided that: (i) there is no significant hazards consideration; (ii) there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (iii) there is no significant increase in individual or cumulative public or occupational radiation exposure; (iv) there is no significant construction impact; (v) there is no significant increase in the potential for or consequences from radiological accidents; and (vi) the requirements from which an exemption is sought involve surety, insurance, or indemnity requirements.

As the Director of the Division of Decommissioning, Uranium Recovery, and Waste Programs in the NRC's Office of Nuclear Material Safety and Safeguards, I have determined that approval of the exemption request involves no significant hazards consideration, as defined in 10 CFR 50.92, because reducing the licensee's offsite liability requirements at Palisades does not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The exempted financial protection regulation is unrelated to the operation of Palisades or site activities. Accordingly, there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite and no significant increase in individual or cumulative public or occupational radiation exposure. The exempted regulation is not associated with construction so there is no significant construction impact. The exempted regulation does not concern the source term (*i.e.,* potential amount of radiation in an accident) nor any activities conducted at the site. Therefore, there is no significant increase in the potential for, or consequences of, a radiological accident. In addition, there would be no significant impacts to biota, water resources, historic properties, cultural resources, or socioeconomic conditions in the region resulting from issuance of the requested exemption. The requirement for offsite liability insurance involves surety, insurance, or indemnity matters only.

Therefore, pursuant to 10 CFR 51.22(b) and 51.22(c)(25), no environmental impact statement or environmental assessment need be prepared in connection with the approval of this exemption request.

IV. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR 140.8, the exemption is authorized by law and is otherwise in the public interest. Therefore, the Commission hereby grants Holtec Palisades and HDI an exemption from the requirements of 10 CFR 140.11(a)(4) for Palisades. Palisades permanently ceased power operations on May 20, 2022. The exemption from 10 CFR 140.11(a)(4) permits Palisades to reduce the required level of primary financial protection from $450 million to $100 million and to withdraw from participation in the secondary layer of financial protection 12 months after permanent cessation of power operations, which was May 20, 2023. Because this period had already elapsed, the exemption is effective upon issuance.

Dated: this 22nd day of December 2023.

For the Nuclear Regulatory Commission.

/RA/

Jane Marshall,

Director, Division of Decommissioning, Uranium Recovery, and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–28951 Filed 1–3–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0094]

Information Collection: Solicitation of Non-Power Operator Licensing Examination Data

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Solicitation of Non-Power Operator Licensing Examination Data.''

DATES: Submit comments by January 4, 2024. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0094 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–2023–0094.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov*. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML23117A289. The supporting statement is available in ADAMS under Accession No. ML23256A256.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David 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

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

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

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Solicitation of Non-Power Operator Licensing Examination Data.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on September 7, 2023, 88 FR 61627.

1. *The title of the information collection:* Solicitation of Non-Power Operator Licensing Examination Data.

2. *OMB approval number:* 3150–0235.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Annually.

6. *Who will be required or asked to respond:* All holders of operating licenses for non-power reactors under the provision of part 50 of title 10 of the *Code of Federal Regulations,* ''Domestic Licensing of Production and Utilization Facilities,'' except those that have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel.

7. *The estimated number of annual responses:* 31.

8. *The estimated number of annual respondents:* 31.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 31.

10. *Abstract:* The NRC annually requests all non-power reactor licensees and applicants for an operating license to voluntarily send to the NRC: (1) their projected number of candidates for initial operator licensing examinations and (2) the estimated dates of the examinations. This information is used to plan budgets and resources in regard to operator examination scheduling in order to meet the needs of the non-power nuclear community.

Dated: December 28, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–28880 Filed 1–3–24; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–145 and CP2024–151; MC2024–146 and CP2024–152; MC2024–147 and CP2024–153; MC2024–148 and CP2024–154; MC2024–149 and CP2024–155; MC2024–150 and CP2024–156]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 5, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–145 and CP2024–151; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 33 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 5, 2024.

2. *Docket No(s).:* MC2024–146 and CP2024–152; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 34 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 5, 2024.

3. *Docket No(s).:* MC2024–147 and CP2024–153; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 160 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 5, 2024.

4. *Docket No(s).:* MC2024–148 and CP2024–154; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 40 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 5, 2024.

5. *Docket No(s).:* MC2024–149 and CP2024–155; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 161 to Competitive Product List of Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* January 5, 2024.

6. *Docket No(s).:* MC2024–150 and CP2024–156; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 162 to Competitive Product List of Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* January 5, 2024.

This Notice will be published in the **Federal Register**.

Mallory Richards,

Federal Register Liaison.

[FR Doc. 2023–28881 Filed 1–2–24; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–151 and CP2024–157]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 8, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by

telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–151 and CP2024–157; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 163 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 28, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 8, 2024.

This Notice will be published in the **Federal Register**.

Mallory Richards,

Federal Register Liaison.

[FR Doc. 2023–28981 Filed 1–3–24; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

DATES: Date of notice: January 4, 2024.

FOR FURTHER INFORMATION CONTACT: Christopher C. Meyerson, (202) 268–7820.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 27, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 34 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2024–146 and CP2024–152.

Christopher Doyle,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023–29004 Filed 1–3–24; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99252; File No. SR–MEMX–2023–37]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Rules To Accommodate the Listing of Options Series That Would Expire at the Close of Business on the Last Business Day of a Calendar Month ("Monthly Options Series")

December 28, 2023.

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 December 20, 2023, MEMX LLC (''MEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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 with the Commission a proposed rule change to amend its Rules to accommodate the listing of options series that would expire at the close of business on the last business day of a calendar month (''Monthly Options Series''). The text of the proposed rule change is provided in Exhibit 5.

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.
[3] 15 U.S.C. 78s(b)(3)(A).
[4] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Rules to accommodate the listing of options series that would expire at the close of business on the last business day of a calendar month (''Monthly Options Series''). Pursuant to proposed Rules 19.5, Interpretation and Policy .08(a) and 29.11(k)(1),[5] the Exchange may list Monthly Options Series for up to five currently listed option classes that are either index options or options on exchange-traded funds (''ETFs'').[6] In addition, the Exchange may also list Monthly Options Series on any options classes that are selected by other securities exchanges that employ a similar program under their respective rules.[7] The Exchange may list 12 expirations for Monthly Options Series. Monthly Options Series need not be for consecutive months; however, the expiration date of a nonconsecutive expiration may not be beyond what would be considered the last expiration date if the maximum number of expirations were listed consecutively.[8] Other expirations in the same class are not counted as part of the maximum numbers of Monthly Options Series expirations for a class.[9] Monthly Options Series will be P.M.-settled.[10]

The strike price of each Monthly Options Series will be fixed at a price per share, with at least two, but no more than five, strike prices above and at least two, but no more than five, strike prices below the value of the underlying index or price of the underlying security at about the time that a Monthly Options Series is opened for trading on the Exchange. The Exchange will list strike prices for Monthly Options Series that are reasonably related to the current price of the underlying security or current index value of the underlying index to which such series relates at about the time such series of options is first opened for trading on the Exchange. The term ''reasonably related to the current price of the underlying security or index value of the underlying index'' means that the exercise price is within 30% of the current underlying security price or index value.[11] Additional Monthly Options Series of the same class may be open for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when the market price of the underlying security moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices will be within 30% above or below the closing price of the underlying index or security on the preceding day. The Exchange may also open additional strike prices of Monthly Options Series that are more than 30% above or below the current price of the underlying security, provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate, or individual customers or their brokers. Market-Makers trading for their own account will not be considered when determining customer interest under this provision. The opening of the new Monthly Options Series will not affect the series of options of the same class previously opened.[12] The interval between strike prices on Monthly Options Series will be the same as the interval for strike prices for series in that same options class that expire in accordance with the normal monthly expiration cycle.[13]

By definition, Monthly Options Series can never expire in the same week as a standard expiration series (which expire on the third Friday of a month) in the same class expires. The same, however, is not the case with regards to Short Term Option Series[14] or Quarterly Options Series. Therefore, to avoid any confusion in the marketplace, the Exchange proposes to amend Rules 19.5, Interpretation and Policy .05 (introductory paragraph), (b), and (h) and 29.11(h) (introductory paragraph) and (2) to provide the Exchange will not list a Short Term Option Series in a class on a date on which a Monthly Options Series or Quarterly Options

[5] The proposed rule change defines the term ''Monthly Options series'' in Rule 29.2(k) (and re-letters current paragraphs (k) through (o) to be (l) through (p)) as a series in an options class that is approved for listing and trading on the Exchange in which the series is opened for trading on any business day and that expires at the close of business on the last business day of a calendar month.

[6] The Exchange proposes to amend Rule 19.5(a) and (b) to provide that proposed Rule 19.5, Interpretation and Policy .08 will describe how the Exchange will fix a specific expiration date and exercise price for Monthly Options Series and will govern the procedures for opening Monthly Options Series, respectively. The proposed change to Rule 19.5(a) is consistent with language in current Rule 19.5(a) for other Short Term Option Series and Quarterly Options Series. The proposed rule change also makes a non-substantive correction to pluralize the term ''policy'' (to become ''policies'') to be consistent with the terminology in the Rules. Additionally, the proposed rule change adds to Rule 19.5(b) that Interpretation and Policies .04 and .05 will govern the procedures for opening Quarterly Options Series and Short Term Option Series, respectively (as well as adding exception language to the beginning of that paragraph). This is merely a clarification, as Rule 19.5, Interpretations and Policies .04 and .05 clearly govern the opening procedures for those options listing programs. This proposed change is also consistent with Cboe Exchange, Inc. (''Cboe Options'') Rule 4.5(b), which has similar options listing programs.

[7] The Securities and Exchange Commission (the ''Commission'') recently approved a Cboe Options proposed rule change to adopt a substantively identical Monthly Options Series program. *See* Securities Exchange Act Release No. 98915 (November 13, 2023) (SR–CBOE–2023–049) (''Cboe Options Approval Order'').

[8] The Exchange notes this provision considers consecutive monthly listings. In other words, as other expirations (such as Quarterly Options Series) are not counted as part of the maximum, those expirations would not be considered when considering when the last expiration date would be if the maximum number were listed consecutively. For example, if it is January 2024 and the Exchange lists Quarterly Options Series in class ABC with expirations in March, June, September, December, and the following March, the Exchange could also list Monthly Options Series in class ABC with expirations in January, February, April, May, July, August, October, and November 2024 and January and February of 2025. This is because, if Quarterly Options Series, for example, were counted, the Exchange would otherwise never be able to list the maximum number of Monthly Options Series. This is consistent with the listing provisions for Quarterly Options Series, which permit calendar quarter expirations. The need to list series with the same expiration in the current calendar year and the following calendar year (whether Monthly or Quarterly expiration) is to allow market participants to execute one-year strategies pursuant to which they may roll their exposures in the longer-dated options (*e.g.,* January 2025) prior to the expiration of the nearer-dated option (*e.g.,* January 2024).

[9] *See* proposed Rules 19.5, Interpretation and Policy .08(b) and 29.11(k)(2).

[10] *See* proposed Rules 19.5, Interpretation and Policy .08(c) and 29.11(k)(3).

[11] *See* proposed Rules 19.5, Interpretation and Policy .08(d) and 29.11(k)(4). The Exchange notes these proposed provisions are consistent with the initial series provision for the Quarterly Options Series program in Rule 29.11(g)(3). While different than the initial strike listing provision for the Quarterly Options Series program in current Rule 19.5, Interpretation and Policy .04(b), the Exchange believes the proposed provision is appropriate, as it contemplates classes that may have strike intervals of $5 or greater. For consistency, the Exchange also proposes to amend Rule 19.5, Interpretation and Policy .04(b) to incorporate the same provision for initial series.

[12] *See* proposed Rules 19.5, Interpretation and Policy .08(e) and 29.11(k)(5).

[13] *See* proposed Rules 19.5, Interpretation and Policy .08(f) and 29.11(k)(6); *see also* Rule 19.5(d), (f), (g) and Interpretations and Policies .01–.03 and .06 (permissible strike prices for ETF classes) and Rule 29.11(c) (permissible strike prices for index options).

[14] The proposed rule change clarifies in Rule 29.11(a)(3) that index options have expiration months and weeks, which expirations may occur in consecutive weeks as specified in Rule 29.11(h). This is merely a clarification, as Rule 29.11(h) currently permits weekly expirations. This language is consistent with Cboe Options Rule 4.13(a)(2). Additionally, the proposed rule change adds to rule 29.11(a)(3) that index options may expire more than 12 months out as specified elsewhere in the Rule. This is consistent with current Rule 29.11(b), which permits long term index options to expire between 12 and 180 months after issuance, as well as proposed Rule 29.11(k)(2), as discussed above.

Series expires.[15] Similarly, proposed Rules 19.5, Interpretation and Policy .08(b) and 29.11(k)(2) provide that no Monthly Options Series may expire on a date that coincides with an expiration date of a Quarterly Options Series in the same index or ETF class. In other words, the Exchange will not list a Short Term Option Series on an index or ETF if a Monthly Options Series on that index or ETF were to expire on the same date, nor will the Exchange list a Monthly Options Series on an ETF or index if a Quarterly Options Series on that index or ETF were to expire on the same date to prevent the listing of series with concurrent expirations.[16]

With respect to Monthly Options Series added pursuant to proposed Rules 19.5, Interpretation and Policy .08(a) through (f) and 29.11(k)(1) through (6), the Exchange will, on a monthly basis, review series that are outside a range of five strikes above and five strikes below the current price of the underlying index or security, and delist series with no open interest in both the put and the call series having a: (i) strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month. Notwithstanding this delisting policy, customer requests to add strikes and/or maintain strikes in Monthly Options Series in series eligible for delisting will be granted. In connection with this delisting policy, if the Exchange identifies series for delisting, the Exchange will notify other options exchanges with similar delisting policies regarding eligible series for delisting and will work with such other exchanges to develop a uniform list of series to be delisted, so as to ensure uniform series delisting of multiply listed Monthly Options Series.[17]

The Exchange believes that Monthly Options Series will provide investors with another flexible and valuable tool to manage risk exposure, minimize capital outlays, and be more responsive to the timing of events affecting the securities that underlie option contracts. The Exchange believes limiting Monthly Options Series to five classes will ensure the addition of these new series will have a negligible impact on the Exchange's and the Options Price Reporting Authority's (''OPRA's'') quoting capacity. The Exchange represents it has the necessary systems capacity to support new options series that will result from the introduction of Monthly Options Series.

The Exchange notes that Rules 18.7 and 29.5 through 29.7 regarding position limits will apply to Monthly Options Series. These Rules provide that the position limits fixed by MEMX Options [18] and Cboe Options [19] apply to options contracts traded on MEMX Options, which would include Monthly Options Series.[20] As noted above, Cboe Options recently received Commission approval to adopt a substantively identical Monthly Options Series Program as the one proposed in this rule filing.[21] Pursuant to those recently approved Cboe Options rules, Monthly Options Series will be aggregated with positions in options contracts on the same underlying security or index.[22] This is consistent with how position (and exercise) limits are currently imposed on series with other expirations (Short Term Option Series and Quarterly Options Series). Therefore, positions in options within a class of index or ETF options, regardless of their expirations, would continue to be subject to existing position (and exercise) limits. The Exchange believes this will address potential manipulative schemes and adverse market impacts surrounding the use of options.

The Exchange also represents its current surveillance programs will apply to Monthly Options Series and will properly monitor trading in the proposed Monthly Options Series. The Exchange currently lists Quarterly Options Series in certain ETF classes, which expire at the close of business at the end of four calendar months (*i.e.,* the end of each calendar quarter), and has not experienced any market disruptions nor issues with capacity. The Exchange's surveillance programs currently in place to support and properly monitor trading in these Quarterly Options Series, as well as Short Term Option Series and standard expiration series, will apply to the proposed Monthly Options Series. The Exchange believes its surveillances continue to be designed to deter and detect violations of its Rules, including position and exercise limits and possible manipulative behavior, and these surveillances will apply to Monthly Options Series that the Exchange determines to list for trading. Ultimately, the Exchange does not believe the proposed rule change raises any unique regulatory concerns because existing safeguards—such as position and exercise limits (and the aggregation of options overlying the same index or ETF) and reporting requirements—would continue to apply.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[23] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [24] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and

[15] The Exchange also proposes to make a non-substantive change to Rules 19.5, Interpretation and Policy .05 and 29.11(h) to change current references to ''monthly options series'' to ''standard expiration options series'' (*i.e.,* series that expire on the third Friday of a month), to eliminate potential confusion. The current references to ''monthly options series'' are intended to refer to those series that expire on the third Friday of a month, which are generally referred to in the industry as standard expirations. The proposed rule change also adds a heading to Rule 19.5, Interpretation and Policy .05 for consistency with other Interpretations and Policies in that Rule.

[16] The Exchange notes this would not prevent the Exchange from listing a P.M.-settled Monthly Options Series on an index with the same expiration date as an A.M.-settled Short Term Option Series on the same index, both of which may expire on a Friday. In other words, the Exchange may list a P.M-settled Monthly Options Series on an index concurrent with an A.M.-settled Short Term Option Series on that index and both of which expire on a Friday. The Exchange believes this concurrent listing would provide investors with yet another hedging mechanism and is reasonable given these series would not be identical (unlike if they were both P.M-settled). This could not occur with respect to ETFs, as all Short Term Option Series on ETFs are P.M.-settled.

[17] *See* proposed Rules 19.5, Interpretation and Policy .08(g) and 22.11(k)(7).

[18] *See* MEMX Rule 18.7.

[19] *See* MEMX Rule 29.5.

[20] The Exchange issued Regulatory Notice 23–12 on September 14, 2023 which clarified its specific position limits applicable to options on the Exchange are those calculated and disseminated by the Options Clearing Corporation (''OCC''). *See: https://info.memxtrading.com/wp-content/uploads/2023/09/RegNotice-23-12-Options-Position-Limits.pdf.*

[21] *See* Cboe Options Approval Order.

[22] *See id.; see also* Cboe Options Rules 8.30, Interpretation and Policy .09 (regarding position limits for options on stocks and ETFs), 8.31(e) (regarding position limits for broad-based index options), 8.32(f) (regarding position limits for industry index options), 8.33(c) (regarding position limits for micro and narrow-based indexes), and 8.34(c) (regarding position limits for individual stock or ETF based volatility index options). Pursuant to Cboe Options Rule 8.42 (and Exchange Rules 18.9 and 29.9), exercise limits for impacted index and ETF classes would be equal to the applicable position limits.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [25] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the introduction of Monthly Options Series will remove impediments to and perfect the mechanism of a free and open market and a national market system by expanding hedging tools available to market participants. The Exchange believes the proposed monthly expirations will allow market participants to transact in the index and ETF options listed pursuant to the proposed rule change based on their timing as needed and allow them to tailor their investment and hedging needs more effectively. Further, the Exchange believes the availability of Monthly Options Series would protect investors and the public interest by providing investors with more flexibility to closely tailor their investment and hedging decisions in these options, thus allowing them to better manage their risk exposure.

The Exchange believes the Quarterly Options Series Program has been successful to date and the proposed Monthly Options Series program simply expands the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur at months' ends in the same way the Quarterly Options Series Program has expanded the landscape of hedging for quarter-end news. Monthly Options Series will also complement Short Term Option Series, which allow investors to hedge risk against events that occur throughout a month. The Exchange believes the availability of additional expirations should create greater trading and hedging opportunities for investors, as well as provide investors with the ability to tailor their investment objectives more effectively.

The Exchange notes the proposed terms of Monthly Options Series, including the limitation to five index and ETF option classes, are substantively the same as the current terms of Quarterly Options Series.[26] Quarterly Options Series expire on the last business day of a calendar quarter, which is the last business day of every third month. The proposed Monthly Options Series would fill the gaps between Quarterly Options Series expirations by permitting series to expire on the last business day of every month, rather than every third month. The proposed Monthly Options Series may be listed in accordance with the same terms as Quarterly Options Series, including permissible strikes.[27] As is the case with Quarterly Options Series, no Short Term Option Series may expire on the same day as a Monthly Options Series. Similarly, as proposed, no Monthly Options Series may expire on the same day as a Quarterly Options Series. The Exchange believes preventing listing series with concurrent expirations in a class will eliminate potential investor confusion and thus protect investors and the public interest. Given that Quarterly Options Series the Exchange currently lists are essentially Monthly Options Series that can expire at the end of only certain calendar months, the Exchange believes it is reasonable to list Monthly Options Series in accordance with the same terms, as it will promote just and equitable principles of trade. The Exchange believes limiting Monthly Options Series to five classes will ensure the addition of these new series will have a negligible impact on the Exchange's and OPRA's quoting capacity. The Exchange represents it has the necessary systems capacity to support new options series that will result from the introduction of Monthly Options Series.

The Exchange further believes the proposed rule change regarding the treatment of Monthly Options Series with respect to determining compliance with position and exercise limits is designed to prevent fraudulent and manipulative acts and practices and promote just and equitable principles of trade. Monthly Options Series will be aggregated with options overlying the same ETF or index for purposes of compliance with position (and exercise) limits, which is consistent with how position (and exercise) limits are currently imposed on series with other expirations (Short Term Option Series and Quarterly Options Series).[28] Therefore, options positions within ETF or index option classes for which Monthly Options Series are listed, regardless of their expirations, would continue to be subject to existing position (and exercise) limits. The Exchange believes this will address potential manipulative schemes and adverse market impacts surrounding the use of options. The Exchange also represents its current surveillance programs will apply to Monthly Options Series and will properly monitor trading in the proposed Monthly Options Series. The Exchange currently trades Quarterly Options Series in certain ETF classes, which expire at the close of business at the end of four calendar months (*i.e.,* the end of each calendar quarter), and has not experienced any market disruptions nor issues with capacity. The Exchange's surveillance programs currently in place to support and properly monitor trading in these Quarterly Options Series, as well as Short Term Option Series and standard expiration series, will apply to the proposed Monthly Options Series. The Exchange believes its surveillances continue to be designed to deter and detect violations of its Rules, including position and exercise limits and possible manipulative behavior, and these surveillances will apply to Monthly Options Series that the Exchange determines to list for trading. Ultimately, the Exchange does not believe the proposed rule change raises any unique regulatory concerns because existing safeguards—such as position and exercise limits (and the aggregation of options overlying the same ETF or index) and reporting requirements—would continue to apply.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change to list Monthly Options Series will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, as any Monthly Options Series the Exchange lists for trading will be available in the same manner for all market participants

[25] *Id.*

[26] *Compare* proposed Rules 19.5, Interpretation and Policy .08 and 29.11(k) to Rules 19.5, Interpretation and Policy .04 and 29.11(g), respectively.

[27] The Exchange notes the proposed maximum number of expirations is consistent with the maximum number of expirations permitted for end-of-month series in index classes. *See* Rule 29.11(j)(2) (which references Rule 29.11(a)(3), which permits up to 12 standard monthly expirations on the majority of index options currently listed on the Exchange).

[28] *See* Cboe Options Approval Order; *see also* Cboe Options Rules 8.30, Interpretation and Policy .09 (regarding position limits for options on stocks and ETFs), 8.31(e) (regarding position limits for broad-based index options), 8.32(f) (regarding position limits for industry index options), 8.33(c) (regarding position limits for micro narrow-based indexes), and 8.34(c) (regarding position limits for individual stock or ETF based volatility index options). Pursuant to Cboe Options Rule 8.42 (and Exchange Rules 18.9 and 29.9), exercise limits for impacted index and ETF classes would be equal to the applicable position limits.

who wish to trade such options. The Exchange notes the proposed terms of Monthly Options Series, including the limitation to five index and ETF option classes, are substantively the same as the current terms of Quarterly Options Series.[29] Quarterly Options Series expire on the last business day of a calendar quarter, which is the last business day of every third month, making the concept of Monthly Options Series in a limited number of index and ETF options not novel. The proposed Monthly Options Series will fill the gaps between Quarterly Options Series expirations by permitting series to expire on the last business day of every month, rather than every third month. The proposed Monthly Options Series may be listed in accordance with the same terms as Quarterly Options Series, including permissible strikes.[30] Monthly Options Series will trade on the Exchange in the same manner as other options in the same class.

The Exchange does not believe the proposed rule change to list Monthly Options Series will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, as nothing prevents other options exchanges from proposing similar rules.[31] As discussed above, the proposed rule change would permit listing of Monthly Options Series in five index or ETF options, as well as any other classes that other exchanges may list under similar programs. To the extent that the availability of Monthly Options Series makes the Exchange a more attractive marketplace to market participants at other exchanges, market participants are free to elect to become market participants on the Exchange.

The Exchange believes that the proposed rule change may relieve any burden on, or otherwise promote, competition. Similar to Short Term Option Series and Quarterly Options Series, the Exchange believes the introduction of Monthly Options Series will not impose an undue burden on competition. The Exchange believes that it will, among other things, expand hedging tools available to market participants. The Exchange believes Monthly Options Series will allow market participants to purchase options based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

The Exchange does not believe the proposed rule change regarding aggregation of positions for purposes of determining compliance with position (and exercise) limits will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will apply in the same manner to all market participants. The Exchange proposes to apply position (and exercise) limits to Monthly Options Series in the same manner it applies position limits to series with other expirations (Short Term Option Series and Quarterly Options Series). Therefore, positions in options in a class of ETF or index options, regardless of their expirations, would continue to be subject to existing position (and exercise) limits. Additionally, the Exchange does not believe this proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will address potential manipulative schemes and adverse market impacts surrounding the use of options.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[32] and Rule 19b–4(f)(6) thereunder.[33] 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[34] and subparagraph (f)(6) of Rule 19b–4 thereunder.[35]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[36] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[37] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange may list Monthly Options Series immediately, which the Exchange believes will benefit investors by promoting competition in Monthly Options Series. The Exchange notes that its proposal is substantively identical to the proposal submitted by Cboe Exchange, Inc. for its Monthly Options Series program.[38] The Commission believes that the proposed rule change presents no novel issues and that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[39]

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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–MEMX–2023–37 on the subject line.

[29] *See* Rules 19.5, Interpretation and Policy .04 and 29.11(g).

[30] *See supra* note 27.

[31] As noted above, at least one other options exchange recently adopted a substantively identical Monthly Options Series program. *See* Cboe Options Approval Order.

[32] 15 U.S.C. 78s(b)(3)(A)(iii).

[33] 17 CFR 240.19b–4(f)(6).

[34] 15 U.S.C. 78s(b)(3)(A)(iii).

[35] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[36] 17 CFR 240.19b–4(f)(6).

[37] 17 CFR 240.19b–4(f)(6)(iii).

[38] *See* Cboe Monthly Approval Order, *supra* note 7.

[39] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–MEMX–2023–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–MEMX–2023–37 and should be submitted on or before January 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28950 Filed 1–3–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. IC–35084]

Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 29, 2023.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'')

ACTION: Notice of Applications for Deregistration under Section 8(f) of the Investment Company Act of 1940.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December 2023. A copy of each application may be obtained via the Commission's website by searching for the applicable file number listed below, 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. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the relevant applicant with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the SEC by 5:30 p.m. on January 23, 2024, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to Rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.*

FOR FURTHER INFORMATION CONTACT: Shawn Davis, Assistant Director, at (202) 551–6413 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE, Washington, DC 20549–8010.

AOG Institutional Diversified Master Fund [File No. 811–23765]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant currently has 2 beneficial owners, is not presently making an offering of securities and does not propose to make any offering of securities. Applicant will continue to operate as a private investment fund in reliance on section 3(c)(1) of the Act.

Filing Dates: The application was filed on September 20, 2023 and amended on November 30, 2023.

Applicant's Address: 11911 Freedom Drive, Suite 730, Reston, Virginia 20190.

AOG Institutional Diversified Tender Fund [File No. 811–23766]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on September 20, 2023 and amended on November 30, 2023.

Applicant's Address: 11911 Freedom Drive, Suite 730, Reston, Virginia 20190.

ASYMmetric ETFs Trust [File No. 811–23622]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 18, 2023, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of $17,292 incurred in connection with the liquidation were paid by the applicant's investment adviser.

Filing Date: The application was filed on November 14, 2023.

Applicant's Address: 158 East 126th Street, Suite 304, New York, New York 10035.

BlackRock 2022 Global Income Opportunity Trust [File No. 811–23218]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On July 30, 2021, August 31, 2021, September 30, 2021, October 29, 2021, November 30, 2021, December 28, 2021, and December 29, 2021, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $172,712 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on November 13, 2023.

Applicant's Address: 100 Bellevue Parkway, Wilmington, Delaware 19809.

Blackrock Florida Municipal 2020 Term Trust [File No. 811–21184]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 22, 2020 and December 24, 2020, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $28,000 incurred in connection with the liquidation were

[40] 17 CFR 200.30–3(a)(12), (59).

paid by the applicant's investment adviser.

Filing Date: The application was filed on November 13, 2023.

Applicant's Address: 100 Bellevue Parkway, Wilmington, Delaware 19809.

Blackrock Muni New York Intermediate Duration Fund, Inc. [File No. 811–21346]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to BlackRock New York Municipal Opportunities Fund (File No. 811–04375) on June 22, 2020, and on June 12, 2020, made a final distribution to its shareholders based on net asset value. Expenses of $292,045 incurred in connection with the reorganization were paid by the applicant.

Filing Date: The application was filed on November 13, 2023.

Applicant's Address: 100 Bellevue Parkway, Wilmington, Delaware 19809.

Blackrock Municipal 2020 Term Trust [File No. 811–21181]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 22, 2020 and December 24, 2020, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $28,000 incurred in connection with the liquidation were paid by the applicant's investment adviser.

Filing Date: The application was filed on November 13, 2023.

Applicant's Address: 100 Bellevue Parkway, Wilmington, Delaware 19809.

Blackrock New York Municipal Bond Trust [File No. 811–21037]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to BlackRock New York Municipal Opportunities Fund (File No. 811–04375) on October 26, 2020, and on October 19, 2020 made a final distribution to its shareholders based on net asset value. Expenses of $321,023 incurred in connection with the reorganization were paid by the applicant.

Filing Date: The application was filed on November 13, 2023.

Applicant's Address: 100 Bellevue Parkway, Wilmington, Delaware 19809.

Cushing Mutual Funds Trust [File No. 811–23293]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 10, 2023, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of $22,500 incurred in connection with the liquidation were paid by the applicant's investment adviser.

Filing Date: The application was filed on November 15, 2023.

Applicant's Address: 600 North Pearl Street, Suite 1205, Dallas, Texas 75201.

Eaton Vance Tax-Managed Buy-Write Strategy Fund [File No. 811–22380]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Eaton Vance Tax-Managed Buy-Write Opportunities Fund (File No. 811–21735) on April 14, 2023. Expenses of approximately $204,390 incurred in connection with the reorganization were paid by the applicant and the applicant's investment adviser.

Filing Dates: The application was filed on October 10, 2023 and amended on November 30, 2023.

Applicant's Address: Two International Place, Boston, Massachusetts 02110.

Goldman Sachs Credit Income Fund [File No. 811–23498]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on October 10, 2023 and amended on December 12, 2023.

Applicant's Address: 200 West Street, New York, New York 10282.

Invesco BLDRS Index Funds Trust [File No. 811–21057]

Summary: Applicant, a unit investment trust, seeks an order declaring that it has ceased to be an investment company. On April 6, 2023, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $12,236 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on November 9, 2023.

Applicant's Address: 3500 Lacey Road, Suite 700, Downers Grove, Illinois 60515.

Kayne Anderson NextGen Energy & Infrastructure, Inc. [File No. 811–22467]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Kayne Anderson Energy Infrastructure Fund, Inc. (File No. 811–21593), and on November 13, 2023, made a final distribution to its shareholders based on net asset value. Expenses of approximately $2,219,000 incurred in connection with the reorganization were by the applicant and the acquiring fund.

Filing Date: The application was filed on November 30, 2023.

Applicant's Address: 811 Main Street, 14th Floor, Houston, Texas 77002.

Mutual of America Variable Insurance Portfolios, Inc. [File No. 811–23449]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 8, 2023, applicant made a liquidating distribution to its shareholders based on net asset value. Expenses of $33,900 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on November 21, 2023.

Applicant's Address: 320 Park Avenue, New York, New York 10022–6839.

Nuveen Corporate Income November 2021 Target Term Fund [File No. 811–23075]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On November 1, 2021, applicant made liquidating distributions to its shareholders based on net asset value. Expenses of $3,684 incurred in connection with the liquidation were paid by the applicant.

Filing Date: The application was filed on November 3, 2023.

Applicant's Address: 333 West Wacker Drive, Chicago, Illinois 60606.

Nuveen Select Tax Free Income Portfolio 2 [File No. 811–06622]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Nuveen Select Tax-Free Income Portfolio (File No. 811–06548), and on December 31, 2021, made a final distribution to its shareholders based on net asset value. Expenses of $867,127 incurred in connection with the reorganization were paid by the applicant, the acquiring

fund, and Nuveen Select Tax-Free Income Portfolio 3.

Filing Date: The application was filed on November 3, 2023.

Applicant's Address: 333 West Wacker Drive, Chicago, Illinois 60606.

Nuveen Select Tax Free Income Portfolio 3 [File No. 811–06693]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Nuveen Select Tax-Free Income Portfolio (File No. 811–06548), and on December 31, 2021, made a final distribution to its shareholders based on net asset value. Expenses of $867,127 incurred in connection with the reorganization were paid by the applicant, the acquiring fund, and Nuveen Select Tax-Free Income Portfolio 2.

Filing Date: The application was filed on November 3, 2023.

Applicant's Address: 333 West Wacker Drive, Chicago, Illinois 60606.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28994 Filed 1–3–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: 30-Day notice.

SUMMARY: The Small Business Administration (SBA) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act and OMB procedures, SBA is publishing this notice to allow all interested member of the public an additional 30 days to provide comments on the proposed collection of information.

DATES: Submit comments on or before February 5, 2024.

ADDRESSES: Written comments and recommendations for this information collection request should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Small Business Administration''; ''Currently Under Review,'' then select the ''Only Show ICR for Public Comment'' checkbox. This information collection can be identified by title and/or OMB Control Number.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the information collection and supporting documents from the Agency Clearance Office at *Curtis.Rich@sba.gov;* (202) 205–7030, or from *www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: SBA has established a pilot loan program, the Intermediary Lending Pilot Program (ILPP), to make direct loans to eligible intermediaries, for the purpose of making loans to startup, newly established, and growing small business concerns. This requested information, which will be provided by intermediaries will be used to monitor program effectiveness while minimizing risk to the Federal taxpayer.

Solicitation of Public Comments

Comments may be submitted on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

OMB Control Number: 3245–0376.

Title: Intermediary Lending Pilot Program Application and Reporting Requirements.

Description of Respondents: Intermediary Lenders.

SBA Form Number: 2418, 2419.

Estimated Number of Respondents: 432.

Estimated Annual Responses: 432.

Estimated Annual Hour Burden: 3,168.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–28975 Filed 1–3–24; 8:45 am]

BILLING CODE 8026–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 774 (Sub-No. 1)]

Notice of Passenger Rail Advisory Committee Vacancies

AGENCY: Surface Transportation Board.

ACTION: Notice of vacancies on federal advisory committee and solicitation of nominations.

SUMMARY: The Surface Transportation Board (Board) hereby gives notice of vacancies on its newly formed Passenger Railroad Advisory Committee (PRAC). The Board is soliciting nominations from the public for candidates to fill these vacancies.

DATES: Nominations for candidates for membership on the PRAC are due by February 5, 2024.

ADDRESSES: Nominations may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's website, at *http://www.stb.gov.* Any person submitting a filing in paper format should send the original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 774 (Sub-No. 1), 395 E Street SW, Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Brian O'Boyle at 202–245–0364. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: By notice served on November 13, 2023, and published in the **Federal Register** on Nov. 13, 2023 (88 FR 77655), the Board announced the formation of the PRAC as a federal advisory committee to provide advice and recommendations to the Board on issues relating to passenger rail service. *See Establishment of the Passenger Rail Advisory Comm.,* EP 774 (STB served Nov. 13, 2023). Matters on which the PRAC will advise the Board include improving efficiency on passenger rail routes; reducing disputes between passenger rail carriers and freight rail hosts regarding the use of freight rail carrier-owned facilities and infrastructure for passenger service, including passenger on-time performance issues; and improving regulatory processes related to intercity passenger rail to the benefit of the public, the communities served by passenger rail, and the environment. The PRAC operates under the Federal Advisory Committee Act (5 U.S.C. chapter 10).

The PRAC will consists of 18 voting members who comprise a balanced representation of individuals knowledgeable regarding passenger rail transportation, freight rail transportation, commuter rail operations, and transportation public policy. Members are selected by the Chair of the Board with the concurrence of a majority of the Board. The Chair of the Board may invite representatives from the U.S. Department of Transportation to serve on the PRAC in advisory capacities as *ex officio* (non-voting) members. The members of the Board also serve as *ex officio* members

of the Committee. The PRAC will meet at least twice a year, and meetings are open to the public, consistent with the Government in the Sunshine Act, Public Law 94–409 (1976).

The PRAC was officially formed on November 29, 2023, and currently has no members. The Board is therefore soliciting nominations from the public for candidates to fill every PRAC vacancy. The members of the PRAC will regularly serve a term of three years. However, under the PRAC charter,[1] half of the initial PRAC members will serve a term of two years as designated by the Chair of the Board at the time of appointment. See PRAC Charter art. 12.a.vii.[2] By letter dated December 28, 2023, the Chair of the Board has designated which initial PRAC members will serve for three-year and two-year terms. A copy of this letter is available on the PRAC website. Members of the PRAC are appointed to serve in a representative capacity.

The vacancies and initial term lengths are as follows:

- Two representatives from the National Railroad Passenger Corporation (Amtrak).
  - One representative will serve an initial three-year term. The other representative will serve an initial two-year term.
- Two representatives from commuter rail operators whose operations use facilities owned and/or utilized by (i) Amtrak, (ii) other intercity passenger rail operators, or (iii) rail freight operators (for purposes of ensuring geographic diversity within PRAC's membership, these representatives cannot be from the same state as any of the state representatives described below and cannot be from the same state as each other).
  - One representative will serve an initial three-year term. The other representative will serve an initial two-year term.
- Two representatives from existing intercity passenger rail operators other than Amtrak, or developers of new intercity passenger rail lines other than Amtrak.
  - One representative will serve an initial three-year term. The other representative will serve an initial two-year term.
- One representative from a state that provides funding for intercity passenger rail (for purposes of ensuring geographic diversity within PRAC's membership, this representative cannot be from the same state as any of the representatives of the commuter rail operators described above, or the representative from a state in which the intercity passenger rail stations are served only by long-distance trains described below).
  - This representative will serve an initial three-year term.
- One representative from a state in which the intercity passenger rail stations are served only by long-distance trains, *i.e.,* passenger trains serving the entirety of routes of more than 750 miles between endpoints (for purposes of ensuring geographic diversity within PRAC's membership, this representative cannot be from the same state as any of the representatives of the commuter rail operators described above or the representative from the state that provides funding for intercity passenger rail described above).
  - This representative will serve an initial two-year term.
- Two representatives from Class I freight railroads.
  - One representative will serve an initial three-year term. The other representative will serve an initial two-year term.
- One representative from a Class II or Class III freight railroad.
  - This representative will serve an initial three-year term.
- One representative from an organized rail labor association.
  - This representative will serve an initial three-year term.
- Two representatives from rail passenger advocacy organizations.
  - One representative will serve an initial three-year term. The other representative will serve a two-year term.
- One representative from a rail shipper or customer advocacy organization or an individual shipper or customer.
  - This representative will serve an initial two-year term.
- Three at-large representatives with relevant experience (including, but not limited to, individuals involved in the design or construction of passenger rail equipment or infrastructure, in the provision of passenger rail analytic or consulting services, in transportation planning, or in transportation-related public policy work).
  - One representative will serve an initial three-year term. The other two representatives will each serve an initial two-year term.

According to revised guidance issued by the Office of Management and Budget, it is permissible for federally registered lobbyists to serve on advisory committees, such as the PRAC, as long as they do so in a representative capacity, rather than an individual capacity. *See Revised Guidance on Appointment of Lobbyists to Fed. Advisory Comms., Bds., & Comm'ns,* 79 FR 47,482 (Aug. 13, 2014). No honoraria, salaries, travel or per diem are available to members of the PRAC; however, reimbursement for travel expenses may be sought from the Board in cases of hardship.

Nominations for candidates to fill the vacancies should be submitted in letter form and should include: (1) the name, position, and business contact information of the candidate to include email address and phone number; (2) the interest the candidate will represent; (3) a summary of the candidate's experience and qualifications for the position; (4) a representation that the candidate is willing to serve as a member of the PRAC; and, (5) a statement that the candidate agrees to serve in a representative capacity. Candidates may nominate themselves. The Chair is committed to having a committee reflecting diverse communities and viewpoints and strongly encourages the nomination of candidates from diverse backgrounds. Nominations for candidates for membership on the PRAC should be filed with the Board by February 5, 2024. Please note that submissions will be posted publicly on the Board's website under Docket No. EP 774 (Sub-No. 1).

Authority: 49 U.S.C. 1321; 49 U.S.C. 24101.

Decided: December 29, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2023–28989 Filed 1–3–24; 8:45 am]

BILLING CODE 4915–01–P

[1] A copy of the PRAC charter is available on the Board's website at: *https://www.stb.gov/resources/stakeholder-committees/prac/.*

[2] Under the PRAC charter, members may serve an additional term with approval from the Chair of the Board, without needing to be renominated for that additional term. *See* PRAC Charter art. 12.a.viii. Any member of the PRAC who has served for two consecutive terms will be required to be renominated for membership and appointed by the Chair of the Board should they wish to serve for additional terms. If reappointed, that individual may serve two additional terms before being required to be renominated. *See id.,* art. 12.a.ix.

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Approval for Information Collections: Joint Notice of Intent To Arbitrate and Notice of Availability for Arbitrator Roster

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or

Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the information collections of the Joint Notice of Intent to Arbitrate and Notice of Availability for Arbitrator Roster, as described separately below.

DATES: Comments on these information collections should be submitted by February 5, 2024.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Arbitration Procedures under 49 CFR 1108.'' Written comments for this information collection should be submitted via *www.reginfo.gov/public/do/PRAMain.* This information collection can be accessed by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. As an alternative, written comments may be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: via email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503.

Please also direct all comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* When submitting comments, please refer to ''Paperwork Reduction Act Comments, Arbitration Procedures under 49 CFR 1108.'' For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance, at (202) 245–0284 or at *RCPA@stb.gov.* If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The Board previously published a notice about this collection in the **Federal Register** (88 FR 73388 (Oct. 25, 2023)). That notice allowed for a 60-day public review and comment period. No comments were received.

Comments are requested concerning: (1) the accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Information Collections

OMB Control Number: 2140–0038.

Information Collection 1

Title: Joint Notice of Intent to Arbitrate.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Parties seeking to submit to arbitration certain matters before the Board.

Number of Respondents: One.

Estimated Time per Response: One hour.

Frequency: On occasion.

Total Burden Hours (annually including all respondents): One hour.

Total ''Non-hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR 1108.5, arbitration commences with a written complaint that contains a statement that the relevant parties are participants in the Board's arbitration program, or that the complainant is willing to arbitrate the dispute pursuant to the Board's arbitration procedures. The respondent's answer to the written complaint must then indicate the respondent's participation in the Board's arbitration program or its willingness to arbitrate the dispute at hand pursuant to the Board's arbitration procedures.

As an alternative to filing a written complaint, parties may submit a joint notice to the Board, indicating the consent of both parties to submit an issue in dispute to the Board's arbitration program. In the joint notice, parties state the issue(s) that they are willing to submit to arbitration. The notice must contain a statement that would indicate that all relevant parties are participants in the Board's arbitration program pursuant to § 1108.3(a), or that the relevant parties are willing to arbitrate voluntarily a matter pursuant to the Board's arbitration procedures, and the relief requested. The notice must also indicate whether parties have agreed to a three-member arbitration panel or a single arbitrator and must indicate whether the parties have mutually agreed to a lower amount of potential liability in lieu of the monetary award cap that would otherwise be applicable. The joint notice encourages greater use of arbitration to resolve disputes at the Board.

Information Collection 2

Title: Notice of Availability for Arbitrator Roster.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Potential arbitrators.

Number of Respondents: 23.

Estimated Time per Response: One hour.

Frequency: Annually.

Total Burden Hours (annually including all respondents): 23 hours.

Total ''Non-hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR 1108.6(b), an arbitration roster is compiled by the Chairman, and potential interested, qualified persons who wish to be placed on the Board's arbitration roster must submit notice of their availability to be added to the roster. The Chairman may augment the roster at any time to include eligible arbitrators and remove from the roster any arbitrators who are no longer available or eligible. Potential arbitrators must also update their availability and information annually, if they wish to remain available for the arbitration roster. The arbitration rosters are available to the public on the Board's website at *https://www.stb.gov/resources/litigation-alternatives/arbitration/#arbitration-procedures.*

Under the PRA, a Federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: December 29, 2023.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2023–28993 Filed 1–3–24; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval for Information Collection: Rail Service Data

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the information collection of Rail Service Data, as described below.

DATES: Comments on this information collection should be submitted by February 5, 2024.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Rail Service Data.'' Written comments for this information collection should be submitted via *www.reginfo.gov/public/do/PRAMain.* This information collection can be accessed by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. As an alternative, written comments may be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: via email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503.

Please also direct all comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* When submitting comments, please refer to ''Paperwork Reduction Act Comments, Rail Service Data.'' For further information regarding this collection, contact Michael Higgins, Deputy Director, Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), at (202) 245–0284 and at *Michael.Higgins@stb.gov.* If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The Board previously published a notice about this collection in the **Federal Register** (88 FR 73389 (Oct. 25, 2023)). That notice allowed for a 60-day public review and comment period. No comments were received.

Comments are requested concerning: (1) the accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether the collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Rail Service Data Collection.

OMB Control Number: 2140–0033.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Class I railroads (on behalf of themselves and the Chicago Transportation Coordination Office (''CTCO'')).

Number of Respondents: Seven.

Estimated Time per Response: The collection seeks three related responses, as indicated in the table below.

TABLE—ESTIMATED TIME PER RESPONSE

Type of responses	Estimated time per response (hours)
Weekly	1.5
Semi-annual	7
On occasion	7

Frequency: The frequencies of the collection are set forth in the table below.

TABLE—FREQUENCY OF RESPONSES

Type of responses	Frequency of responses
Weekly	52/year.
Semi-annual	2/year.
On occasion	1/year.

Total Burden Hours (annually including all respondents): The total annual burden hours are estimated to be no more than 651 hours per year, as indicated in the table below.

TABLE—TOTAL BURDEN HOURS (PER YEAR)

Type of responses	Number of respondents	Estimated time per response (hours)	Frequency of responses	Total yearly burden hours
Weekly	7	1.5	52/year	546
Semi-annual	7	7	2/year	98
On occasion	1	7	1/year	7
Total				651

Total ''Non-hour Burden'' Cost: There are no other costs identified because filings are submitted electronically to the Board.

Needs and Uses: Under 49 CFR part 1250, the Board requires the nation's seven Class I (large) railroads and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to report certain railroad service performance metrics on a weekly basis and certain other information on a semi-annual and occasional basis. This collection of rail service data aids the Board in identifying rail service issues, allowing the Board to better understand current service issues and to identify and address potential future regional and national service disruptions more quickly. The transparency resulting from this collection also benefits rail shippers and other stakeholders by helping them to better plan operations and make informed decisions based on publicly available, near real-time data and their own analysis of performance trends over time.

Under the PRA, a Federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: December 29, 2023.

Brendetta Jones,

Clearance Clerk.

[FR Doc. 2023–28992 Filed 1–3–24; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–2554]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewal of an Information Collection: Operational Waivers for Small Unmanned Aircraft Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Renewal notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request Office of Management and Budget (OMB) approval for a renewal of information collection. The FAA must continue collecting information about requests for waivers from certain operational rules that apply to small unmanned aircraft systems (sUAS). The FAA will continue to use the collected information to make determinations whether to authorize or deny the requested operations of sUAS. The information collected is necessary to issue such authorizations or denials consistent with the FAA's mandate to ensure safe and efficient use of national airspace.

DATES: Written comments should be submitted by March 4, 2024.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Dwayne C. Morris, 800 Independence Ave. SW, Washington, DC 20591.

By fax: (202) 267–1078.

FOR FURTHER INFORMATION CONTACT: Daniel Ridgeway by email at: *Dan.Ridgeway@faa.gov;* or phone at: (360) 605–9425.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0796.

Title: Operational Waivers for Small Unmanned Aircraft Systems.

Form Numbers: N/A (Online Portal).

Type of Review: Renewal.

Background: The FAA is seeing increased complexity of small unmanned aircraft systems (sUAS) operation flying under 14 CFR part 107. Under 14 CFR 107.205, operators of small UAS continue to request waivers from certain operational rules. In 2018, the FAA updated and modernized the process for applying for such waivers by introducing the FAADroneZone website. These improvements have facilitated the process of collecting and submitting the information required as part of a waiver application. In 2021, recognizing the demand to expedite the integration of unmanned aircraft systems (UAS) into the National Airspace System (NAS), the FAA revised the regulatory framework for safely integrating UAS into routine NAS operations. The was accomplished by publishing the ''Operation of Small Unmanned Aircraft Systems Over People'' rule in January, 2021, which permitted routine operations of small unmanned aircraft over people and at night under certain conditions. This change significantly decreased the waiver requests for such operations by over 55%. The reporting burdens for operational waiver applications are currently covered by Information Collection Request (ICR) 2120–0768. As part of this effort, the FAA is renewing this ICR, for operational waiver applications only. In order to process operational waiver requests, the FAA requires the operator's name, the operator's contact information, and information related to the date, place, and time of the requested small UAS operation. Additional information is required related to the proposed waiver and any necessary mitigations. The FAA will use the requested information to determine if the proposed UAS operation can be conducted safely. This information is necessary for the FAA to meet its statutory mandate of maintaining a safe and efficient national airspace. See 49 U.S.C. 40103, 44701 and 44807.

Respondents: sUAS 107 Waiver Applications: 3,565 per year.

Frequency: On occasion. For operational waivers requests, a respondent provides the information once, at the time of the request for a waiver. If granted, operational waivers may be valid for up to four (4) years.

Estimated Average Burden per Response: 0.65 hours per response.

Estimated Total Annual Burden: 2,317 hours.

Issued in Washington, DC, on December 29, 2023.

Daniel Ridgeway,

Aviation Safety Inspector, Flight Standards Service, Emerging Technologies Division (AFS–700).

[FR Doc. 2023–28991 Filed 1–3–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Carbon Dioxide Sequestration Credit

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 8933, Carbon Dioxide Sequestration Credit.

DATES: Comments should be received on or before February 5, 2024 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

Title: Carbon Dioxide Sequestration Credit.

OMB Number: 1545–2132.

Form Number: 8933.

Abstract: Use Form 8933 to claim the carbon oxide sequestration credit. The

credit is allowed for qualified carbon oxide that is captured and disposed of or captured, used, and disposed of by the taxpayer in secure geological storage. Only carbon oxide captured and disposed of or used within the United States or a U.S. possession is taken into account when figuring the credit.

Current Actions: Form 8933 has been updated and revised to reflect new provisions under Public Law 117–169, section 13104.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, Individuals or households, and Farms.

Estimated Number of Respondents: 250.

Estimated Time per Respondent: 17 hours 31 min.

Estimated Total Annual Burden Hours: 4,380.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–29002 Filed 1–3–24; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 231206–0289]

RIN 0648–BM32

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from US Wind, Inc., (US Wind) for Incidental Take Regulations (ITR) and an associated Letter of Authorization (LOA) pursuant to the Marine Mammal Protection Act (MMPA). The requested regulations would govern the authorization of take, by Level A harassment and Level B harassment, of small number of marine mammals over the course of 5 years (2025–2029) incidental to construction of the Maryland Offshore Wind Project offshore of Maryland within the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area OCS–A 0490 (Lease Area) and associated Export Cable Routes. Project activities likely to result in incidental take include impact pile driving and site assessment surveys using high-resolution geophysical (HRG) equipment. NMFS requests comments on its proposed rule. NMFS will consider public comments prior to making any final decision on the promulgation of the requested ITR and issuance of the LOA; agency responses to public comments will be summarized in the final notice of our decision. The proposed regulations, if issued, would be effective January 1, 2025 through December 31, 2029.

DATES: Comments and information must be received no later than February 5, 2024.

ADDRESSES: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0110 in the Search box. (note: copying and pasting the FDMS Docket Number directly from this document may not yield search results). Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of US Wind's Incidental Take Authorization (ITA) application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This proposed rule would provide a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to construction of the Maryland Offshore Wind Project (hereafter, ''Project'') within the BOEM Renewable Energy Development Lease Area and along export cable corridors to landfall locations in Delaware. NMFS received a request from US Wind for 5-year regulations and a LOA that would authorize take of individuals of 19 species of marine mammals (5 species by Level A harassment and Level B harassment and 14 species by Level B harassment only), comprising 20 stocks, incidental to US Wind's construction activities. No mortality or serious injury is anticipated or proposed for authorization. Please see below for definitions of harassment. Please see the Estimated Take of Marine Mammals section below for definitions of relevant terms.

Legal Authority for the Proposed Action

The 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, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

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, the availability of the species or stocks for taking for certain subsistence uses (referred to as ''mitigation''), and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

As noted above, no serious injury or mortality is anticipated or proposed for authorization in this proposed rule. Relevant definitions of MMPA statutory and regulatory terms are included below:

- *Citizen*—individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) (50 CFR 216.103);
- *Take*—to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362; 50 CFR 216.3);
- *Incidental taking*—an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable, or accidental (50 CFR 216.103);
- *Serious injury*—any injury that will likely result in mortality (50 CFR 216.3);
- *Level A harassment*—any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362); and
- *Level B harassment*—any act of pursuit, torment, or annoyance which has the potential to disturb a marine

mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362).

Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for proposing and, if appropriate, issuing 5-year regulations and associated LOA. This proposed rule also establishes required mitigation, monitoring, and reporting requirements for US Wind's activities.

Summary of Major Provisions Within the Proposed Action

The major provisions within this proposed rule are as follows:

- Authorize take of marine mammals by Level A harassment and/or Level B harassment;
- No mortality or serious injury of any marine mammal is proposed to be authorized;
- Establish a seasonal moratorium on pile driving during the months of highest North Atlantic right whale (*Eubalaena glacialis*) presence in the project area (December 1–April 30);
- Require both visual and passive acoustic monitoring by trained, NMFS-approved Protected Species Observers (PSOs) and Passive Acoustic Monitoring (PAM) operators before, during, and after impact pile driving and HRG surveys;
- Require training for all US Wind personnel that would clearly articulate all relevant responsibilities, communication procedures, marine mammal monitoring and mitigation protocols, reporting protocols, safety, operational procedures, and requirements of the ITA and ensure that all requirements are clearly understood by all participating parties;
- Require the use of sound attenuation device(s) during all foundation installation activities to reduce noise levels;
- Delay the start of foundation installation if a North Atlantic right whale is observed at any distance by a PSO or acoustically detected within certain distances;
- Delay the start of foundation installation if other marine mammals are observed entering or within their respective clearance zones;
- Shut down pile driving (if feasible) if a North Atlantic right whale is observed or if other marine mammals enter their respective shut down zones;
- Shut down HRG survey equipment that may impact marine mammals if a marine mammal enters their respective shut down zones;
- Conduct sound field verification during impact pile driving to ensure in situ noise levels are not exceeding those modeled;
- Implement soft starts for impact pile driving;
- Implement ramp-up for HRG site characterization survey equipment;
- Increase awareness of North Atlantic right whale presence through monitoring of the appropriate networks and very high-frequency (VHF) Channel 16, as well as reporting any sightings to the sighting network;
- Implement various vessel strike avoidance measures;
- Implement Best Management Practices (BMPs) during fisheries monitoring surveys, such as removing gear from the water if marine mammals are considered at-risk or are interacting with gear; and
- Require frequent scheduled and situational reporting including, but not limited to, information regarding activities occurring, marine mammal observations and acoustic detections, and sound field verification monitoring results.

Under section 105(a)(1) of the MMPA, failure to comply with these requirements or any other requirements in a regulation or permit implementing the MMPA may result in civil monetary penalties. Pursuant to 50 CFR 216.106, violations may also result in suspension or withdrawal of the LOA for the project. Knowing violations may result in criminal penalties under section 105(b) of the MMPA.

National Environmental Policy Act (NEPA)

To comply with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate the proposed action (*i.e.,* promulgation of regulations and subsequent issuance of a 5-year LOA) and alternatives with respect to potential impacts on the human environment.

Accordingly, NMFS plans to adopt the BOEM Environmental Impact Statement (EIS), provided our independent evaluation of the document finds that it includes adequate information analyzing the effects of promulgating the proposed regulations and LOA issuance on the human environment. NMFS is a cooperating agency on BOEM's EIS. BOEM's draft EIS, ''Maryland Offshore Wind Project Draft Environmental Impact Statement (DEIS) for Commercial Wind Lease OCS–A 0490'', was made available for public comment on October 6, 2023 (88 FR 69658) and is available at *https://www.boem.gov/renewable-energy/state-activities/maryland-offshore-wind.* The DEIS had a 45-day public comment period open from October 6, 2023 to November 20, 2023. Additionally, BOEM held two in-person public meetings on October 24, 2023 in Ocean City, Maryland and October 26, 2023 in Dagsboro, Delaware and two virtual public meetings on October 19, 2023 and October 30, 2023.

Information contained within US Wind's ITA application and this **Federal Register** document provide the environmental information related to these proposed regulations and associated 5-year LOA for public review and comment. NMFS will review all comments submitted in response to this notice of proposed rulemaking prior to concluding the NEPA process or making a final decision on the requested 5-year ITR and LOA.

Fixing America's Surface Transportation Act (FAST–41)

This project is covered under Title 41 of the Fixing America's Surface Transportation Act, or ''FAST–41.'' FAST–41 includes a suite of provisions designed to expedite the environmental review for covered infrastructure projects, including enhanced interagency coordination as well as milestone tracking on the public-facing Permitting Dashboard. FAST–41 also places a 2-year limitations period on any judicial claim that challenges the validity of a Federal agency decision to issue or deny an authorization for a FAST–41 covered project (42 U.S.C. 4370m–6(a)(1)(A)).

US Wind's proposed project is listed on the Permitting Dashboard. Milestones and schedules related to the environmental review and permitting for the US Wind's Maryland Offshore Wind Project can be found at *https://www.permits.performance.gov/permitting-project/maryland-offshore-wind-project.*

Summary of Request

On August 31, 2022, NMFS received a request from US Wind, a Baltimore, Maryland-based company registered in the State of Delaware and subsidiary of Renexia SpA, for the promulgation of regulations and issuance of an associated 5-year LOA to take marine mammals incidental to construction activities associated with implementation of the Project offshore of Maryland in the BOEM Lease Area OCS–A 0490 and associated export cable routes. The request was for the incidental, but not intentional, taking of a small number of 19 marine mammal species (comprising 20 stocks). Neither

US Wind nor NMFS expects serious injury or mortality to result from the specified activities nor is any proposed for authorization.

US Wind is proposing to develop the Project over the course of three construction campaigns. In total, the 3 campaigns would result in a maximum of 114 wind turbine generators (WTGs), 4 offshore substations (OSS) positions, and 1 Meteorological tower (Met tower) within the Lease Area. The initial construction campaign, MarWin, would include installation of approximately 21 WTGs, 1 OSS, and cable landing infrastructure during the first year of activities in the most eastern part of the Lease Area. The second construction campaign, Momentum Wind, would take place during the second year of construction activities and include installation of approximately 55 WTGs, 2 OSSs, and a Met tower immediately to the west of MarWin. The third construction campaign, currently unnamed and referred to as Future Development, would occur during the third year of construction activities and include the installation of approximately 38 WTGs and 1 OSS in the most western portion of the Lease Area. Four offshore export cables would transmit electricity generated by the WTGs from the Lease Area to onshore transmission systems within Delaware Seashore State Park.

In response to our comments and following extensive information exchanges with NMFS, US Wind submitted a final, revised application on March 31, 2023 that NMFS deemed adequate and complete on April 3, 2023. The final version of the application is available on NMFS' website at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-wind-inc-construction-and-operation-maryland-offshore-wind.* On May 2, 2023, NMFS published a notice of receipt (NOR) of the adequate and complete application in the **Federal Register** (88 FR 27463), requesting comments and soliciting information related to US Wind's request during a 30-day public comment period. During the NOR public comment period, NMFS received comment letters from 77 private citizens, 6 non-governmental organizations, and 1 state government organization (Delaware Department of Natural Resources and Environmental Control). NMFS has reviewed all submitted material and has taken these into consideration during the drafting of this proposed rule.

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations (87 FR 46921, August 1, 2022) to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event (UME). Should a final vessel speed rule be issued and become effective during the effective period of this ITR (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. The responsibility to comply with the applicable requirements of any vessel speed rule would become effective immediately upon the effective date of any final vessel speed rule and when notice is published on the effective date, NMFS would also notify US Wind if the measures in the speed rule were to supersede any of the measures in the MMPA authorization such that they were no longer required.

On September 6, 2023, and September 11, 2023, US Wind submitted supplemental information related to its pilot whale and seal take analyses. The corresponding memos, entitled ''US Wind NMFS Request for Information (RFI) Response Memo and Maryland Offshore Wind Project Revised Requested Take Tables'' are available on our website.

Description of the Specified Activities

Overview

US Wind has proposed to construct and operate a wind energy facility, the Project, in the Atlantic Ocean in lease area OCS–A 0490, offshore Maryland. The Project would allow the State of Maryland to advance Federal and State offshore wind targets as well as reduce greenhouse gas emissions, increase grid reliability, and support economic development growth in the region. The Project consists of three construction campaigns including MarWin, located in the southeastern portion of the Lease Area with the potential to generate approximately 300 megawatts (MW) of energy, Momentum Wind, located immediately west of MarWin with the potential to generate approximately 808 MW of energy, and Future Development, which encompasses buildout of the remainder of the Lease Area and for which generation capacity has yet to be determined. Once operational, MarWin and Momentum Wind would advance the State of Maryland's renewable energy goals of 50 percent by the year 2030, with the full buildout of the Lease Area further achieving renewable energy targets. US Wind also anticipates completing the Future Development campaign within the effective period of the proposed rule.

The Project would consist of several different types of permanent offshore infrastructure, including up to 114 WTGs (*e.g.,* 18–MW model with a 250-meter (m) rotor diameter platform), four OSSs, a Met tower, and inter-array and export cables. The Project is divided into three construction campaigns: MarWin, Momentum Wind, and Future Development (table 1). MarWin would occupy approximately 46.6 km^2 (11,515 acres) which would include approximately 21 WTGs and 1 OSS. The MarWin campaign, as well as subsequent Momentum Wind and Future Development, includes monopiles as the one potential WTG foundation type. For each campaign, the OSS would be supported by monopiles or jacket foundations with skirt piles. Skirt piles are post-piled pin piles. Jacket foundations are placed on the seabed and pin piles are driven into jacket pile guides, which are known as skirts. Table 1 provides a summary of each construction campaign.

TABLE 1—US WIND'S ANTICIPATED CONSTRUCTION CAMPAIGN SCHEDULE

Campaigns	Construction year	Number of 11-m monopiles for WTGs	Number 3-m pin piles for OSS jacket foundations [1]	Number of 1.8-m pin piles for Met tower	Onshore export cables	Offshore substations
MarWin	1 (2025)	21	4 (1 jacket)	0	4	1
Momentum	2 (2026)	55	8 (2 jackets)	3	0	2

TABLE 1—US WIND'S ANTICIPATED CONSTRUCTION CAMPAIGN SCHEDULE—Continued

Campaigns	Construction year	Number of 11-m monopiles for WTGs	Number 3-m pin piles for OSS jacket foundations [1]	Number of 1.8-m pin piles for Met tower	Onshore export cables	Offshore substations
Future Development	3 (2027)	38	4 (1 jacket)	0	0	1

[1] Potential OSS foundations could also include monopile and suction bucket jacket foundations.

Strings of WTGs will connect with the OSS via a submarine inter-array cable transmission system. Up to four high-voltage alternating current (HVAC) offshore export cables would be installed during the MarWin campaign, spanning approximately 65–97 km (40–60 miles (mi)) in length, dependent on the location of the OSS and the final routing. The Export Cable Corridor (ECC) would transmit electricity from the OSS to one or two landfall sites in Delaware Seashore State Park.

The second construction campaign, Momentum Wind, would contain approximately 55 WTGs, 2 OSSs, and 1 Met tower within an area of approximately 142.4 km^2 (35,188 acres). The Met tower would be supported by pin pile foundations. During the third construction campaign, Future Development, approximately 38 WTGs and 1 OSS would be installed within an area of approximately 80.3 km^2 (19,843 acres).

US Wind plans to install all monopile or pin pile foundations via impact pile driving. If suction bucket foundations are selected for OSS jacket foundations, impact pile driving would not be necessary. US Wind would also conduct the following supporting activities: temporary installation and subsequent removal of gravity cells to connect the offshore export cables to onshore facilities; permanently install scour protection around all foundations; permanently install and perform trenching, laying, and burial activities associated with the export cables from the OSSs to shore-based switching and sub-stations and WTG inter-array cables; and, during years 2 and 3, performance of HRG surveys using active acoustic sources with frequencies of less than 180 kilohertz (kHz). Vessels would transit within the project area and anticipated between ports (Port Norris, NJ; Lewes, DE; Ocean City, MD; Baltimore, MD; Hampton Roads, VA; and Cape Charles, VA) and the Lease Area and cable corridors to transport crew, supplies, and materials to support construction activities.

Up to four offshore export cables would be located among up to two corridors from the OSSs and connect to the planned landfall at either 3R's Beach or Tower Road within Delaware Seashore State Park. When the cables reach the landfall site, they would be pulled into a cable duct generated by horizontal directional drilling (HDD), which would route the cables under the existing beach to subterranean transition vaults. All offshore cables would be connected to onshore export cables at the sea-to-shore transition point via trenchless installation (*i.e.,* underground tunneling utilizing micro tunnel boring installation methodologies).

Fishery monitoring surveys, performed via recreational boat-based surveys and a pot-based monitoring approach using ropeless gear technology, would be conducted in conjunction with the University of Maryland Center for Environmental Science (UMCES) to enhance existing data for specific benthic and pelagic species of concern.

Dates and Duration

As described above, US Wind would conduct 3 campaigns over 3 years: MarWin, Momentum Wind, and Future Development (table 1). In case of any delays to any campaign, NMFS is proposing a 5-year effective date of the proposed regulations and LOA; however, no more work in any given year or total over 5 years other than described here would occur. US Wind anticipates that activities with the potential to result in incidental take of marine mammals would occur throughout 3 of the 5 years (2025–2027) of the proposed regulations which, if issued, would be effective from January 1, 2025 through December 31, 2029. Based on US Wind's proposed schedule, the installation of all permanent structures would be completed by the end of November 2027. More specifically, US Wind would install piles only between May 1 and November 30. Also, the installation of WTG foundations and OSS 3-m pin pile jacket foundations is expected to occur during daylight hours between May 1 and November 30 of 2025, 2026, and 2027 (table 2); however, NMFS is proposing to allow nighttime pile driving if US Wind submits, and NMFS approves, an Alternative Monitoring Plan, as discussed below. The single Met tower foundation would be installed in 2026 (table 2).

US Wind anticipates HRG surveys using sparkers and boomers to occur during 2026 and 2027. Up to 14 days of HRG survey activity are planned from April through June 2026 during the Momentum campaign. In addition, up to 14 days of HRG survey activity are planned from April through June 2027 during the Future Development campaign. No HRG surveys using equipment that has the potential to result in the harassment of marine mammals (*e.g.,* sparkers or boomers) are planned for the MarWin campaign during year 1.

TABLE 2—US WIND'S ANTICIPATED CONSTRUCTION AND OPERATIONS SCHEDULE DURING THE EFFECTIVE PERIOD OF THE LOA [1]

Project activity	Construction campaign	Expected timing [2]	Expected duration (approximate)
Scour Protection Pre-Installation	MarWin	*Year 1:* Q2 through Q3 of 2025	21 days.
	Momentum Wind	*Year 2:* Q2 through Q3 of 2026	55 days.
	Future Development	*Year 3:* Q2 through Q3 of 2027	38 days.
WTG Foundation Installation [3 5]	MarWin	*Year 1:* June through September of 2025	21 days.
	Momentum Wind	*Year 2:* May through August of 2026	55 days.
	Future Development	*Year 3:* June through August of 2027	38 days.
Scour Protection Post-Installation	MarWin	*Year 1:* Q2 through Q3 of 2025	42 days.
	Momentum Wind	*Year 2:* Q2 through Q3 of 2026	110 days.
	Future Development	*Year 3:* Q2 through Q3 of 2027	76 days.
OSS Foundation Installation [3 5]	MarWin	*Year 1:* July of 2025	1 day.

TABLE 2—US WIND'S ANTICIPATED CONSTRUCTION AND OPERATIONS SCHEDULE DURING THE EFFECTIVE PERIOD OF THE LOA [1]—Continued

Project activity	Construction campaign	Expected timing [2]	Expected duration (approximate)
	Momentum Wind	*Year 2:* July of 2026	2 days.
	Future Development	*Year 3:* July of 2027	1 day.
Met Tower Installation [3 4]	Momentum Wind	*Year 2:* June of 2026	1 day.
HRG Surveys [5]	Momentum Wind	*Year 2:* Q2 through Q3 of 2026	14 days.
	Future Development	*Year 3:* Q2 through Q3 of 2027	14 days.
Site Preparation	n/a	Not anticipated	n/a.
Inter-array Cable Installation	Marwin	*Year 1:* Q2 through Q4 of 2025	42 days.
	Momentum Wind	*Year 2:* Q2 through Q4 of 2026	110 days.
	Future Development	*Year 3:* Q2 through Q4 of 2027	76 days.
Export Cable Installation	MarWin	*Year 1:* Q1 through Q4 of 2025	60 days.
	Momentum Wind	*Year 2:* Q1 through Q4 of 2026	120 days (2 cables).
	Future Development	*Year 3:* Q1 through Q4 of 2027	60 days.
Fishery Monitoring Surveys	MarWin	Q1 through Q4 Years 1–5	16 days/year for commercial pot surveys.
	Momentum Wind		12 days/year for recreational surveys.
	Future Development		

[1] While the effective period of the proposed regulations would extend through December 31, 2029, no activities are proposed to occur in 2028 or 2029 by US Wind so these were not included in this table.

[2] Installation timing will depend on vessel availability, contractor selection, weather, and more. Year 1 is anticipated to be 2025, year 2 to be 2026, and year 3 to be 2027, although these are subject to change per the factors identified. Note: ''Q1, Q2, Q3, and Q4'' each refer to a quarter of the year, starting in January and comprising 3 months each. Therefore, Q1 represents January through March, Q2 represents April through June, Q3 represents July through September, and Q4 represents October through December.

[3] The months identified here represent US Wind's planned schedule; however, in case of unanticipated delays, foundation installation may occur between May 1 and November 30 annually.

[4] US Wind anticipates that all WTGs, OSS, and Met tower foundations will be installed by November 30, 2027; however, unanticipated delays may require some foundation pile driving to occur in years 4 (2028) or 5 (2029).

[5] Represents HRG surveys that may result in take of marine mammals. US Wind plans to conduct HRG surveys that do not have the potential to result in take of marine mammals during Q2 through Q3 of year 1 given those surveys would utilize equipment all operating over 180kHz or have no acoustic output.

Specific Geographic Region

US Wind's specified activities would occur within the Northeast U.S. Continental Shelf Large Marine Ecosystem (NES LME), an area of approximately 260,000 km^2 (64,247,399.2 acres) from Cape Hatteras in the south to the Gulf of Maine in the north. Specifically, the specified geographic region is the Middle-Atlantic Bight (Mid-Atlantic Bight) sub-area of the NES LME. The Mid-Atlantic Bight encompasses waters of the Atlantic Ocean between Cape Hatteras, North Carolina and Martha's Vineyard, Massachusetts, extending westward into the Atlantic to the 100-m isobath. In the Mid-Atlantic Bight, the pattern of sediment distribution is relatively simple. The continental shelf south of New England is broad and flat, dominated by fine grained sediments. Most of the surficial sediments on the continental shelf are sands and gravels. Silts and clays predominate at and beyond the shelf edge, with most of the slope being 70–100 percent mud. Fine sediments are also common in the shelf valleys leading to the submarine canyons. There are some larger materials, left by retreating glaciers, along the coast of Long Island and to the north and east.

Primary productivity is highest in the nearshore and estuarine regions, with coastal phytoplankton blooms initiating in the winter and summer, although the timing and spatial extent of blooms varies from year to year. The relatively productive continental shelf supports a wide variety of fauna and flora, making it important habitat for various benthic and fish species and marine mammals, including but not limited to, fin whales, humpback whales, North Atlantic right whales, and other large whales as they migrate through the area. The Cold Pool, a bottom-trapped cold, nutrient-rich pool and distinct oceanographic feature of the Mid-Atlantic Bight, creates habitat that provides thermal refuge to cold water species in the area (Lentz, 2017). Cold Pool waters, when upwelled to the surface, promote primary productivity within this region (Voynova *et al.,* 2013).

The seafloor in the Project Area is dynamic and changes over time due to current, tidal flows, and wave conditions. As the Lease Area is located just south of the mouth of Delaware Bay, the seafloor bedforms and sediments are affected by interactions between storm-driven currents, storm discharges from Delaware Bay, and tidal flows associated with Delaware Bay (US Wind, 2023b). The Lease Area is defined by medium-coarse grained sand at the surface and sub-surface interlays of clay and gravel (Alpine, 2015). The most prominent bathymetric features of the Lease Area are ridges and swales offshore of the Delmarva Peninsula that extend seaward from Delaware Bay (US Wind, 2023b). Sand ripples are present throughout the Project area. Sediment within the onshore export cable corridor is composed of predominantly silt-sand mixed with medium-coarse grained sand (US Wind, 2023b). The bottom habitat of Indian River Bay, through which the export cable route may pass through, is relatively flat in elevation and comprises fine to course-grained sands area.

The benthic habitat of the Project Area contains a variety of seafloor substrates, physical features, and associated benthic organisms. The benthic macrofaunal community of the Lease Area is dominated by polychaetes and oligochaete worms yet may also include sand dollars, sea stars, tube anemones, hermit crabs, rock crabs, moon snails, nassa snails, surf clams, sea scallops, shrimp, and ocean quahog (Guida *et al.,* 2017).

Additional information on the underwater environment's physical resources can be found in the COP for the Maryland Offshore Wind Project (US Wind, 2023b) available at: *https://www.boem.gov/renewable-energy/state-activities/maryland-offshore-wind-construction-and-operations-plan.*

US Wind would construct the Project in Federal and State waters offshore of Maryland within the BOEM Lease Area OCS–A 0490 and associated export cable routes (figure 1). The Lease Area covers approximately 323.7 square kilometers (km^2) (80,000 acres) and is located approximately 18.5 km offshore of Maryland. The water depths in the Lease Area range from 13 m along the western lease border to 41.5 m (43 to 136.1 feet (ft)) along the southeast corner of the lease area while depths along the export cable routes range from 10 m to 45 m (33 to 148 ft). Mean sea

surface temperatures range from 42 to 75.8 degrees Fahrenheit (°F; 5.56 to 24.3 degrees Celsius (°C), while the depth-average annual water temperature is 58.2 °F (14.6 °C). Cables would come ashore at 3Rs Beach or Tower Road within Delaware Seashore State Park. The Project Area is defined as the Lease Area and export cable route area.

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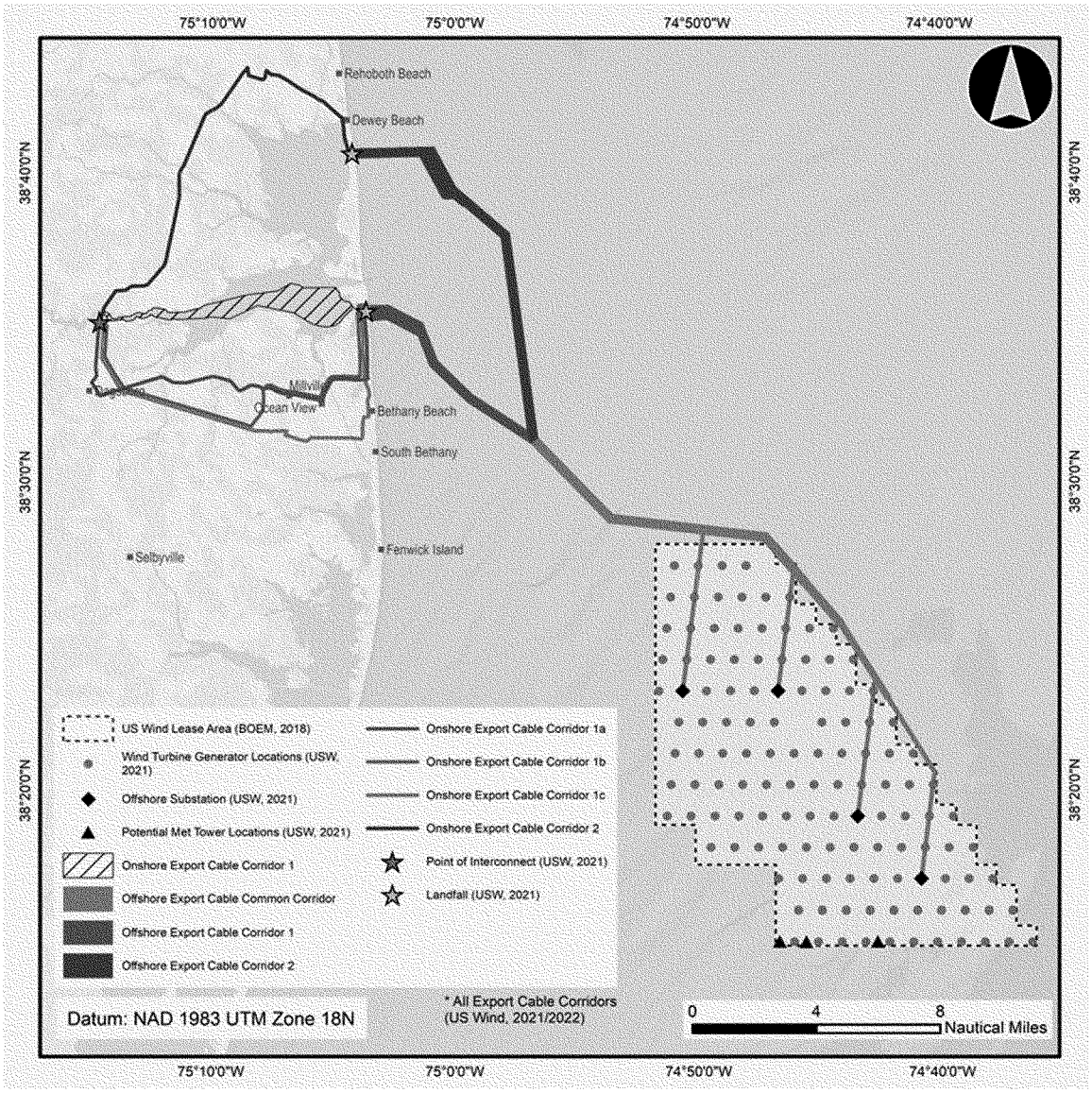

Figure 1 -- The Maryland Offshore Wind Project Area

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Detailed Description of the Specified Activity

Below, we provide detailed descriptions of US Wind's planned activities, explicitly noting those that are anticipated to result in the take of marine mammals and for which incidental take authorization is requested. Additionally, a brief explanation is provided for those activities that are not expected to result in the take of marine mammals.

WTG, OSS, and Met Tower Foundations

US Wind proposes to install up to 114 WTGs on monopile foundations, 4 OSSs on 3-m pin pile jacket foundations, and one Met tower on a 1.8-m pin pile foundation. US Wind is also considering monopile foundations and suction bucket jacket foundations for OSSs, although 3-m pin pile jacket foundations are the most likely foundation type. All WTG and OSS foundations would be installed between May 1 and November 30 in 2025 (MarWin), 2026 (Momentum Wind), and 2027 (Future Development) (refer back to table 1). No pile driving would occur December 1–April 30. For purposes of this proposed rule, US Wind assumed all foundations would be installed using an impact hammer, unless US Wind

uses gravity suction bucket-based jacket foundations for OSSs.

A WTG monopile foundation typically consists of a coated single steel tubular section, with several sections of rolled steel plate welded together. Each monopile would have a maximum diameter of 11 m (36 ft). WTGs would be spaced approximately 0.77 nautical miles (nmi; 1.42 km) in an east-west direction and 1.02 nmi (1.89 km) in a north-south direction and driven to a maximum penetration depth of 50 m (164 ft) below the seafloor (US Wind, 2023a). Monopile foundations would consist of a monopile with an integrated or separate transition piece. US Wind would install rock scour protection around the base of the monopile foundations prior to or following installation to minimize scour around the foundation bases (US Wind, 2023). Monopile foundations would be installed using an MHU 4400 impact hammer at a maximum hammer energy of 4,400 kJ. US Wind anticipates that one monopile will be installed per day at a rate of approximately 2 hours of active pile driving time per monopile, though two or more monopile installations per day may be possible depending on operational limitations and environmental conditions (table 3).

Monopile, pin pile jacket, and gravity suction-bucket jacket foundations are technically and economically feasible for OSSs. Up to four OSSs would be installed via impact pile driving (monopile and pin pile jacket foundations) or dewatering process to sink suction buckets to the appropriate depth. Rock scour protection would be applied after foundation installation.

Monopile foundations for the OSSs would have a maximum diameter of 11 m (36 ft) and maximum pile penetration depth of 40 m (131 ft). Monopile foundations would have a separate transition piece with a number of J-tubes to support and protect cables as well as to connect the inter-array cables and the offshore export cable to the OSS. If monopiles are selected for the OSSs, monopiles would be installed through impact pile driving according to the same methods as described for WTG monopile foundations.

Jacket foundations with pin piles, if selected for OSS design, may be pre-piled or post-piled using pin piles with a maximum diameter of 3-m (9.8 ft). A pre-piled jacket would involve pin piles pre-installed in the seabed using a template. A post-piled jacket foundation is formed by a steel lattice construction (comprising tubular steel members and welded joints) secured to the seabed by means of hollow steel pin piles attached to the jacket where the pin piles have been driven through jacket skirts (skirt piles). Each jacket structure may have three, four, or six legs. A four-leg OSS with a post-piled pin pile jacket foundation is the most likely design and was selected for modeling impacts to marine mammals from OSS installation. Each jacket foundation would consist of up to four pin piles. In total, US Wind would install up to 4 OSSs for a total of 16 pin piles. Up to four 3-m pin piles would be installed per day using an impact hammer with a maximum hammer energy 1,500 kJ (table 3). Pin piles would have a maximum diameter of 3 m (9.8 ft) each and would be installed vertically.

US Wind plans to install one Met tower to serve as a permanent metocean monitoring station. The Met tower foundation would be a Braced Caisson design, in which one main steel pile would be supported laterally by two steel supporting (bracing) piles. The main steel pin pile would have a maximum diameter of 1.8 m (72 in) and the two bracing pin piles would have a maximum diameter of 1.5 m (60 in). US Wind assumed bracing pin piles would be 1.8 m in diameter for the purposes of modeling impacts of installation on marine mammals. The main caisson and bracing piles would be installed using an impact hammer with a maximum energy of 500 kJ at a rate of approximately 2 hours per pin over the course of 2 days (table 3). The Met tower would include measurement devices to record weather conditions, such as wind and waves, in the Project Area. US Wind identified three potential locations for placement of the Met tower along the southern edge of the Lease Area, as shown in figure 1–2 of the ITA application.

If US Wind installs suction bucket jacket foundations, they would have a maximum diameter of 15 m (49 ft) and pile penetration depth of 15 m (49 ft). Suction bucket jacket foundations would be installed through a dewatering process which generates pressure that draws the buckets to the desired depth. The process to install a suction bucket foundation does not produce elevated noise levels that could harass marine mammals; therefore, no take from this activity is anticipated to occur or is proposed to be authorized. Installation is not expected to result in take of marine mammals. Suction bucket foundations are not further discussed.

TABLE 3—IMPACT PILE DRIVING SCHEDULE

Pile type	Project component	Max hammer energy (kJ) [1]	Number of hammer blows	Piling time duration per pile (min)	Piling time duration per day (min)	Number piles/day
11-m monopile	WTG	1,100	600	120	120	1
		2,200	2,400			
		3,300	[2] 1,800			
3-m pin pile jacket foundations	OSS	1,500	19,200	120	480	4
1.8-m Steel Bracing Caisson pile [3]	Met tower	500	2,988	120	360	1
1.8-m Steel Bracing pile [3]						2

[1] Assumes MHU 4400 hammer.
[2] US Wind has proposed a hammer strike energy progression for impact pile driving of monopiles, beginning at a hammer energy of 1,100 kJ to an energy of 3,300 kJ, although the maximum hammer energy possible (4,400 kJ) was used and scaled in the modeling.
[3] A bracing caisson design has one main pile supported laterally by two bracing piles. The bracing caisson pile and bracing piles for the Met tower are pin piles.

While pre-piling preparatory work and post-piling activities could be ongoing at one foundation position as pile driving is occurring at another position, no concurrent/simultaneous pile driving of foundations would occur (see *Dates and Duration* section).

Installation of foundations is anticipated to result in the take of marine mammals due to noise generated during pile driving. Proposed mitigation, monitoring, and reporting measures for impact pile driving are described in detail later in this document (see Proposed Mitigation and Proposed Monitoring and Reporting).

US Wind anticipates the 21 WTGs to be installed during the MarWin campaign would become operational by December 31, 2025. The 55 WTGs to be installed during the Momentum Wind

campaign would become operational by December 31, 2026, and the 38 WTGs to be installed during the Future Development campaign would become operational by December 31, 2027 (table 2).

HRG Surveys

US Wind plans on conducting HRG surveys to identify any seabed debris or unexploded ordnance (UXO), confirm previously surveyed site conditions prior to cable installation, meet BOEM or other agency requirements for additional surveys, and to refine or (microsite) locations of construction footprints, WTG and OSS foundations, and cables. US Wind has committed to not detonating any UXOs. US Wind would prepare an avoidance plan for working around UXOs and conduct micro-siting surveys to identify any UXOs in the area. Only the micro-siting surveys have the potential to result in harassment of marine mammals and would be limited to the Lease Area. Pre-construction and UXO HRG surveys would utilize equipment that have operating frequencies that are above relevant marine mammal hearing thresholds or no acoustic output (*e.g.,* magnetometers). Take is not anticipated from the use of this equipment; therefore, pre-construction and UXO HRG surveys are not analyzed further.

HRG micro-siting surveys would occur within the Lease Area, focusing on the inter-array cable layout, as well as along the offshore export cable corridors, if necessary. US Wind estimates approximately 14 days of HRG micro-siting survey effort per year from April through June during years 2 and 3 (Momentum Wind in 2026, Future Development in 2027) and only during daylight hours. HRG micro-siting surveys would be conducted using one vessel at a time. Up to 111.1 km of survey lines would be surveyed per vessel each survey day at approximately 7.4 km/hour (4 knots (kn)) during daylight hours. Acoustic equipment described above (multibeam echosounders, side scan sonars, and marine magnetometers) may be used during micro-siting surveys as well as non-impulsive ultra-short baseline positioning equipment (*i.e.,* Ultra-Short BaseLine (USBL) and other parametric sub-bottom profilers), shallow penetration sub-bottom profilers (SBPs) (*e.g.,* Innomar SES–2000 non-parametric SBP), and medium penetration SBPs (*e.g.,* sparkers and boomers). Take is not anticipated resulting from the use of ultra-short baseline position equipment or the Innomar SBP as these equipment types have a very narrow beam width which limits acoustic propagation, and these sources are not analyzed further.

Of the HRG equipment types proposed for use during micro-siting surveys, the following sources have the potential to result in take of marine mammals:

- Medium penetration SBPs (boomers) to map deeper subsurface stratigraphy as needed. A boomer is a broad-band sound source operating in the 0.2 kHz to 15 kHz frequency range. This system is typically mounted on a sled and towed behind the vessel.
- Medium penetration SBPs (sparkers) to map deeper subsurface stratigraphy as needed. A sparker creates acoustic pulses from 0.05 kHz to 3 kHz omni-directionally from the source that can penetrate several hundred meters into the seafloor. These are typically towed behind the vessel with adjacent hydrophone arrays to receive the return signals.

Table 4 provides a list of the equipment specifications for the medium penetration SBPs that may result in take of marine mammals during HRG micro-siting surveys. Equipment with operating frequencies above 180 kHz are not discussed further because they are outside the general hearing range of marine mammals and therefore do not have the potential to cause harassment. Although US Wind has proposed a beamwidth of 100 degrees for the Geo Spark sparker, NMFS has determined that a 180-degree beamwidth is more appropriate for this analysis, as sparkers are considered omnidirectional sources (Ruppel *et al.,* 2022). Additionally, US Wind proposed an RMS source level of 219 decibels (dB), based on a manufacturer specification. Because it was not clear which operating energy, tip configuration, or specific sparker model this source level was based on, and also because the manufacturer-provided source levels are not well-documented, NMFS considers the well-documented measurements for a wide variety of sparker configurations from Crocker and Fratantonio (2016) to be the best-available data for use in deriving appropriate proxy source levels. Further, the RMS source levels are given directly in Crocker and Fratantonio (2016), thus mitigating uncertainty associated with deriving RMS levels from peak levels. For these reasons, we have instead used an RMS source level of 206 dB, based on Crocker and Fratantonio (2016) and a 3 dB adjustment to account for the potential use of two 400 tip decks. Source characteristics and details of the source proxy are found in Table 4, and its footnotes below. The net result of NMFS's changes to the proposed methodology is an increase of the Level B isopleth from 50.1 m to 200 m.

Proposed mitigation, monitoring, and reporting measures for HRG micro-siting surveys are described in detail later in this document (see Proposed Mitigation and Proposed Monitoring and Reporting).

TABLE 4—SUMMARY OF REPRESENTATIVE HRG MICRO-SITING SURVEY EQUIPMENT THAT MAY RESULT IN TAKE OF MARINE MAMMALS [1]

HRG system	Representative survey equipment	Operating frequencies (kHz)	Peak source level (dB_{peak})	RMS source level (dB_{RMS})	Pulse duration (ms)	Repetition rate (Hz)	Beamwidth (degrees)
Medium- penetration SBP	Applied Acoustic S Boomer [2]	0.1–5	211	205	0.6	3	80
	AA Dura Spark 400 tip (500 J) [3] ...	0.3–4	214	206	2.3	2	180

dB = decibels; Hz = hertz.

[1] Of note, NMFS has performed a preliminary review of a report submitted by Rand (2023), that includes measurements of the Geo-Marine Geo-Source 400 sparker (400 tip, 800 J), and suggests that NMFS is assuming lower source and received levels than appropriate in its assessments of HRG impacts. NMFS has determined that the values in our assessment remain appropriate, based on the model methodology (*i.e.,* source level propagated using spherical spreading) here predicting a peak level 3 dB louder than the maximum measured peak levels at the closest measurement range in Rand (2023). NMFS will continue reviewing any available data relevant to these sources.

[2] Crocker and Fratantonio (2016) provide Applied Acoustics S Boomer measurements. Frequency and repetition rate of the Applied Acoustics S Boomer verified by survey contractors.

[3] AA Dura-Spark 400 tip used as a proxy due to similar configuration and energy to the Geo-spark 2000. See Table 10 in Crocker and Fratantonio (2016) source levels for 500 J setting and 400 tips. Based on previous survey experience, US Wind expects to operate the Geo-spark at 400–500 J per 400 tip deck, with the possibility of one or two total 400 tip decks (*i.e.,* 400–1000 J total energy). To account for the potential of two decks, the source level is doubled in energy, which results in the addition of approximately 3 dB (to the 206 dB RMS, as shown in Table 4).

Cable Landfall Construction

US Wind would bring up to four offshore export cables through Indian River Bay to shore to landing locations at 3Rs Beach or Tower Road within the Delaware Seashore State Park (figure 1). The US Wind export cable would be connected to the onshore transmission cable at the landfall locations using horizontal directional drilling (HDD) and a jet plow. Cables would be pulled into cable ducts that would route the cables under the beach to subterranean transition vaults, located in existing developed areas such as parking lots. US Wind evaluated cofferdams at the HDD locations and determined that the use of a gravity cell would be more appropriate for soil conditions as well as avoid the use of a vibratory hammer that would create additional underwater sound. The gravity cell would be lowered onto the seafloor and would not require the walls of the cell to be driven into the seabed (*i.e.,* no pile driving would occur). The HDD drill rig would be set up onshore in an excavated area and the drill would advance to the offshore exit point. The offshore cable would be pulled in through the HDD ducts into the cable jointing/transition vault at the landfall location. The cable installation vessel would then begin laying the cable on the seabed as described in the Cable Laying and Installation section below. Given the work is not expected to produce noise levels that could result in harassment to marine mammals, HDD and gravity cell installation is not expected to result in the take of marine mammals. US Wind did not request, and NMFS is not proposing to authorize, take associated with cable landfall construction; therefore, this activity is not discussed further.

Cable Laying and Installation

Cable burial operations would occur both in the Lease Area and ECCs from the Lease Area to shore. The inter-array cables would connect the WTGs to any one of the OSSs. All WTGs would connect to an OSS in strings of 4–6 WTGs via the inter-array cables. Cables within the ECCs would carry power from the OSSs to shore at the landfall location(s) within Delaware Seashore State Park. The offshore export cables would be buried in the seabed at a target depth of up to 1 m (3.3 ft) to 3 m (9.8 ft), although the exact depth would not exceed 4 m (13.1 ft). Inter-array cable burial operations would be installed to a target depth of 1 m (3.3 ft) to 2 m (6.6 ft), not to exceed 4 m (13.1 ft) in depth and would follow installation of the WTG and OSS foundations as the foundations must be in place to provide connection points. Offshore cable installation may occur concurrently with foundation installation.

Cable laying, cable installation, and cable burial activities planned to occur during the construction of the Project would include the following methods: offshore export cable pull through the HDD duct, simultaneous lay and burial for cable installation through the use of a jet plow, and post-lay burial for cables, as needed. Offshore export cables would be pulled through the HDD duct, as described in the Cable Landfall Construction section above. The inter-array cables would be installed from a dynamically positioned cable installation vessel. US Wind plans to use a jet plow to achieve the target inter-array and offshore cable burial depth. If necessary, post-lay cable burial would be completed through the use of a cable installation support vessel and remotely operated vehicle (ROV) system (US Wind, Inc., 2023a). Areas with cable crossings or hard bottoms may require additional protection measures, such as mattresses, rock placement, or cable protection systems. In shallow areas of cable installation, dredging may be necessary to allow access by the cable lay barge. As the noise levels generated from cable laying and installation work are low, the potential for take of marine mammals to result is discountable. US Wind is not requesting, and NMFS is not proposing, to authorize take associated with cable laying activities. Therefore, cable laying activities are not analyzed further in this document.

Site Preparation and Scour Protection

Site preparation typically includes sand bedform leveling, boulder clearance, pre-lay grapnel runs, and a pre-lay survey to prepare the area for export cable installation. Route clearance activities would be conducted prior to offshore export cable installation. Project activities would include a pre-installation survey and grapnel run along the offshore export cable corridor to remove debris that could impact the cable lay and burial. US Wind does not expect pre-installation seabed preparation, such as leveling, pre-trenching, to be necessary. A pre-lay grapnel run would be conducted along the cable route to remove debris that could impact cable lay and burial.

US Wind would also deposit rock around each foundation as scour protection. Prior to or following the installation of a monopile or jacket foundation for the OSS, a first layer of scour protection rocks will be deployed in a circle around the pile location to stabilize the seabed (US Wind, Inc., 2023a). If suction bucket foundations are selected for OSSs, scour protection would be deployed after buckets reach target penetration depth. A 1–2 m (2–7 ft) thick second layer of larger rocks would be placed for stabilization once the inter-array cables have been pulled into the monopile. Scour protection may also be applied as additional protection for cables after burial.

NMFS does not expect scour protection placement or site preparation work, including pre-lay grapnel runs and pre-lay surveys, to generate noise levels that would cause take of marine mammals. Although not anticipated, any necessary dredging, bedform leveling, or boulder clearance would be extremely localized at any given time, and NMFS expects that any marine mammals would not be exposed at levels or durations likely to disrupt behavioral patterns (*i.e.,* migrating, foraging, calving, *etc.*). Therefore, the potential for the take of marine mammals to result from these activities is so low as to be discountable. US Wind did not request, and NMFS is not proposing, to authorize any takes associated with site preparation and scour protection activities; therefore, they are not analyzed further in this document.

Vessel Operation

US Wind will utilize various types of vessels over the course of the 5-year proposed regulations for surveying, foundation installation, cable installation, WTG and OSS installation, and support activities. US Wind has identified several existing port facilities located in Maryland, Virginia, Delaware, and New Jersey to support offshore construction, assembly and fabrication, crew transfer and logistics, and other operational activities. In addition, some components, materials, and vessels could come from Canadian and European ports. A variety of vessels would be used throughout the construction activities. These range from crew transportation vessels, tugboats, jack-up vessels, cargo ships, and various support vessels (table 5). Details on the vessels, related work, operational speeds, and general trip behavior can be found in table 1–2 of the ITA application and table 4–1 in the COP volume 1.

As part of various vessel-based construction activities, including cable laying and construction material delivery, dynamic positioning thrusters may be utilized to hold vessels in position or move slowly. Sound produced through use of dynamic positioning thrusters is similar to that

produced by transiting vessels, and dynamic positioning thrusters are typically operated either in a similarly predictable manner or used for short durations around stationary activities. Fall pipe vessels may use dynamic positioning thrusters during the installation of scour protection up to 24 hours per day. Jack-up cranes or floating cranes may use dynamic positioning thrusters for up to 4 hours per WTG or OSS installation. Heavy lift and general cargo vessels may use dynamic positioning thrusters for the delivery of Project components from the manufacturing location to the staging/assembly port only while maneuvering in port. Multipurpose offshore supply vessels may also use dynamic positioning thrusters throughout the day during the pre-lay grapnel run boulder clearance and cable burial. Jack-up or accommodation vessels may use dynamic positioning thrusters while constructing housing for offshore works, yet only while maneuvering to the site, which would last approximately 2 hours per WTG or OSS. Dynamic positioning thrusters may also be used by vessels throughout the day for pre-installation, geophysical and geotechnical verification surveys, cable installation, placement of scour protection and concrete mattresses, seabed preparation and leveling, and commissioning activities. Sound produced by dynamic positioning thrusters would be preceded by, and associated with, sound from ongoing vessel noise and would be similar in nature; thus, any marine mammals in the vicinity of the activity would be aware of the vessel's presence. Construction-related vessel activity, including the use of dynamic positioning thrusters, is not expected to result in take of marine mammals. US Wind did not request, and NMFS does not propose to authorize, any take associated with vessel activity.

The total vessels expected for use during the Project are provided in table 5; more details can be found in table 1–2 of the ITA application. Assuming the maximum design scenario, approximately 458 total vessel round trips are expected to occur during the MarWin construction campaign (2025), approximately 1,944 total vessel round trips are expected to occur during the Momentum Wind construction campaign (2026), and approximately 1,587 total vessel round trips are expected to occur during the Future Development construction campaign (2027). Vessels would remain on site during construction activities each year to reduce the number of transits between the Project Area and ports.

For operations and maintenance, US Wind anticipates that up to 10 vessels could be used, although not all vessels would operate at the same time or every year. A fall pipe vessel, jack-up vessel, and multi-role survey vessel only be used for non-routine maintenance activities (table 5). Crew transfer vessels would not be likely to operate on a daily basis year-round, however, to be conservative, US Wind assumed that these vessels would operate on a daily basis (table 5).

TABLE 5—TYPE AND NUMBER OF VESSELS ANTICIPATED DURING CONSTRUCTION AND OPERATIONS

Project period	Vessel types	Max number of vessels	Expected maximum annual number of trips [1]
Foundation Installation	Transport, Installation, and Support	5	10
	Crew Transfer	1	26
	Environmental Monitoring and Mitigation	4	52
WTG Installation	Transport, Installation, and Support	4	26
	Crew Transfer Vessel	0	0
Inter-array Cable Installation	Transport, Installation, and Support	4	5
	Crew Transfer Vessel	2	136
OSS Installation	Transport, Installation, and Support	9	16
	Crew Transfer Vessel	0	0
Offshore Export Cable Installation	Transport, Installation, and Support	6	25
	Crew Transfer Vessel	0	0
Operations and Maintenance [2]	Fall Pipe Vessel	1	1
	Crew Transfer Vessel (refueling) [3]	1	20
	Jack-up Vessel	1	1
	Multi-role Survey Vessel [4]	2	13
	Sportfisher Vessel	1	100
	Crew Transfer Vessel	4	365 [5]

[1] Vessels and trips provided represent the maximum number of year 2 trips for each vessel category for each activity from US Wind's OCS air permit application, appendix A.
[2] Potential operation and maintenance ports include Ocean City, MD; Baltimore, MD; and Portsmouth, VA.
[3] Only for non-routine maintenance activities
[4] One of these vessels would be for non-routine maintenance activities
[5] Expected maximum annual number of trips per year for each of the four vessels. Fourth vessel may not be necessary.

While a vessel strike could cause injury or mortality of a marine mammal, NMFS is proposing to require extensive vessel strike avoidance measures that would avoid vessel strikes from occurring (see Proposed Mitigation section). US Wind has not requested, and NMFS is not proposing to authorize, take from vessel strikes.

Fisheries and Benthic Monitoring

Fisheries and benthic monitoring surveys are being designed for the project in collaboration with UMCES. UMCES and US Wind would conduct pot surveys and recreational fishing surveys focusing on evaluating the extent that commercial and recreational fisheries would be impacted due to changes in black sea bass aggregation behaviors during and after Project construction activities. The program includes a trial baseline year to test deployments and collect baseline data in the Project Area as well as a data synthesis year before construction activities would begin. UMCES and US Wind would conduct additional passive acoustic monitoring research for marine mammals.

Pot surveys offshore Ocean City would be conducted monthly from March through November using ropeless fishing gear to collect data on black sea bass relative abundance in the vicinity of the proposed turbine areas. Catches and sizes of other fauna would be assessed as well. US Wind would set strings of 15 pots (six strings, up to 90 pots total) from a commercial fishing vessel, each string with a 1-day duration set period. EdgeTech ropeless gear (EdgeTech, 2023) would allow sets (trawls) of 15 pots without any rope in the water column. Approximately 300–355 m (984–1,165 ft) of 7/16 inch (in) main-line rope would lie on the bottom during the survey. There would also be approximately 1.5 m of 7/16 in line that would form the bridle connecting each pot to the main line. Each string of pots would consist of 15 black sea bass pots, an EdgeTech pot, and an anchor. The EdgeTech pot would be the release pot attached at the end of each trawl. Each survey would consist of six strings deployed for a 1-day soak time (see diagram in Proposed Rule Comment Responses Memo, October 12, 2023). After the 1-day set period, UMCES and US Wind would retrieve the pot trawls by sending a release command from the on-site research vessel to activate an acoustic release on the release pot. Upon activation, the flotation with the attached rope would ascend to the water surface. UMCES and US Wind would recover the floatation connected to the release pot as well as the rest of the pots for that trawl. The pot survey would be conducted under a NMFS Scientific LOA for black sea bass collection research, of which a similar letter was received by UMCES from NMFS Greater Atlantic Regional Fisheries Office (GARFO) for the initial trial baseline year.

UMCES and US Wind would operate the recreational fishing survey off a recreational charter vessel based in Ocean City to compare data on black sea bass and other fauna between two artificial reef/wreck sites and two turbine sites using a Before-After-Control-Impact (BACI) study design. Angling techniques, such as drop bottom fishing and jigging, would be used to collect catch data on black sea bass and other fauna. Six monthly recreational surveys spanning a 2-day window each, would be conducted annually from May through October.

Passive acoustic monitoring research would focus on using rockhopper recorders to determine occurrence and position of large whales and dolphins as well as F–POD (full waveform capture Pod) devices to detect tonal echolocation clicks of small cetaceans in the Lease Area. The goal of the research would be to distinguish changes in marine mammal behavior due to natural inter-annual variation versus behaviors influenced by wind facility operations. US Wind and UMCES would use a before-during-after gradient design involving 2 years of monitoring in each period before, during, and after Project construction, from 2023 to 2029. The Rockhopper recorder would sample at 200 kHz for baleen whales and dolphins while the F–POD would detect echolocation clicks of small cetaceans. Rockhopper recorders would include a localization array with the Lease Area to allow the positions of calling North Atlantic right whales, humpback whales, and dolphins to be detected. Innovasea receivers would also be attached at up to four mooring sites within the Lease Area to examine spatiotemporal patterns of previously tagged fish, such as Atlantic sturgeon, white sharks, and sand tiger sharks.

Given the gear used (ropeless pot and hook and line), the fishery surveys present little risk to marine mammals (although some hook and line entanglement has been documented in marine mammals). To further minimize this already low risk of interaction, US Wind has proposed, and NMFS has included in the proposed rule, mitigation and monitoring measures to avoid taking marine mammals, including, but not limited to, monitoring for marine mammals before and during fishing/survey activities, not deploying, pulling gear, or fishing in certain circumstances, limiting tow times, and fully repairing nets and lines. All vessel captains and crew would also abide by the vessel strike avoidance measures outlined in § 217.344(b) of this rule. A full description of mitigation measures can be found in the Proposed Mitigation section.

With the implementation of these measures, US Wind does not anticipate, and NMFS is not proposing to authorize, take of marine mammals incidental to research pot and recreational surveys. Given no take is anticipated from these surveys, impacts from fishery surveys will not be discussed further in this document (with the exception of the description of measures in the Proposed Mitigation section).

Description of Marine Mammals in the Geographic Area

Thirty-eight marine mammal species under NMFS' jurisdiction have geographic ranges within the western North Atlantic OCS (Hayes *et al.,* 2023). However, for reasons described below, US Wind has requested, and NMFS proposes to authorize, take of only 19 species (comprising 20 stocks) of marine mammals. Sections 3 and 4 of US Wind's ITA application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions in the application instead of reprinting the information.

Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Of the 38 marine mammal species and/or stocks with geographic ranges that include the Project Area (*i.e.,* found in the coastal and offshore waters of Maryland), 19 species are not expected to be present or are considered rare or unexpected in the Project Area based on sighting and distribution data (see table 3–1 in US Wind's ITA application). Specifically, the following cetacean species are known to occur off of Maryland but are not expected to occur in the Project Area due to the location of preferred habitat outside the Lease Area and ECCs, based on the best available information, and therefore US Wind did not request, and NMFS is not proposing to authorize take, of these species: Blue whale (*Balaenoptera musculus*), Cuvier's beaked whale (*Ziphius cavirostris*), four species of Mesoplodont beaked whales (*Mesoplodon densitostris, M. europaeus, M. mirus,* and *M. bidens*), Atlantic white-sided dolphin (*Lagenorhynchus acutus*), Clymene dolphin (*Stenella clymene*), dwarf sperm whale (*Kogia sima*), false killer whale (*Pseudorca crassidens*), Fraser's dolphin (*Lagenodelphis hosei*), melon-headed whale (*Peponocephala electra*), northern bottlenose whale (*Hyperoodon ampullatus*), pygmy killer whale (*Feresa attenuata*), pygmy sperm whale (*Kogia breviceps*), sperm whale (*Physeter macrocephalus*), spinner dolphin (*Stenella longirostris*), and white-beaked dolphin (*Lagenorhynchus albirostris*). Two species of phocid pinnipeds are also uncommon in the Project Area, including: harp seals (*Pagophilus groenlandica*) and hooded seals (*Cystophora cristata*). However, harp seals are known to strand in coastal Maryland. Therefore, NMFS is

proposing to authorize take of harp seals.

In addition, the Florida manatee (*Trichechus manatus,* a sub-species of the West Indian manatee) has been previously documented as an occasional visitor to the Mid-Atlantic region during summer months (Morgan *et al.,* 2002; Cummings *et al.,* 2014). However, manatees are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this document.

Table 6 lists all species or stocks for which take is expected and proposed to be authorized for this action and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined as ''the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population'' (16 U.S.C. 1362(20)). While no mortality is anticipated or proposed to be authorized, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats. Take for 19 species (20 stocks) in table 6 is expected and proposed to be authorized for this activity.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock, or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico SARs. All values presented in table 6 are the most recent available at the time of publication and, unless noted otherwise, use NMFS' final 2022 SARs (Hayes *et al.,* 2023) available online at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports.*

TABLE 6—MARINE MAMMAL SPECIES THAT MAY OCCUR IN THE PROJECT AREA AND BE TAKEN, BY HARASSMENT

Common name [1]	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [2]	Stock abundance (*CV,* Nmin, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Order Artiodactyla—Cetacea—Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E, D, Y	338 (0; 332; 2020); 356 (346–363, 2022) [5].	0.7	[6] 31.2
Family Balaenopteridae (rorquals):						
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E, D, Y	6,802 (0.24, 5573, 2016)	11	1.8
Sei whale	*Balaenoptera borealis*	Nova Scotia	E, D, Y	6,292 (1.02, 3098, 2016)	6.2	0.8
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal	-, -, N	21,968 (0.31, 17,002, 2016).	170	10.6
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-, -, Y	1,396 (0, 1,380, 2016)	22	12.15
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale [7]	*Orcinus orca*	Western North Atlantic	-, -, N	UNK (UNK, UNK, 2016)	UNK	0
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	-, -, N	39,215 (0.3, 30,627, 2016).	306	29
Short-finned pilot whale	*Globicephala macrorhynchus*	Western North Atlantic	-, -, Y	28,924 (0.24, 23,637, 2016).	236	136
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic Offshore	-, -, N	62,851 (0.23, 51,914, 2016).	519	28
Bottlenose dolphin	*Tursiops truncatus*	Northern Migratory Coastal	-, -, Y	6,639 (0.41, 4,759, 2016)	48	12.2–21.5
Common dolphin	*Delphinus delphis*	Western North Atlantic	-, -, N	172,897 (0.21, 145,216, 2016).	1,452	390
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic	-, -, N	39,921 (0.27, 32,032, 2016).	320	0
Pantropical spotted dolphin	*Stenella attenuata*	Western North Atlantic	-, D, N	6,593 (0.52, 4,367, 2016)	44	0
Risso's dolphin	*Grampus griseus*	Western North Atlantic	-, -, N	35,215 (0.19, 30,051, 2016).	301	34
Rough-toothed dolphin [7]	*Steno bredanensis*	Western North Atlantic	-, -, N	136 (1, 67, 2016)	0.7	0
Striped dolphin [7]	*Stenella coeruleoalba*	Western North Atlantic	-, -, N	67,036 (0.29, 52,939, 2016).	529	0
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-, -, N	95,543 (0.31, 74,034, 2016).	851	164
Order Carnivora—Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Western North Atlantic	-, -, N	61,336 (0.08, 57,637, 2018).	1,729	339
Gray seal [8]	*Halichoerus grypus*	Western North Atlantic	-, -, N	27,300 (0.22, 22,785, 2016).	1,389	4453
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic	-, -, N	7.6M (UNK, 7.1M, 2019)	426,000	178,573

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://www.marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

[2] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR, or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[3] NMFS 2022 marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is the coefficient of variation; Nmin is the minimum estimate of stock abundance.

[4] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike).

[5] The current SAR includes an estimated population (N_{best} 338) based on sighting history through November 2020 (Hayes *et al.,* 2023). In October 2023, NMFS released a technical report identifying that the North Atlantic right whale population size based on sighting history through 2022 was 356 whales, with a 95 percent credible interval ranging from 346 to 363 (Linden, 2023).

[6] Total annual average observed North Atlantic right whale mortality during the period 2016–2020 was 8.1 animals and annual average observed fishery mortality was 5.7 animals. Numbers presented in this table (31.2 total mortality and 22 fishery mortality) are 2015–2019 estimated annual means, accounting for undetected mortality and serious injury.

[7] US Wind did not request take of these species; however, their exposure analysis demonstrates there is a low risk of harassment. Although these species are rare in the project area, NMFS is proposing to authorize a small amount of Level B harassment in the case of potential presence during pile driving.

[8] NMFS' stock abundance estimate (and associated PBR value) applies to the U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

As indicated above, all 19 species and 20 stocks in table 6 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. Three of the marine mammal species for which take is requested are listed as endangered under the ESA, including North Atlantic right, fin, and sei whales. In addition to what is included in sections 3 and 4 of US Wind's ITA application (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-wind-inc-construction-and-operation-maryland-offshore-wind*), the SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*), and NMFS' website (*https://www.fisheries.noaa.gov/species-directory/marine-mammals*), we provide further detail below informing the baseline for select species (*e.g.,* information regarding current UME and known important habitat areas, such as Biologically Important Areas (BIAs; *https://oceannoise.noaa.gov/biologically-important-areas*) (Van Parijs, 2015)). There are no ESA-designated critical habitats for any species within the project area (*https://www.fisheries.noaa.gov/resource/map/national-esa-critical-habitat-mapper*).

Under the MMPA, a UME is defined as ''a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response'' (16 U.S.C. 1421h(6)). As of July 2023, five UMEs are active. Four of these UMEs are occurring along the U.S. Atlantic coast for various marine mammal species. Of these, the most relevant to the project area are the North Atlantic right whale, humpback whale, and harbor and gray seal UMEs given the prevalence of these species in the project area. More information on UMEs, including all active, closed, or pending, can be found on NMFS' website at *https://www.fisheries.noaa.gov/national/marine-life-distress/active-and-closed-unusual-mortality-events.*

Below, we include information for a subset of the species that presently have an active or recently closed UME occurring along the Atlantic coast or for which there is information available related to areas of biological significance. For the majority of species potentially present in the specific geographic region, NMFS has designated only a single generic stock (*e.g.,* ''western North Atlantic'') for management purposes. This includes the ''Canadian east coast'' stock of minke whales, which includes all minke whales found in U.S. waters and is also a generic stock for management purposes. For humpback and sei whales, NMFS defines stocks on the basis of feeding locations (*i.e.,* Gulf of Maine and Nova Scotia, respectively). However, references to humpback whales and sei whales in this document refer to any individuals of the species that are found in the project area. Any areas of known biological importance (including the BIAs identified in LaBrecque *et al.,* 2015) that overlap spatially (or are adjacent) with the project area are addressed in the species sections below.

North Atlantic Right Whale

The North Atlantic right whale has been listed as Endangered since the ESA's enactment in 1973. The species was recently uplisted from Endangered to Critically Endangered on the International Union for Conservation of Nature (IUCN) Red List of Threatened Species (Cooke, 2020). The uplisting was due to a decrease in population size (Pace *et al.,* 2017), an increase in vessel strikes and entanglements in fixed fishing gear (Daoust *et al.,* 2017; Davis & Brillant, 2019; Knowlton *et al.,* 2012; Knowlton *et al.,* 2022; Moore *et al.,* 2021; Sharp *et al.,* 2019), and a decrease in birth rate (Pettis *et al.,* 2022; Reed *et al.,* 2022). The western Atlantic stock is considered depleted under the MMPA (Hayes *et al.,* 2023). There is a recovery plan (NMFS, 2005) for the North Atlantic right whale, and NMFS completed 5-year reviews of the species in 2012, 2017, and 2022 which concluded no change to the listing status is warranted.

Designated by NMFS as a Species in the Spotlight, the North Atlantic right whale is considered among the species with the greatest risk of extinction in the near future (*https://www.fisheries.noaa.gov/topic/endangered-species-conservation/species-in-the-spotlight*).

The North Atlantic right whale population had only a 2.8-percent recovery rate between 1990 and 2011 and an overall abundance decline of 23.5 percent from 2011 to 2019 (Hayes *et al.,* 2023). Since 2011, the North Atlantic right whale population has been in decline; however, the sharp decrease observed from 2015 to 2020 appears to have slowed, though the right whale population continues to experience annual mortalities above recovery thresholds (Pace *et al.,* 2017; Pace *et al.,* 2021; Linden, 2023). North Atlantic right whale calving rates dropped from 2017 to 2020 with zero births recorded during the 2017–2018 season. The 2020–2021 calving season had the first substantial calving increase in 5 years with 20 calves born (including 2 mortalities) followed by 15 calves during the 2021–2022 calving season and 12 births (including 1 mortality) in 2022–2023 calving season. These data demonstrate that birth rates are increasing. However, mortalities continue to outpace births. Best estimates indicate fewer than 70 reproductively active females remain in the population and adult females experience a lower average survival rate than males (Linden, 2023). In 2023, the total annual average observed North Atlantic right whale mortality increased from 8.1 (which represents 2016–2020) to 31.2 (which represents 2015–2019), however, this updated estimate also accounts for undetected mortality and serious injury (Hayes *et al.,* 2023). Although the predicted number of deaths from the population are lower in recent years (2021–2022) when compared to the high number of deaths

from 2014 to 2020 suggesting a short-term increase in survival, annual mortality rates still exceed PBR (Linden, 2023).

Critical habitat for North Atlantic right whales is not present in the Project Area. However, the Project Area both spatially and temporally overlaps a portion of the migratory corridor BIA within which North Atlantic right whales migrate south to calving grounds generally in November and December, followed by a northward migration (primarily moms with young calves) into feeding areas far north of the Project Area in March and April (LaBrecque *et al.,* 2015; Van Parijs, 2015). North Atlantic right whale foraging may rarely opportunistically occur around the Project Area, yet the region is not considered primary foraging habitat. Engelhaupt *et al.* (2023) documented feeding and socializing behavior off Virginia and North Carolina, just south of the Project Area, suggesting that North Atlantic right whales may use the mid-Atlantic migratory corridor for more than just migration.

NMFS' regulations at 50 CFR 224.105 designated Seasonal Management Areas (SMAs) for North Atlantic right whales in 2008 (73 FR 60173, October 10, 2008). SMAs were developed to reduce the threat of collisions between ships and North Atlantic right whales around their migratory route and calving grounds. The Delaware Bay SMA overlaps with the export cable corridor of the proposed project. This SMA is currently active from November 1 through April 30 of each year and may be used by North Atlantic right whales for migrating and/or feeding. As noted above, NMFS is proposing changes to the North Atlantic right whale speed rule (87 FR 46921, August 1, 2022). Due to the current status of North Atlantic right whales and the spatial proximity overlap of the proposed project with areas of biological significance, (*i.e.,* a migratory corridor, SMA), the potential impacts of the proposed project on North Atlantic right whales warrant particular attention.

During the spring, North Atlantic right whales use the migratory corridor BIA to move north from calving grounds off Georgia and Florida to feeding grounds in New England and Canadian waters (Hayes *et al.,* 2023). Right whales feed primarily on the copepod, *Calanus finmarchicus,* a species whose availability and distribution has changed both spatially and temporally over the last decade due to an oceanographic regime shift that has been ultimately linked to climate change (Meyer-Gutbrod *et al.,* 2021; Record *et al.,* 2019; Sorochan *et al.,* 2019). This distribution change in prey availability has led to shifts in right whale habitat-use patterns over the same time period (Davis *et al.,* 2020; Meyer-Gutbrod *et al.,* 2022; Quintano-Rizzo *et al.,* 2021; O'Brien *et al.,* 2022; Van Parijs *et al.,* 2023) with reduced use of foraging habitats in the Great South Channel and Bay of Fundy and increased use of habitats within Cape Cod Bay and a region south of Martha's Vineyard and Nantucket Islands (Stone *et al.,* 2017; Mayo *et al.,* 2018; Ganley *et al.,* 2019; Record *et al.,* 2019; Meyer-Gutbrod *et al.,* 2021; Van Parijs *et al.,* 2023); these foraging habitats are all located several hundred kilometers north of the project area. In late fall (*i.e.,* November), a portion of the right whale population (including pregnant females) typically departs the feeding grounds in the North Atlantic, moves south along the migratory corridor BIA, including through the Project Area, to right whale calving grounds off Georgia and Florida. Observations of these transitions in right whale habitat use, variability in seasonal presence in identified core habitats, and utilization of habitat outside of previously focused survey effort prompted the formation of a NMFS' Expert Working Group, which identified current data collection efforts, data gaps, and provided recommendations for future survey and research efforts (Oleson *et al.,* 2020). Recent research indicates understanding of their movement patterns remains incomplete and not all of the population undergoes a consistent annual migration (Davis *et al.,* 2017; Gowan *et al.,* 2019; Krzystan *et al.,* 2018). Non-calving females may remain in the feeding grounds, during the winter in the years preceding and following the birth of a calf to increase their energy stores (Gowen *et al.,* 2019).

Although North Atlantic right whales move seasonally between foraging and calving grounds, Davis *et al.* (2017) acoustically detected right whales along the coast from Cape Hatteras, NC, United States to Nova Scotia, Canada year-round, suggesting that North Atlantic right whale use of the mid-Atlantic and southeast has increased since 2010 (Davis *et al.,* 2017). North Atlantic right whale presence in the Project Area is predominately seasonal with individuals likely to be transient and migrating through the area. Bailey *et al.* (2018) acoustically detected the year-round presence of North Atlantic right whales in the vicinity of the Project Area, with a maximum abundance during the late winter and early spring. In addition, a monitoring buoy, deployed by UMCES offshore of Ocean City Maryland in 2022, acoustically detected the presence of North Atlantic right whales in the lease area from November through January, with the highest frequency of confirmed detections occurring during the months of December and January (Woods Hole Oceanographic Institute, 2022). Visual surveys also confirm a maximum abundance of North Atlantic right whales in the vicinity of the Lease Area during the winter (Barco *et al.,* 2015; Williams *et al.,* 2015). As part of the Mid-Atlantic Baseline Studies Project and Maryland Project, Williams *et al.* (2015) conducted standardized aerial and boat-based surveys of the Delaware, Maryland, Virginia Wind Energy Areas (WEAs), and visually observed North Atlantic right whales in the lease area during the months of February and March. Based upon year-round aerial surveys conducted from 2013 to 2015, Barco *et al.* (2015) observed the largest numbers of North Atlantic right whales in the Maryland WEA during the month of January, suggesting that the area may be a destination for non-breeding individuals and pulses of North Atlantic right whales may travel through the region. Barco *et al.* (2015) also documented North Atlantic right whale open mouth behavior, which is consistent with, though not necessarily indicative of, feeding. As part of the U.S. Navy's Marine Species Monitoring Program, HDR has conducted aerial and vessel-based surveys for large whales off Virginia and North Carolina since 2015. The majority of North Atlantic right whale sightings have occurred in these areas, just south of the Project Area, during the months of January–March (Aschettino *et al.,* 2023). The highest density month for North Atlantic right whales in the vicinity of the lease area is February (0.00076 individuals/km (0.54 nmi grid square)) (Roberts *et al.,* 2023).

Since 2017, 98 dead, seriously injured, or sublethally injured or ill North Atlantic right whales along the United States and Canadian coasts have been documented, necessitating a UME declaration and investigation. The leading category for the cause of death for this ongoing UME is ''human interaction,'' specifically from entanglements or vessel strikes. As of October 30, 2023, there have been 36 confirmed mortalities (dead, stranded, or floaters) and 34 seriously injured free-swimming whales for a total of 70 whales. Beginning on October 14, 2022, the UME also considers animals with sublethal injury or illness bringing the total number of whales in the UME to

115. Approximately 42 percent of the population is known to be in reduced health (Hamilton *et al.,* 2021) likely contributing to smaller body sizes at maturation, making them more susceptible to threats and reducing fecundity (Moore *et al.,* 2021; Reed *et al.,* 2022; Stewart *et al.,* 2022). More information about the North Atlantic right whale UME is available online at *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event.*

Humpback Whale

Humpback whales were listed as endangered under the Endangered Species Conservation Act (ESCA) in June 1970. In 1973, the ESA replaced the ESCA, and humpbacks continued to be listed as endangered. On September 8, 2016, NMFS divided the once single species into 14 distinct population segments (DPS), removed the species-level listing, and, in its place, listed four DPSs as endangered and one DPS as threatened (81 FR 62259, September 8, 2016). The remaining nine DPSs were not listed. The West Indies DPS, which is not listed under the ESA, is the only DPS of humpback whales that is expected to occur in the Project Area. Bettridge *et al.* (2015) estimated the size of the West Indies DPS population at 12,312 (95 percent confidence interval (CI) 8,688–15,954) whales in 2004–2005, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.,* 2003; Smith *et al.,* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.,* 2015).

The Project Area does not overlap with any BIAs or other important areas for the humpback whales. A humpback whale feeding BIA extends throughout the Gulf of Maine, Stellwagen Bank, and Great South Channel from May through December, annually (LaBrecque *et al.,* 2015). However, this BIA is located approximately 556.2 km (345.6 mi) north of the Project Area, and thus, would not be impacted by project activities.

Humpback whale presence in the mid-Atlantic varies seasonally. Humpback whales are most typically observed in this region during the winter months (Williams *et al.,* 2015d; Barco *et al.,* 2015) and are known to be migratory off coastal Maryland, moving seasonally between northern feeding grounds in New England and southern calving grounds in the West Indies (Hayes *et al.,* 2023). However, not all humpback whales migrate to the Caribbean during the winter as individuals are sighted in mid- to high-latitude areas during this season (Swingle *et al.,* 1993; Davis *et al.,* 2020). In addition to a migratory pathway, the mid-Atlantic region also represents a supplemental winter feeding ground for juveniles and mature whales (Barco *et al.,* 2002). Records of humpback whales off the U.S. mid-Atlantic coast (New Jersey south to North Carolina) suggest that these waters are used as a winter feeding ground from December through March (Mallette *et al.,* 2017; Barco *et al.,* 2002; LaBrecque *et al.,* 2015) and represent important habitat for juveniles, in particular (Swingle *et al.,* 1993; Wiley *et al.,* 1995).

Acoustic monitoring in the vicinity of the lease area has detected the presence of humpback whales year-round, although detections exhibit similar seasonal trends as visual sightings. Humpback whale detections were lowest during the summer months (June through September), increased through the winter (January through March) and peaked in April (Bailey *et al.,* 2018). Davis *et al.* (2020) also found detections of humpback whales off the mid-Atlantic (Virginia) to peak from January through May. Density modeling (Roberts *et al.,* 2023) confirms April (0.00187 individuals per 1 km (0.54 nmi) grid cell) as the month of the highest average density of humpback whales in the vicinity of the Project Area.

Since January 2016, elevated humpback whale mortalities along the Atlantic coast from Maine to Florida led to the declaration of a UME. As of October 2, 2023, 209 humpback whales have stranded as part of this UME. Partial or full necropsy examinations have been conducted on approximately 90 of the known cases. Of the whales examined, about 40 percent had evidence of human interaction, either ship strike or entanglement. While a portion of the whales have shown evidence of pre-mortem vessel strike, this finding is not consistent across all whales examined and more research is needed. As the humpback whale population has grown, they are seen more often in the mid-Atlantic. Since January 2023, 34 humpbacks have stranded along the east coast of the United States (1 of these stranded in Maryland). These whales may have been following their prey (small fish) which were reportedly close to shore this past winter. These prey also attract fish that are targeted by recreational and commercial fishermen, which increases the number of boats in these areas. More information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/active-and-closed-unusual-mortality-events.*

Fin Whale

Fin whales frequently occur in the waters of the U.S. Atlantic Exclusive Economic Zone (EEZ), principally from Cape Hatteras, North Carolina northward and are distributed in both continental shelf and deep-water habitats (Hayes *et al.,* 2023). Although fin whales are present north of the 35-degree latitude region in every season and are broadly distributed throughout the western North Atlantic for most of the year, densities vary seasonally (Edwards *et al.,* 2015; Hayes *et al.,* 2023). Fin whales typically feed in the Gulf of Maine and the waters surrounding New England, but their mating and calving (and general wintering) areas are largely unknown (Hain *et al.,* 1992; Hayes *et al.,* 2023). Acoustic detections of fin whale singers augment and confirm these visual sighting conclusions for males. Recordings from Massachusetts Bay, New York Bight, and deep-ocean areas have detected some level of fin whale singing from September through June (Watkins *et al.,* 1987; Clark and Gagnon, 2002; Morano *et al.,* 2012). These acoustic observations from both coastal and deep-ocean regions support the conclusion that male fin whales are broadly distributed throughout the western North Atlantic for most of the year (Hayes *et al.,* 2022).

Fin whale feeding BIAs occur offshore of Montauk Point, New York from March to October (2,933 km^2) (Hain *et al.,* 1992; LaBrecque *et al.,* 2015) and year-round in the southern Gulf of Maine (18,015 km^2). However, given the more southerly location of the Project Area (located approximately 364.8 km (226.7 mi) and 546.2 km (339.4 mi) away from these BIAs, respectively), there is no spatial overlap from with these BIAs.

Fin whales were among the most frequently observed baleen whale species during the Maryland Wind Energy Area aerial surveys conducted for the Maryland Department of Natural Resources (MD DNR) by the Virginia Aquarium and Marine Science Center Foundation (Barco *et al.,* 2015), and the most commonly detected baleen whale species during acoustic monitoring surveys from 2014 to 2017 in the Maryland WEA, although the majority of detections were offshore of the WEA (Bailey *et al.,* 2018a). Fin whale abundance in the vicinity of the Project Area peaked during the winter and early spring (Williams *et al.,* 2015d; Barco *et al.,* 2015), with the lowest occurrence documented during summer and early fall (Bailey *et al.,* 2018). Consistent with visual sightings and acoustic detections,

the highest average density of fin whales in the vicinity of the proposed Project Area occurs in January (0.00214 individuals per 1 km (0.54 nmi) grid cell) (Roberts *et al.,* 2023). There is no active fin whale UME.

Minke Whale

Minke whales are common and widely distributed throughout the U.S. Atlantic EEZ (Cetacean and Turtle Assessment Program (CETAP), 1982; Hayes *et al.,* 2022), although their distribution has a strong seasonal component. Individuals have often been detected acoustically in shelf waters from spring to fall and more often detected in deeper offshore waters from winter to spring (Risch *et al.,* 2013). Minke whales are abundant in New England waters from May through September (Pittman *et al.,* 2006; Waring *et al.,* 2014), yet largely absent from these areas during the winter, suggesting the possible existence of a migratory corridor (LaBrecque *et al.,* 2015). A migratory route for minke whales transiting between northern feeding grounds and southern breeding areas may exist to the east of the Project Area, as minke whales may track warmer waters along the continental shelf while migrating (Risch *et al.,* 2014). Risch *et al.* (2014) suggests the presence of a minke whale breeding ground offshore of the southeastern US during the winter.

There are two minke whale feeding BIAs identified in the southern and southwestern section of the Gulf of Maine, including Georges Bank, the Great South Channel, Cape Cod Bay and Massachusetts Bay, Stellwagen Bank, Cape Anne, and Jeffreys Ledge from March through November, annually (LaBrecque *et al.,* 2015). However, these BIAs are approximately 512.1 km (318.2 mi) and 668.8 km (415.6 mi) northwest of the Project Area, respectively, and would not be impacted by the proposed project activities.

Overall, minke whale use of the Project Area is likely highest during fall, winter, and spring months based upon visual sightings and acoustic detections in the vicinity of the lease area during the months of November, January, February, and April (Bailey *et al.,* 2018a; Barco *et al.,* 2015; Williams *et al.,* 2015b). The highest average density of minke whales in the vicinity of the lease area is expected to occur in May (0.00750 individuals per 1 km (0.54 nmi)).

From 2017 through 2022, elevated minke whale mortalities detected along the Atlantic coast from Maine through South Carolina resulted in the declaration of a UME. As of October 2, 2023, a total of 160 minke whale mortalities have occurred during this UME. Full or partial necropsy examinations were conducted on more than 60 percent of the whales. Preliminary findings in several of the whales have shown evidence of human interactions or infectious disease, but these findings are not consistent across all of the minke whales examined, so more research is needed. More information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-minke-whale-unusual-mortality-event-along-atlantic-coast.*

Sei Whale

The Nova Scotia stock of sei whales can be found in deeper waters of the continental shelf edge of the eastern United States and northeastward to south of Newfoundland (Mitchell, 1975; Hain *et al.,* 1985; Hayes *et al.,* 2022). During spring and summer, the stock is mainly concentrated in northern feeding areas, including the Scotian Shelf (Mitchell and Chapman, 1977), the Gulf of Maine, Georges Bank, the Northeast Channel, and south of Nantucket (CETAP, 1982; Kraus *et al.,* 2016; Roberts *et al.,* 2016; Palka *et al.,* 2017; Cholewiak *et al.,* 2018; Hayes *et al.,* 2022). Sei whales have been detected acoustically along the Atlantic Continental Shelf and Slope from south of Cape Hatteras, North Carolina to the Davis Strait, with acoustic occurrence increasing in the mid-Atlantic region since 2010 (Davis *et al.,* 2020). Although their migratory movements are not well understood, sei whales are believed to migrate north in June and July to feeding areas and south in September and October to breeding areas (Mitchell, 1975; CETAP, 1982; Davis *et al.,* 2020). Sei whales generally occur offshore; however, individuals may also move into shallower, more inshore waters (Payne *et al.,* 1990; Halpin *et al.,* 2009; Hayes *et al.,* 2022).

A sei whale feeding BIA occurs in New England waters from May through November (LaBrecque *et al.,* 2015). However, this BIA is located approximately 501.5 km (311.6 mi) north of the Project Area and not likely to be impacted by the Project activities.

Sei whales were sighted infrequently during visual surveys (Williams *et al.,* 2015d) and acoustic monitoring (WHOI, 2022; WHOI, 2023) of the Maryland WEA. The highest average density of sei whales in the vicinity of the lease area is expected to occur during the month of April (0.00061 individuals per 1 km (0.54 nmi) (Roberts *et al.,* 2023). There is no active sei whale UME.

Phocid Seals

Since June 2022, elevated numbers of harbor seal and gray seal mortalities have occurred across the southern and central coast of Maine. This event has been declared a UME. Preliminary testing of samples has found some harbor and gray seals positive for highly pathogenic avian influenza. While the UME is not occurring in the Project Area, the populations affected by the UME are the same as those potentially affected by the project. Information on this UME is available online at *https://www.fisheries.noaa.gov/2022-2023-pinniped-unusual-mortality-event-along-maine-coast.*

The above event was preceded by a different UME, occurring from 2018 to 2020 (closure of the 2018–2020 UME is pending). Beginning in July 2018, elevated numbers of harbor seal and gray seal mortalities occurred across Maine, New Hampshire, and Massachusetts. Additionally, stranded seals have shown clinical signs as far south as Virginia, although not in elevated numbers, therefore the UME investigation encompassed all seal strandings from Maine to Virginia. A total of 3,152 reported strandings (of all species) occurred from July 1, 2018, through March 13, 2020. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted thus far, the main pathogen found in the seals is phocine distemper virus. NMFS is performing additional testing to identify any other factors that may be involved in this UME, which is pending closure. Information on this UME is available online at: *https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019a) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges

(behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 7.

TABLE 7—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65-dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013). For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

NMFS notes that in 2019a, Southall *et al.* recommended new names for hearing groups that are widely recognized. However, this new hearing group classification does not change the weighting functions or acoustic thresholds (*i.e.,* the weighting functions and thresholds in Southall *et al.* (2019a) are identical to NMFS 2018 Revised Technical Guidance). When NMFS updates our Technical Guidance, we will be adopting the updated Southall *et al.* (2019a) hearing group classification.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take of Marine Mammals section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. General background information on marine mammal hearing was provided previously (see the Description of Marine Mammals in the Geographic Area section). Here, the potential effects of sound on marine mammals are discussed.

US Wind has requested, and NMFS proposes to authorize, the take of marine mammals incidental to the construction activities associated with the project area. In their application, US Wind presented their analyses of potential impacts to marine mammals from the acoustic sources. NMFS both carefully reviewed the information provided by US Wind, as well as independently reviewed applicable scientific research and literature and other information to evaluate the potential effects of the Project's activities on marine mammals.

The proposed activities would result in the construction and placement of up to 119 permanent foundations to support WTGs, OSSs, a Met tower, and seafloor mapping using HRG surveys. There are a variety of types and degrees of effects to marine mammals, prey species, and habitat that could occur as a result of the Project. Below we provide a brief description of the types of sound sources that would be generated by the project, the general impacts from these types of activities, and an analysis of the anticipated impacts on marine mammals from the project, with consideration of the proposed mitigation measures.

Description of Sound Sources

This section contains a brief technical background on sound, on the characteristics of certain sound types, and on metrics used in this proposal inasmuch as the information is relevant to the specified activity and to a discussion of the potential effects of the specified activity on marine mammals found later in this document. For general information on sound and its interaction with the marine environment, please see: Au and Hastings, 2008; Richardson *et al.,* 1995; Urick, 1983; as well as the Discovery of Sound in the Sea (DOSITS) website at *https://www.dosits.org.* Sound is a vibration that travels as an acoustic wave through a medium such as a gas, liquid, or solid. Sound waves alternately compress and decompress the medium as the wave travels. These compressions and decompressions are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones (underwater microphones). In water, sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam (narrow beam or directional sources) or sound beams may radiate in all directions (omnidirectional sources).

Sound travels in water more efficiently than almost any other form of energy, making the use of acoustics ideal for the aquatic environment and its inhabitants. In seawater, sound travels at roughly 1,500 meters per second (m/s). In-air, sound waves travel much more slowly, at about 340 m/s. However, the speed of sound can vary by a small amount based on characteristics of the transmission

medium, such as water temperature and salinity. Sound travels in water more efficiently than almost any other form of energy, making the use of acoustics ideal for the aquatic environment and its inhabitants. In seawater, sound travels at roughly 1,500 m/s. In-air, sound waves travel much more slowly, at about 340 m/s. However, the speed of sound can vary by a small amount based on characteristics of the transmission medium, such as water temperature and salinity.

The basic components of a sound wave are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water.

The intensity (or amplitude) of sounds is measured in dB, which are a relative unit of measurement that is used to express the ratio of one value of a power or field to another. Decibels are measured on a logarithmic scale, so a small change in dB corresponds to large changes in sound pressure. For example, a 10-dB increase is a ten-fold increase in acoustic power. A 20-dB increase is then a hundred-fold increase in power and a 30-dB increase is a thousand-fold increase in power. However, a ten-fold increase in acoustic power does not mean that the sound is perceived as being 10 times louder. Decibels are a relative unit comparing two pressures; therefore, a reference pressure must always be indicated. For underwater sound, this is 1 microPascal (µPa). For in-air sound, the reference pressure is 20 microPascal (µPa). The amplitude of a sound can be presented in various ways; however, NMFS typically considers three metrics. In this proposed rule, all decibel levels are referenced to (re) 1µPa.

Sound exposure level (SEL) represents the total energy in a stated frequency band over a stated time interval or event and considers both amplitude and duration of exposure (represented as dB re 1 μPa^2-s). SEL is a cumulative metric; it can be accumulated over a single pulse (for pile driving this is often referred to as single-strike SEL; SEL_{ss}) or calculated over periods containing multiple pulses (SEL_{cum}). Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. The SEL metric is useful because it allows sound exposures of different durations to be related to one another in terms of total acoustic energy. The duration of a sound event and the number of pulses, however, should be specified as there is no accepted standard duration over which the summation of energy is measured.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source and is represented in the same units as the rms sound pressure. Along with SEL, this metric is used in evaluating the potential for PTS (permanent threshold shift) and TTS (temporary threshold shift).

Sounds can be either impulsive or non-impulsive. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward, 1997 in Southall *et al.,* 2007). Please see NMFS *et al.* (2018) and Southall *et al.* (2007, 2019a) for an in-depth discussion of these concepts. Impulsive sound sources (*e.g.,* airguns, explosions, gunshots, sonic booms, impact pile driving) produce signals that are brief (typically considered to be less than 1 second), broadband, atonal transients (American National Standards Institute (ANSI), 1986; ANSI, 2005; Harris, 1998; National Institute for Occupational Safety and Health (NIOSH), 1998; International Organization for Standardization (ISO), 2003) and occur either as isolated events or repeated in some succession. Impulsive sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features. Impulsive sounds are typically intermittent in nature.

Non-impulsive sounds can be tonal, narrowband, or broadband, brief, or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-impulsive sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.,* rapid rise time). Examples of non-impulsive sounds include those produced by vessels, aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems. Sounds are also characterized by their temporal component. Continuous sounds are those whose sound pressure level remains above that of the ambient sound with negligibly small fluctuations in level (NIOSH, 1998; ANSI, 2005) while intermittent sounds are defined as sounds with interrupted levels of low or no sound (NIOSH, 1998). NMFS identifies Level B harassment thresholds based on if a sound is continuous or intermittent.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al.,* 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.,* vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 Hz and 50 kHz (International Council for the Exploration of the Sea (ICES), 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for

frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz, and if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals. Human-generated sound is a significant contributor to the acoustic environment in the project location.

Potential Effects of Underwater Sound on Marine Mammals

Anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life from none or minor to potentially severe responses depending on received levels, duration of exposure, behavioral context, and various other factors. Broadly, underwater sound from active acoustic sources, such as those in the Project, can potentially result in one or more of the following: temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, stress, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2003; Nowacek *et al.,* 2007; Southall *et al.,* 2007; Götz *et al.,* 2009). Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to high level underwater sound or as a secondary effect of extreme behavioral reactions (*e.g.,* change in dive profile as a result of an avoidance reaction) caused by exposure to sound include neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007; Zimmer and Tyack, 2007; Tal *et al.,* 2015).

In general, the degree of effect of an acoustic exposure is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure, in addition to the contextual factors of the receiver (*e.g.,* behavioral state at time of exposure, age class, *etc.*). In general, sudden, high-level sounds can cause hearing loss as can longer exposures to lower-level sounds. Moreover, any temporary or permanent loss of hearing will occur almost exclusively for noise within an animal's hearing range. We describe below the specific manifestations of acoustic effects that may occur based on the activities proposed by US Wind. Richardson *et al.* (1995) described zones of increasing intensity of effect that might be expected to occur in relation to distance from a source and assuming that the signal is within an animal's hearing range. First (at the greatest distance) is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone (closer to the receiving animal) corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. The third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking (*i.e.,* when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold) may occur; the masking zone may be highly variable in size.

Below, we provide additional detail regarding potential impacts on marine mammals and their habitat from noise in general, starting with hearing impairment, as well as from the specific activities US Wind plans to conduct, to the degree it is available (noting that there is limited information regarding the impacts of offshore wind construction on marine mammals).

Hearing Threshold Shift

Marine mammals exposed to high-intensity sound or to lower-intensity sound for prolonged periods can experience hearing threshold shift (TS), which NMFS defines as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level expressed in decibels (NMFS, 2018). Threshold shifts can be permanent, in which case there is an irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range or temporary, in which there is reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range and the animal's hearing threshold would fully recover over time (Southall *et al.,* 2019a). Repeated sound exposure that leads to TTS could cause PTS.

When PTS occurs, there can be physical damage to the sound receptors in the ear (*i.e.,* tissue damage) whereas TTS represents primarily tissue fatigue and is reversible (Henderson *et al.,* 2008). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.,* Ward, 1997; Southall *et al.,* 2019a). Therefore, NMFS does not consider TTS to constitute auditory injury. Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans. However, such relationships are assumed to be similar to those in humans and other terrestrial mammals. Noise exposure can result in either a permanent shift in hearing thresholds from baseline (a 40-dB threshold shift approximates a PTS onset; *e.g.,* Kryter *et al.,* 1966; Miller, 1974; Henderson *et al.,* 2008) or a temporary, recoverable shift in hearing that returns to baseline (a 6-dB threshold shift approximates a TTS onset; *e.g.,* Southall *et al.,* 2019a). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds, expressed in the unweighted peak sound pressure level metric (PK), for impulsive sounds (such as impact pile driving pulses) are at least 6 dB higher than the TTS thresholds and the weighted PTS cumulative sound exposure level thresholds are 15 (impulsive sound) to 20 (non-impulsive sounds) dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.,* 2019a). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, PTS is less likely to occur as a result of these activities; however, it is possible, and a small amount has been proposed for authorization for several species.

TTS is the mildest form of hearing impairment that can occur during exposure to sound, with a TTS of 6 dB considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000; Finneran *et al.,* 2002). While

experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. There is data on sound levels and durations necessary to elicit mild TTS for marine mammals, but recovery is complicated to predict and dependent on multiple factors.

Marine mammal hearing plays a critical role in communication with conspecifics, and interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious depending on the degree of interference of marine mammals hearing. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that occurs during a time where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical (*e.g.,* for successful mother/calf interactions, consistent detection of prey) could have more serious impacts.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocaena asiaeorientalis*)) and six species of pinnipeds (northern elephant seal (*Mirounga angustirostris*), harbor seal, ring seal, spotted seal, bearded seal, and California sea lion (*Zalophus californianus*)) that were exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise with limited number of exposure to impulsive sources such as seismic airguns or impact pile driving) in laboratory settings (Southall *et al.,* 2019a). There is currently no data available on noise-induced hearing loss for mysticetes. For summaries of data on TTS or PTS in marine mammals or for further discussion of TTS or PTS onset thresholds, please see Southall *et al.* (2019a) and NMFS (2018).

Recent studies with captive odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale) have observed increases in hearing threshold levels when individuals received a warning sound prior to exposure to a relatively loud sound (Nachtigall and Supin, 2013; Nachtigall and Supin, 2015; Nachtigall *et al.,* 2016a; Nachtigall *et al.,* 2016b; Nachtigall *et al.,* 2016c; Finneran, 2018; Nachtigall *et al.,* 2018). These studies suggest that captive animals have a mechanism to reduce hearing sensitivity prior to impending loud sounds. Hearing change was observed to be frequency dependent and Finneran (2018) suggests hearing attenuation occurs within the cochlea or auditory nerve. Based on these observations on captive odontocetes, the authors suggest that wild animals may have a mechanism to self-mitigate the impacts of noise exposure by dampening their hearing during prolonged exposures of loud sound or if conditioned to anticipate intense sounds (Finneran, 2018; Nachtigall *et al.,* 2018).

Behavioral Effects

Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007). A review of marine mammal responses to anthropogenic sound was first conducted by Richardson (1995). More recent reviews address studies conducted since 1995 and focused on observations where the received sound level of the exposed marine mammal(s) was known or could be estimated (Nowacek *et al.,* 2007; DeRuiter *et al.,* 2013; Ellison *et al.,* 2012; Gomez *et al.,* 2016). Gomez *et al.* (2016) conducted a review of the literature considering the contextual information of exposure in addition to received level and found that higher received levels were not always associated with more severe behavioral responses and vice versa. Southall *et al.* (2021) states that results demonstrate that some individuals of different species display clear yet varied responses, some of which have negative implications while others appear to tolerate high levels and that responses may not be fully predictable with simple acoustic exposure metrics (*e.g.,* received sound level). Rather, the authors state that differences among species and individuals along with contextual aspects of exposure (*e.g.,* behavioral state) appear to affect response probability.

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately predisposed to respond to certain sounds in certain ways) (Southall *et al.,* 2019a). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), the similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007; DeRuiter *et al.,* 2013). Individuals (of different age, gender, reproductive status, *etc.*) among most populations will have variable hearing capabilities, and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors, such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Overall, the variability of responses to acoustic stimuli depends on the species receiving the sound, the sound source, and the social, behavioral, or environmental contexts of exposure (*e.g.,* DeRuiter and Doukara, 2012). For example, Goldbogen *et al.* (2013a) demonstrated that individual behavioral state was critically important in determining response of blue whales to sonar, noting that some individuals engaged in deep (greater than 50 m) feeding behavior had greater dive responses than those in shallow feeding or non-feeding conditions. Some blue whales in the Goldbogen *et al.* (2013a) study that were engaged in shallow feeding behavior demonstrated no clear changes in diving or movement even when received levels were high (~160 dB re 1µPa (microPascal)) for exposures to 3–4 kHz sonar signals, while deep feeding and non-feeding whales showed a clear response at exposures at lower received levels of sonar and pseudorandom noise. Southall *et al.* (2011) found that blue whales had a different response to sonar exposure

depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

With respect to distance influencing disturbance, DeRuiter *et al.* (2013) examined behavioral responses of Cuvier's beaked whales to mid-frequency sonar and found that whales responded strongly at low received levels (89–127 dB re 1µPa) by ceasing normal fluking and echolocation, swimming rapidly away, and extending both dive duration and subsequent non-foraging intervals when the sound source was 3.4–9.5 km away. Importantly, this study also showed that whales exposed to a similar range of received levels (78–106 dB re 1µPa) from distant sonar exercises (118 km away) did not elicit such responses, suggesting that context may moderate reactions. Thus, distance from the source is an important variable in influencing the type and degree of behavioral response and this variable is independent of the effect of received levels (*e.g.,* DeRuiter *et al.,* 2013; Dunlop *et al.,* 2017a; Dunlop *et al.,* 2017b; Falcone *et al.,* 2017; Dunlop *et al.,* 2018; Southall *et al.,* 2019a).

Ellison *et al.* (2012) outlined an approach to assessing the effects of sound on marine mammals that incorporates contextual-based factors. The authors recommend considering not just the received level of sound, but also the activity the animal is engaged in at the time the sound is received, the nature and novelty of the sound (*i.e.,* is this a new sound from the animal's perspective), and the distance between the sound source and the animal. They submit that this ''exposure context,'' as described, greatly influences the type of behavioral response exhibited by the animal. Forney *et al.* (2017) also point out that an apparent lack of response (*e.g.,* no displacement or avoidance of a sound source) may not necessarily mean there is no cost to the individual or population, as some resources or habitats may be of such high value that animals may choose to stay, even when experiencing stress or hearing loss. Forney *et al.* (2017) recommend considering both the costs of remaining in an area of noise exposure such as TTS, PTS, or masking, which could lead to an increased risk of predation or other threats or a decreased capability to forage, and the costs of displacement, including potential increased risk of vessel strike, increased risks of predation or competition for resources, or decreased habitat suitable for foraging, resting, or socializing. This sort of contextual information is challenging to predict with accuracy for ongoing activities that occur over large spatial and temporal expanses. However, distance is one contextual factor for which data exist to quantitatively inform a take estimate, and the method for predicting Level B harassment in this rule does consider distance to the source. Other factors are often considered qualitatively in the analysis of the likely consequences of sound exposure where supporting information is available.

Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. However, individuals may be able to compensate for some types and degrees of shifts in behavior, preserving their health and thus their vital rates and population dynamics. For example, New *et al.* (2013) developed a model simulating the complex social, spatial, behavioral, and motivational interactions of coastal bottlenose dolphins in the Moray Firth, Scotland, to assess the biological significance of increased rate of behavioral disruptions caused by vessel traffic. Despite a modeled scenario in which vessel traffic increased from 70 to 470 vessels a year (a six-fold increase in vessel traffic) in response to the construction of a proposed offshore renewables' facility, the dolphins' behavioral time budget, spatial distribution, motivations, and social structure remained unchanged. Similarly, two bottlenose dolphin populations in Australia were also modeled over 5 years against a number of disturbances (Reed *et al.,* 2020) and results indicate that habitat/noise disturbance had little overall impact on population abundances in either location, even in the most extreme impact scenarios modeled. Friedlaender *et al.* (2016) provided the first integration of direct measures of prey distribution and density variables incorporated into across-individual analyses of behavior responses of blue whales to sonar and demonstrated a fivefold increase in the ability to quantify variability in blue whale diving behavior. These results illustrate that responses evaluated without such measurements for foraging animals may be misleading, which again illustrates the context-dependent nature of the probability of response.

The following subsections provide examples of behavioral responses that give an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound, contextual factors, and the wide range of potential acoustic sources to which a marine mammal may be exposed. Behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists, along with contextual factors.

Avoidance and Displacement

Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors and is one of the most obvious manifestations of disturbance in marine mammals (Richardson *et al.,* 1995). For example, gray whales (*Eschrichtius robustus*) and humpback whales are known to change direction—deflecting from customary migratory paths—in order to avoid noise from airgun surveys (Malme *et al.,* 1984; Dunlop *et al.,* 2018). Avoidance is qualitatively different from the flight response but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, *etc.*). Avoidance may be short-term with animals returning to the area once the noise has ceased (*e.g.,* Malme *et al.,* 1984; Bowles *et al.,* 1994; Goold, 1996; Stone *et al.,* 2000; Morton and Symonds, 2002; Gailey *et al.,* 2007; Dähne *et al.,* 2013; Russel *et al.,* 2016). Longer-term displacement is possible, however, which may lead to changes in abundance or distribution patterns of the affected species in the affected region if habituation to the presence of the sound does not occur (*e.g.,* Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006; Forney *et al.,* 2017). Avoidance of marine mammals during the construction of offshore wind facilities (specifically, impact pile driving) has been documented in the literature with some significant variation in the temporal and spatial degree of avoidance and with most studies focused on harbor porpoises as one of the most common marine mammals in European waters (*e.g.,* Tougaard *et al.,* 2009; Dähne *et al.,* 2013; Thompson *et al.,* 2013; Russell *et al.,* 2016; Brandt *et al.,* 2018).

Available information on impacts to marine mammals from pile driving associated with offshore wind is limited to information on harbor porpoises and seals, as the vast majority of this research has occurred at European offshore wind projects where large whales and other odontocete species are uncommon. Harbor porpoises and harbor seals are considered to be behaviorally sensitive species (*e.g.,* Southall *et al.,* 2007) and the effects of wind farm construction in Europe on

these species have been well documented. These species have received particular attention in European waters due to their abundance in the North Sea (Hammond *et al.,* 2002; Nachtsheim *et al.,* 2021). A summary of the literature on documented effects of wind farm construction on harbor porpoise and harbor seals is described below.

Brandt *et al.* (2016) summarized the effects of the construction of eight offshore wind projects within the German North Sea (*i.e.,* Alpha Ventus, BARD Offshore I, Borkum West II, DanTysk, Global Tech I, Meerwind Süd/Ost, Nordsee Ost, and Riffgat) between 2009 and 2013 on harbor porpoises, combining passive acoustic monitoring (PAM) data from 2010 to 2013 and aerial surveys from 2009 to 2013 with data on noise levels associated with pile driving. Results of the analysis revealed significant declines in porpoise detections during pile driving when compared to 25–48 hours before pile driving began, with the magnitude of decline during pile driving clearly decreasing with increasing distances to the construction site. During the majority of projects, significant declines in detections (by at least 20 percent) were found within at least 5–10 km of the pile driving site, with declines at up to 20–30 km of the pile driving site documented in some cases. Similar results demonstrating the long-distance displacement of harbor porpoises (18–25 km) and harbor seals (up to 40 km) during impact pile driving have also been observed during the construction at multiple other European wind farms (Tougaard *et al.,* 2009; Bailey *et al.,* 2010; Dähne *et al.,* 2013; Lucke *et al.,* 2012; Haelters *et al.,* 2015).

While harbor porpoises and seals tend to move several kilometers away from wind farm construction activities, the duration of displacement has been documented to be relatively temporary. In two studies at Horns Rev II using impact pile driving, harbor porpoise returned within 1 to 2 days following cessation of pile driving (Tougaard *et al.,* 2009; Brandt *et al.,* 2011). Similar recovery periods have been noted for harbor seals off England during the construction of four wind farms (Brasseur *et al.,* 2012; Carroll *et al.,* 2010; Hamre *et al.,* 2011; Hastie *et al.,* 2015; Russell *et al.,* 2016). In some cases, an increase in harbor porpoise activity has been documented inside wind farm areas following construction (*e.g.,* Lindeboom *et al.,* 2011). Other studies have noted longer term impacts after impact pile driving. Near Dogger Bank in Germany, harbor porpoises continued to avoid the area for over 2 years after construction began (Gilles *et al.,* 2009). Approximately 10 years after construction of the Nysted wind farm, harbor porpoise abundance had not recovered to the original levels previously seen, although the echolocation activity was noted to have been increasing when compared to the previous monitoring period (Teilmann and Carstensen, 2012). However, overall, there are no indications for a population decline of harbor porpoises in European waters (*e.g.,* Brandt *et al.,* 2016). Notably, where significant differences in displacement and return rates have been identified for these species, the occurrence of secondary project-specific influences such as use of mitigation measures (*e.g.,* bubble curtains, acoustic deterrent devices (ADDs)), or the manner in which species use the habitat in the project area, are likely the driving factors of this variation.

NMFS notes the aforementioned studies from Europe involve installing much smaller piles than US Wind proposes to install and, therefore, we anticipate noise levels from impact pile driving to be louder. For this reason, we anticipate that the greater distances of displacement observed in harbor porpoise and harbor seals documented in Europe are likely to occur off Maryland. However, we do not anticipate any greater severity of response due to harbor porpoise and harbor seal habitat use off Maryland or population-level consequences similar to European findings. In many cases, harbor porpoises and harbor seals are resident to the areas where European wind farms have been constructed. However, off Maryland, harbor porpoises are transient (with higher abundances in winter when foundation installation would not occur) and a very small percentage of the large harbor seal population are only seasonally present with no rookeries established. In summary, we anticipate that harbor porpoise and harbor seals will likely respond to pile driving by moving several kilometers away from the source but return to typical habitat use patterns when pile driving ceases.

Some avoidance behavior of other marine mammal species has been documented to be dependent on distance from the source. As described above, DeRuiter *et al.* (2013) noted that distance from a sound source may moderate marine mammal reactions in their study of Cuvier's beaked whales (an acoustically sensitive species), which showed the whales swimming rapidly and silently away when a sonar signal was 3.4–9.5 km away while showing no such reaction to the same signal when the signal was 118 km away even though the received levels were similar. Tyack *et al.* (1983) conducted playback studies of Surveillance Towed Array Sensor System (SURTASS) low-frequency active (LFA) sonar in a gray whale migratory corridor off California. Similar to North Atlantic right whales, gray whales migrate close to shore (approximately +2 km) and are low-frequency hearing specialists. The LFA sonar source was placed within the gray whale migratory corridor (approximately 2 km offshore) and offshore of most, but not all, migrating whales (approximately 4 km offshore). These locations influenced received levels and distance to the source. For the inshore playbacks, not unexpectedly, the louder the source level of the playback (*i.e.,* the louder the received level), whale avoided the source at greater distances. Specifically, when the source level was 170 dB rms and 178 dB rms, whales avoided the inshore source at ranges of several hundred meters, similar to avoidance responses reported by Malme *et al.* (1983, 1984). Whales exposed to source levels of 185 dB rms demonstrated avoidance levels at ranges of +1 km. Responses to the offshore source broadcasting at source levels of 185 and 200 dB, avoidance responses were greatly reduced. While there was observed deflection from course, in no case did a whale abandon its migratory behavior.

The signal context of the noise exposure has been shown to play an important role in avoidance responses. In a 2007–2008 Bahamas study, playback sounds of a potential predator—a killer whale—resulted in a similar but more pronounced reaction in beaked whales (an acoustically sensitive species), which included longer inter-dive intervals and a sustained straight-line departure of more than 20 km from the area (Boyd *et al.,* 2008; Southall *et al.,* 2009; Tyack *et al.,* 2011). US Wind does not anticipate, and NMFS is not proposing to authorize take of beaked whales and, moreover, the sounds produced by US Wind do not have signal characteristics similar to predators. Therefore, we would not expect such extreme reactions to occur. Southall *et al.* (2011) found that blue whales had a different response to sonar exposure depending on behavioral state, more pronounced when deep feeding/travel modes than when engaged in surface feeding.

One potential consequence of behavioral avoidance is the altered energetic expenditure of marine mammals because energy is required to move and avoid surface vessels or the

sound field associated with active sonar (Frid and Dill, 2002). Most animals can avoid that energetic cost by swimming away at slow speeds or speeds that minimize the cost of transport (Miksis-Olds, 2006), as has been demonstrated in Florida manatees (Miksis-Olds, 2006). Those energetic costs increase, however, when animals shift from a resting state, which is designed to conserve an animal's energy, to an active state that consumes energy the animal would have conserved had it not been disturbed. Marine mammals that have been disturbed by anthropogenic noise and vessel approaches are commonly reported to shift from resting to active behavioral states, which would imply that they incur an energy cost.

Forney *et al.* (2017) detailed the potential effects of noise on marine mammal populations with high site fidelity, including displacement and auditory masking, noting that a lack of observed response does not imply absence of fitness costs and that apparent tolerance of disturbance may have population-level impacts that are less obvious and difficult to document. Avoidance of overlap between disturbing noise and areas and/or times of particular importance for sensitive species may be critical to avoiding population-level impacts because (particularly for animals with high site fidelity) there may be a strong motivation to remain in the area despite negative impacts. Forney *et al.* (2017) stated that, for these animals, remaining in a disturbed area may reflect a lack of alternatives rather than a lack of effects.

A flight response is a dramatic change in normal movement to a directed and rapid movement away from the perceived location of a sound source. The flight response differs from other avoidance responses in the intensity of the response (*e.g.,* directed movement, rate of travel). Relatively little information on flight responses of marine mammals to anthropogenic signals exist, but observations of flight responses to the presence of predators have occurred (Connor and Heithaus, 1996; Frid and Dill, 2002). The result of a flight response could range from brief, temporary exertion and displacement from the area where the signal provokes flight to, in extreme cases, beaked whale strandings (Cox *et al.,* 2006; D'Amico *et al.,* 2009). However, it should be noted that response to a perceived predator does not necessarily invoke flight (Ford and Reeves, 2008), and whether individuals are solitary or in groups may influence the response. Flight responses of marine mammals have been documented in response to mobile high intensity active sonar (*e.g.,* Tyack *et al.,* 2011; DeRuiter *et al.,* 2013; Wensveen *et al.,* 2019), and more severe responses have been documented when sources are moving towards an animal or when they are surprised by unpredictable exposures (Watkins, 1986; Falcone *et al.,* 2017). Generally speaking, however, marine mammals would be expected to be less likely to respond with a flight response to either stationery pile driving (which they can sense is stationery and predictable) or significantly lower-level HRG surveys, unless they are within the area ensonified above behavioral harassment thresholds at the moment the source is turned on (Watkins, 1986; Falcone *et al.,* 2017).

Diving and Foraging

Changes in dive behavior in response to noise exposure can vary widely. They may consist of increased or decreased dive times and surface intervals as well as changes in the rates of ascent and descent during a dive (*e.g.,* Frankel and Clark, 2000; Costa *et al.,* 2003; Ng and Leung, 2003; Nowacek *et al.,* 2004; Goldbogen *et al.,* 2013a; Goldbogen *et al.,* 2013b). Variations in dive behavior may reflect interruptions in biologically significant activities (*e.g.,* foraging) or they may be of little biological significance. Variations in dive behavior may also expose an animal to potentially harmful conditions (*e.g.,* increasing the chance of ship-strike) or may serve as an avoidance response that enhances survivorship. The impact of a variation in diving resulting from an acoustic exposure depends on what the animal is doing at the time of the exposure, the type and magnitude of the response, and the context within which the response occurs (*e.g.,* the surrounding environmental and anthropogenic circumstances).

Nowacek *et al.* (2004) reported disruptions of dive behaviors in foraging North Atlantic right whales when exposed to an alerting stimulus, an action, they noted, that could lead to an increased likelihood of ship strike. The alerting stimulus was in the form of an 18-minute exposure that included three 2-minute signals played three times sequentially. This stimulus was designed with the purpose of providing signals distinct to background noise that serve as localization cues. However, the whales did not respond to playbacks of either right whale social sounds or vessel noise, highlighting the importance of the sound characteristics in producing a behavioral reaction. Although source levels for the proposed pile driving activities may exceed the received level of the alerting stimulus described by Nowacek *et al.* (2004), proposed mitigation strategies (further described in the Proposed Mitigation section) will reduce the severity of response to proposed pile driving activities. Converse to the behavior of North Atlantic right whales, Indo-Pacific humpback dolphins have been observed to dive for longer periods of time in areas where vessels were present and/or approaching (Ng and Leung, 2003). In both of these studies, the influence of the sound exposure cannot be decoupled from the physical presence of a surface vessel, thus complicating interpretations of the relative contribution of each stimulus to the response. Indeed, the presence of surface vessels, their approach, and speed of approach, seemed to be significant factors in the response of the Indo-Pacific humpback dolphins (Ng and Leung, 2003). Low-frequency signals of the Acoustic Thermometry of Ocean Climate (ATOC) sound source were not found to affect dive times of humpback whales in Hawaiian waters (Frankel and Clark, 2000) or to overtly affect elephant seal dives (Costa *et al.,* 2003). They did, however, produce subtle effects that varied in direction and degree among the individual seals, illustrating the equivocal nature of behavioral effects and consequent difficulty in defining and predicting them.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the cessation of secondary indicators of foraging (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007; Southall *et al.,* 2019b). An understanding of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal can facilitate the assessment of whether foraging disruptions are likely to incur fitness consequences (Goldbogen *et al.,* 2013b; Farmer *et al.,* 2018; Pirotta *et al.,* 2018a; Southall *et al.,* 2019a; Pirotta *et al.,* 2021).

Impacts on marine mammal foraging rates from noise exposure have been documented, though there is little data regarding the impacts of offshore turbine construction specifically. Several broader examples follow, and it

is reasonable to expect that exposure to noise produced during the 5 years that the proposed rule would be effective could have similar impacts. Visual tracking, passive acoustic monitoring, and movement recording tags were used to quantify sperm whale behavior prior to, during, and following exposure to airgun arrays at received levels in the range 140–160 dB at distances of 7–13 km, following a phase-in of sound intensity and full array exposures at 1–13 km (Madsen *et al.,* 2006; Miller *et al.,* 2009). Sperm whales did not exhibit horizontal avoidance behavior at the surface. However, foraging behavior may have been affected. The sperm whales exhibited 19 percent less vocal (buzz) rate during full exposure relative to post exposure, and the whale that was approached most closely had an extended resting period and did not resume foraging until the airguns had ceased firing. The remaining whales continued to execute foraging dives throughout exposure; however, swimming movements during foraging dives were 6 percent lower during exposure than during control periods (Miller *et al.,* 2009). Miller *et al.* (2009) noted that more data are required to understand whether the differences were due to exposure or natural variation in sperm whale behavior. Balaenopterid whales exposed to moderate low-frequency signals similar to the ATOC sound source demonstrated no variation in foraging activity (Croll *et al.,* 2001), whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.,* 2004). Although the received SPLs were similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. The source levels of both the proposed construction and HRG activities exceed the source levels of the signals described by Nowacek *et al.* (2004) and Croll *et al.* (2001), and noise generated by US Wind's activities at least partially overlap in frequency with the described signals. Blue whales exposed to mid-frequency sonar in the Southern California Bight were less likely to produce low-frequency calls usually associated with feeding behavior (Melcón *et al.,* 2012). However, Melcón *et al.* (2012) were unable to determine if suppression of low-frequency calls reflected a change in their feeding performance or abandonment of foraging behavior and indicated that implications of the documented responses are unknown. Further, it is not known whether the lower rates of calling actually indicated a reduction in feeding behavior or social contact since the study used data from remotely deployed, passive acoustic monitoring buoys. Results from the 2010–2011 field season of a behavioral response study in Southern California waters indicated that, in some cases and at low received levels, tagged blue whales responded to mid-frequency sonar but that those responses were mild and there was a quick return to their baseline activity (Southall *et al.,* 2011; Southall *et al.,* 2012b; Southall *et al.,* 2019).

Information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal will help better inform a determination of whether foraging disruptions incur fitness consequences. Foraging strategies may impact foraging efficiency, such as by reducing foraging effort and increasing success in prey detection and capture, in turn promoting fitness and allowing individuals to better compensate for foraging disruptions. Surface feeding blue whales did not show a change in behavior in response to mid-frequency simulated and real sonar sources with received levels between 90 and 179 dB re 1 µPa, but deep feeding and non-feeding whales showed temporary reactions including cessation of feeding, reduced initiation of deep foraging dives, generalized avoidance responses, and changes to dive behavior (DeRuiter *et al.,* 2017; Goldbogen *et al.,* 2013b; Sivle *et al.,* 2015). Goldbogen *et al.* (2013b) indicate that disruption of feeding and displacement could impact individual fitness and health. However, for this to be true, we would have to assume that an individual whale could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication that individual fitness and health would be impacted, particularly since unconsumed prey would likely still be available in the environment in most cases following the cessation of acoustic exposure.

Similarly, while the rates of foraging lunges decrease in humpback whales due to sonar exposure, there was variability in the response across individuals, with one animal ceasing to forage completely and another animal starting to forage during the exposure (Sivle *et al.,* 2016). In addition, almost half of the animals that demonstrated avoidance were foraging before the exposure, but the others were not; the animals that avoided while not feeding responded at a slightly lower received level and greater distance than those that were feeding (Wensveen *et al.,* 2017). These findings indicate the behavioral state of the animal and foraging strategies play a role in the type and severity of a behavioral response. For example, when the prey field was mapped and used as a covariate in examining how behavioral state of blue whales is influenced by mid-frequency sound, the response in blue whale deep-feeding behavior was even more apparent, reinforcing the need for contextual variables to be included when assessing behavioral responses (Friedlaender *et al.,* 2016).

Vocalizations and Auditory Masking

Marine mammals vocalize for different purposes and across multiple modes, such as whistling, production of echolocation clicks, calling, and singing. Changes in vocalization behavior in response to anthropogenic noise can occur for any of these modes and may result directly from increased vigilance or a startle response, or from a need to compete with an increase in background noise (see Erbe *et al.,* 2016 review on communication masking), the latter of which is described more below.

For example, in the presence of potentially masking signals, humpback whales and killer whales have been observed to increase the length of their songs (Miller *et al.,* 2000; Fristrup *et al.,* 2003; Foote *et al.,* 2004) and blue whales increased song production (Di Iorio and Clark, 2009), while North Atlantic right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). In some cases, animals may cease or reduce sound production during production of aversive signals (Bowles *et al.,* 1994; Thode *et al.,* 2020; Cerchio *et al.,* 2014; McDonald *et al.,* 1995). Blackwell *et al.* (2015) showed that whales increased calling rates as soon as airgun signals were detectable before ultimately decreasing calling rates at higher received levels.

Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, or navigation) (Richardson *et al.,* 1995; Erbe and Farmer, 2000; Tyack, 2000; Erbe *et al.,* 2016). Masking occurs when the receipt of a sound is interfered with

by another coincident sound at similar frequencies and at similar or higher intensity and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age, or TTS hearing loss), and existing ambient noise and propagation conditions.

Masking these acoustic signals can disturb the behavior of individual animals, groups of animals, or entire populations. Masking can lead to behavioral changes including vocal changes (*e.g.,* Lombard effect, increasing amplitude, or changing frequency), cessation of foraging or lost foraging opportunities, and leaving an area, to both signalers and receivers, in an attempt to compensate for noise levels (Erbe *et al.,* 2016) or because sounds that would typically have triggered a behavior were not detected. In humans, significant masking of tonal signals occurs as a result of exposure to noise in a narrow band of similar frequencies. As the sound level increases, the detection of frequencies above those of the masking stimulus decreases. This principle is expected to apply to marine mammals as well because of common biomechanical cochlear properties across taxa.

Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting behavioral patterns. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which only occurs during the sound exposure. Because masking (without resulting in threshold shift) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (*e.g.,* Clark *et al.,* 2009; Matthews, 2017) and may result in energetic or other costs as animals change their vocalization behavior (*e.g.,* Miller *et al.,* 2000; Foote *et al.,* 2004; Parks *et al.,* 2007; Di Iorio and Clark, 2009; Holt *et al.,* 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.,* 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (*e.g.,* Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds likely to be experienced by marine mammals in the wild (*e.g.,* Branstetter *et al.,* 2013; Cholewiak *et al.,* 2018).

The echolocation calls of toothed whales are subject to masking by high-frequency sound. Human data indicate low-frequency sound can mask high-frequency sounds (*i.e.,* upward masking). Studies on captive odontocetes by Au *et al.* (1974, 1985, 1993) indicate that some species may use various processes to reduce masking effects (*e.g.,* adjustments in echolocation call intensity or frequency as a function of background noise conditions). There is also evidence that the directional hearing abilities of odontocetes are useful in reducing masking at the high-frequencies these cetaceans use to echolocate, but not at the low-to-moderate frequencies they use to communicate (Zaitseva *et al.,* 1980). A study by Nachtigall and Supin (2008) showed that false killer whales adjust their hearing to compensate for ambient sounds and the intensity of returning echolocation signals.

Impacts on signal detection, measured by masked detection thresholds, are not the only important factors to address when considering the potential effects of masking. As marine mammals use sound to recognize conspecifics, prey, predators, or other biologically significant sources (Branstetter *et al.,* 2016), it is also important to understand the impacts of masked recognition thresholds (often called ''informational masking''). Branstetter *et al.* (2016) measured masked recognition thresholds for whistle-like sounds of bottlenose dolphins and observed that they are approximately 4 dB above detection thresholds (energetic masking) for the same signals. Reduced ability to recognize a conspecific call or the acoustic signature of a predator could have severe negative impacts. Branstetter *et al.* (2016) observed that if ''quality communication'' is set at 90 percent recognition the output of communication space models (which are based on 50 percent detection) would likely result in a significant decrease in communication range.

As marine mammals use sound to recognize predators (Allen *et al.,* 2014; Cummings and Thompson, 1971; Curé *et al.,* 2015; Fish and Vania, 1971), the presence of masking noise may also prevent marine mammals from responding to acoustic cues produced by their predators, particularly if it occurs in the same frequency band. For example, harbor seals that reside in the coastal waters off British Columbia are frequently targeted by mammal-eating killer whales. The seals acoustically discriminate between the calls of mammal-eating and fish-eating killer whales (Deecke *et al.,* 2002), a capability that should increase survivorship while reducing the energy required to attend to all killer whale calls. Similarly, sperm whales (Curé *et al.,* 2016; Isojunno *et al.,* 2016), long-finned pilot whales (Visser *et al.,* 2016), and humpback whales (Curé *et al.,* 2015) changed their behavior in response to killer whale vocalization playbacks; these findings indicate that some recognition of predator cues could be missed if the killer whale vocalizations were masked. The potential effects of masked predator acoustic cues depend on the duration of the masking noise and the likelihood of a marine mammal encountering a predator during the time that detection and recognition of predator cues are impeded.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these sounds by improving the effective signal-to-noise ratio.

Masking affects both senders and receivers of acoustic signals and, at higher levels and longer duration, can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times

in terms of sound pressure level (SPL)) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009; Cholewiak *et al.,* 2018). All anthropogenic sound sources, but especially chronic and lower-frequency signals (*e.g.,* from commercial vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking.

In addition to making it more difficult for animals to perceive and recognize acoustic cues in their environment, anthropogenic sound presents separate challenges for animals that are vocalizing. When they vocalize, animals are aware of environmental conditions that affect the ''active space'' (or communication space) of their vocalizations, which is the maximum area within which their vocalizations can be detected before it drops to the level of ambient noise (Brenowitz, 2004; Brumm *et al.,* 2004; Lohr *et al.,* 2003). Animals are also aware of environmental conditions that affect whether listeners can discriminate and recognize their vocalizations from other sounds, which is more important than simply detecting that a vocalization is occurring (Brenowitz, 1982; Brumm *et al.,* 2004; Dooling, 2004; Marten and Marler, 1977; Patricelli and Blickley, 2006). Most species that vocalize have evolved with an ability to adjust their vocalizations to increase the signal-to-noise ratio, active space, and recognizability/distinguishability of their vocalizations in the face of temporary changes in background noise (Brumm *et al.,* 2004; Patricelli and Blickley, 2006). Vocalizing animals can adjust their vocalization characteristics such as the frequency structure, amplitude, temporal structure, and temporal delivery (repetition rate), or ceasing to vocalize.

Many animals will combine several of these strategies to compensate for high levels of background noise. Anthropogenic sounds that reduce the signal-to-noise ratio of animal vocalizations, increase the masked auditory thresholds of animals listening for such vocalizations, or reduce the active space of an animal's vocalizations impair communication between animals. Most animals that vocalize have evolved strategies to compensate for the effects of short-term or temporary increases in background or ambient noise on their songs or calls. Although the fitness consequences of these vocal adjustments are not directly known in all instances, like most other trade-offs animals must make, some of these strategies likely come at a cost (Patricelli and Blickley, 2006; Noren *et al.,* 2017; Noren *et al.,* 2020). Shifting songs and calls to higher frequencies may also impose energetic costs (Lambrechts, 1996).

Marine mammals are also known to make vocal changes in response to anthropogenic noise. In cetaceans, vocalization changes have been reported from exposure to anthropogenic noise sources such as sonar, vessel noise, and seismic surveying (*e.g.,* Gordon *et al.,* 2003; Di Iorio and Clark, 2009; Hatch *et al.,* 2012; Holt *et al.,* 2009; Holt *et al.,* 2011; Lesage *et al.,* 1999; McDonald *et al.,* 2009; Parks *et al.,* 2007; Risch *et al.,* 2012; Rolland *et al.,* 2012), as well as changes in the natural acoustic environment (Dunlop *et al.,* 2014). Vocal changes can be temporary or can be persistent. For example, model simulation suggests that the increase in starting frequency for the North Atlantic right whale upcall over the last 50 years resulted in increased detection ranges between right whales. The frequency shift, coupled with an increase in call intensity by 20 dB, led to a call detectability range of less than 3 km to over 9 km (Tennessen and Parks, 2016). Holt *et al.* (2009) measured killer whale call source levels and background noise levels in the 1 to 40 kHz band and reported that the whales increased their call source levels by 1-dB SPL for every 1-dB SPL increase in background noise level. Similarly, another study on St. Lawrence River belugas reported a similar rate of increase in vocalization activity in response to passing vessels (Scheifele *et al.,* 2005). Di Iorio and Clark (2009) showed that blue whale calling rates vary in association with seismic sparker survey activity, with whales calling more on days with surveys than on days without surveys. They suggested that the whales called more during seismic survey periods as a way to compensate for the elevated noise conditions.

In some cases, these vocal changes may have fitness consequences, such as an increase in metabolic rates and oxygen consumption, as observed in bottlenose dolphins when increasing their call amplitude (Holt *et al.,* 2015). A switch from vocal communication to physical, surface-generated sounds such as pectoral fin slapping or breaching was observed for humpback whales in the presence of increasing natural background noise levels, indicating that adaptations to masking may also move beyond vocal modifications (Dunlop *et al.,* 2010).

While these changes all represent possible tactics by the sound-producing animal to reduce the impact of masking, the receiving animal can also reduce masking by using active listening strategies such as orienting to the sound source, moving to a quieter location, or reducing self-noise from hydrodynamic flow by remaining still. The temporal structure of noise (*e.g.,* amplitude modulation) may also provide a considerable release from masking through comodulation masking release (a reduction of masking that occurs when broadband noise, with a frequency spectrum wider than an animal's auditory filter bandwidth at the frequency of interest, is amplitude modulated) (Branstetter and Finneran, 2008; Branstetter *et al.,* 2013). Signal type (*e.g.,* whistles, burst-pulse, sonar clicks) and spectral characteristics (*e.g.,* frequency modulated with harmonics) may further influence masked detection thresholds (Branstetter *et al.,* 2016; Cunningham *et al.,* 2014).

Masking is more likely to occur in the presence of broadband, relatively continuous noise sources, such as vessels. Several studies have shown decreases in marine mammal communication space and changes in behavior as a result of the presence of vessel noise. For example, right whales were observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007) as well as increasing the amplitude (intensity) of their calls (Parks, 2009; Parks *et al.,* 2011). Clark *et al.* (2009) observed that right whales' communication space decreased by up to 84 percent in the presence of vessels. Cholewiak *et al.* (2018) also observed loss in communication space in Stellwagen National Marine Sanctuary for North Atlantic right whales, fin whales, and humpback whales with increased ambient noise and shipping noise. Although humpback whales off Australia did not change the frequency or duration of their vocalizations in the presence of ship noise, their source levels were lower than expected based on source level changes to wind noise, potentially indicating some signal masking (Dunlop, 2016). Multiple delphinid species have also been shown to increase the minimum or maximum frequencies of their whistles in the presence of anthropogenic noise and reduced communication space (*e.g.,* Holt *et al.,* 2009; Holt *et al.,* 2011; Gervaise *et al.,* 2012; Williams *et al.,* 2013; Hermannsen *et al.,* 2014; Papale *et al.,* 2015; Liu *et al.,* 2017). While masking impacts are not a concern from lower intensity, higher frequency HRG surveys, some degree of masking would be expected in the vicinity of turbine pile driving and concentrated support vessel operation. However, pile driving

is an intermittent sound and would not be continuous throughout the day.

Habituation and Sensitization

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. It is important to note that habituation is appropriately considered as a ''progressive reduction in response to stimuli that are perceived as neither aversive nor beneficial,'' rather than as, more generally, moderation in response to human disturbance having a neutral or positive outcome (Bejder *et al.,* 2009). The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure.

Both habituation and sensitization require an ongoing learning process. As noted, behavioral state may affect the type of response. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; National Research Council (NRC), 2003; Wartzok *et al.,* 2003; Southall *et al.,* 2019b). Controlled experiments with captive marine mammals have shown pronounced behavioral reactions, including avoidance of loud sound sources (*e.g.,* Ridgway *et al.,* 1997; Finneran *et al.,* 2003; Houser *et al.,* 2013a; Houser *et al.,* 2013b; Kastelein *et al.,* 2018). Observed responses of wild marine mammals to loud impulsive sound sources (typically airguns or acoustic harassment devices) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Richardson *et al.,* 1995; Nowacek *et al.,* 2007; Tougaard *et al.,* 2009; Brandt *et al.,* 2011; Brandt *et al.,* 2012; Dähne *et al.,* 2013; Brandt *et al.,* 2014; Russell *et al.,* 2016; Brandt *et al.,* 2018).

Stone (2015) reported data from at-sea observations during 1,196 airgun surveys from 1994 to 2010. When large arrays of airguns (considered to be 500 cubic inches (in^3) or more) were firing, lateral displacement, more localized avoidance, or other changes in behavior were evident for most odontocetes. However, significant responses to large arrays were found only for the minke whale and fin whale. Behavioral responses observed included changes in swimming or surfacing behavior with indications that cetaceans remained near the water surface at these times. Behavioral observations of gray whales during an airgun survey monitored whale movements and respirations pre-, during, and post-seismic survey (Gailey *et al.,* 2016). Behavioral state and water depth were the best 'natural' predictors of whale movements and respiration and after considering natural variation, none of the response variables were significantly associated with survey or vessel sounds. Many delphinids approach low-frequency airgun source vessels with no apparent discomfort or obvious behavioral change (*e.g.,* Barkaszi *et al.,* 2012), indicating the importance of frequency output in relation to the species' hearing sensitivity.

Physiological Responses

An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Selye, 1950; Moberg and Mench, 2000). In many cases, an animal's first, and sometimes most economical (in terms of energetic costs), response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficiently to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Lusseau and Bejder, 2007; Romano *et al.,* 2002a; Rolland *et al.,* 2012). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales.

These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003; NRC, 2017). Respiration naturally varies with different behaviors and variations in respiration rate as a function of acoustic exposure can be expected to co-occur with other behavioral reactions, such as a flight response or an alteration in diving. However, respiration rates in and of themselves may be representative of annoyance or an acute stress response. Mean exhalation rates of gray whales at rest and while diving were found to be unaffected by seismic surveys conducted adjacent to the whale feeding grounds (Gailey *et al.,* 2007). Studies with captive harbor porpoises show increased respiration rates upon introduction of acoustic alarms (Kastelein *et al.,* 2001; Kastelein *et al.,* 2006a) and emissions for underwater data transmission (Kastelein *et al.,* 2005). However, exposure of the same acoustic alarm to a striped dolphin under the same conditions did not elicit a response (Kastelein *et al.,* 2006a), again highlighting the importance in understanding species differences in the tolerance of underwater noise when determining the potential for impacts resulting from anthropogenic sound exposure.

Stranding

The definition for a stranding under title IV of the MMPA is that (A) a marine mammal is dead and is (i) on a beach or shore of the United States, or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water, (ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention, or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance (16 U.S.C. 1421h).

Marine mammal strandings have been linked to a variety of causes, such as illness from exposure to infectious agents, biotoxins, or parasites; starvation; unusual oceanographic or weather events; or anthropogenic causes including fishery interaction, ship strike, entrainment, entrapment, sound exposure, or combinations of these stressors sustained concurrently or in series. There have been multiple events worldwide in which marine mammals (primarily beaked whales, or other deep divers) have stranded coincident with relatively nearby activities utilizing loud sound sources (primarily military training events), and five in which mid-frequency active sonar has been more definitively determined to have been a contributing factor.

There are multiple theories regarding the specific mechanisms responsible for marine mammal strandings caused by exposure to loud sounds. One primary theme is the behaviorally mediated responses of deep-diving species (odontocetes), in which their startled response to an acoustic disturbance (1) affects ascent or descent rates, the time they stay at depth or the surface, or other regular dive patterns that are used to physiologically manage gas formation and absorption within their bodies, such that the formation or growth of gas bubbles damages tissues or causes other injury, or (2) results in their flight to shallow areas, enclosed bays, or other areas considered ''out of habitat,'' in which they become disoriented and physiologically compromised. For more information on marine mammal stranding events and potential causes, please see the Mortality and Stranding section of NMFS Proposed Incidental Take Regulations for the Navy's Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area (50 CFR part 218, volume 83, No. 123, June 26, 2018).

The construction activities proposed by US Wind (*i.e.,* pile driving) do not inherently have the potential to result in marine mammal strandings. While vessel strikes could kill or injure a marine mammals (which may eventually strand), the required mitigation measures would reduce the potential for take from these activities to *de minimus* levels (see Proposed Mitigation section for more details). As described above, no mortality or serious injury is anticipated or proposed to be authorized from any Project activities.

Of the strandings documented to date worldwide, NMFS is not aware of any being attributed to pile driving or to the types of HRG equipment proposed for use during the Project. Recently, there has been heightened interest in HRG surveys and their potential role in recent marine mammals strandings along the U.S. east coast. HRG surveys involve the use of certain sources to image the ocean bottom, which are very different from seismic airguns used in oil and gas surveys or tactical military sonar, in that they produce much smaller impact zones. Marine mammals may respond to exposure to these sources by, for example, avoiding the immediate area, which is why offshore wind developers have authorization to allow for Level B (behavioral) harassment, including US Wind. However, because of the combination of lower source levels, higher frequency, narrower beam-width (for some sources), and other factors, the area within which a marine mammal might be expected to be behaviorally disturbed by HRG sources is much smaller (by orders of magnitude) than the impact areas for seismic airguns or the military sonar with which a small number of marine mammal have been causally associated. Specifically, estimated harassment zones for HRG surveys are typically less than 200m (such as those associated with the Project), while zones for military mid-frequency active sonar or seismic airgun surveys typically extend for several kms ranging up to 10s of km. Further, because of this much smaller ensonified area, any marine mammal exposure to HRG sources is reasonably expected to be at significantly lower levels and shorter duration (associated with less severe responses), and there is no evidence suggesting, or reason to speculate, that marine mammals exposed to HRG survey noise are likely to be injured, much less strand, as a result. Last, all but one of the small number of marine mammal stranding events that have been causally associated with exposure to loud sound sources have been deep-diving toothed whale species (not mysticetes), which are known to respond differently to loud sounds.

Potential Effects of Disturbance on Marine Mammal Fitness

The different ways that marine mammals respond to sound are sometimes indicators of the ultimate effect that exposure to a given stimulus will have on the well-being (survival, reproduction, *etc.*) of an animal. There are numerous data relating the exposure of terrestrial mammals from sound to effects on reproduction or survival, and data for marine mammals continues to grow. Several authors have reported that disturbance stimuli may cause animals to abandon nesting and foraging sites (Sutherland and Crockford, 1993); may cause animals to increase their activity levels and suffer premature deaths or reduced reproductive success when their energy expenditures exceed their energy budgets (Daan *et al.,* 1996; Feare, 1976; Mullner *et al.,* 2004); or may cause animals to experience higher predation rates when they adopt risk-prone foraging or migratory strategies (Frid and Dill, 2002). Each of these studies addressed the consequences of animals shifting from one behavioral state (*e.g.,* resting or foraging) to another behavioral state (*e.g.,* avoidance or escape behavior) because of human disturbance or disturbance stimuli.

Attention is the cognitive process of selectively concentrating on one aspect of an animal's environment while ignoring other things (Posner, 1994). Because animals (including humans) have limited cognitive resources, there is a limit to how much sensory information they can process at any time. The phenomenon called ''attentional capture'' occurs when a stimulus (usually a stimulus that an animal is not concentrating on or attending to) ''captures'' an animal's attention. This shift in attention can occur consciously or subconsciously (for example, when an animal hears sounds that it associates with the approach of a predator) and the shift in attention can be sudden (Dukas, 2002; van Rij, 2007). Once a stimulus has captured an animal's attention, the animal can respond by ignoring the stimulus, assuming a ''watch and wait'' posture, or treat the stimulus as a disturbance and respond accordingly, which includes scanning for the source of the stimulus or ''vigilance'' (Cowlishaw *et al.,* 2004).

Vigilance is an adaptive behavior that helps animals determine the presence or absence of predators, assess their distance from conspecifics, or to attend cues from prey (Bednekoff and Lima,

1998; Treves, 2000). Despite those benefits, however, vigilance has a cost of time; when animals focus their attention on specific environmental cues, they are not attending to other activities such as foraging or resting. These effects have generally not been demonstrated for marine mammals, but studies involving fish and terrestrial animals have shown that increased vigilance may substantially reduce feeding rates (Saino, 1994; Beauchamp and Livoreil, 1997; Fritz *et al.,* 2002; Purser and Radford, 2011). Animals will spend more time being vigilant, which may translate to less time foraging or resting, when disturbance stimuli approach them more directly, remain at closer distances, have a greater group size (*e.g.,* multiple surface vessels), or when they co-occur with times that an animal perceives increased risk (*e.g.,* when they are giving birth or accompanied by a calf).

The primary mechanism by which increased vigilance and disturbance appear to affect the fitness of individual animals is by disrupting an animal's time budget and, as a result, reducing the time they might spend foraging and resting (which increases an animal's activity rate and energy demand while decreasing their caloric intake/energy). In a study of northern resident killer whales off Vancouver Island, exposure to boat traffic was shown to reduce foraging opportunities and increase traveling time (Holt *et al.,* 2021). A simple bioenergetics model was applied to show that the reduced foraging opportunities equated to a decreased energy intake of 18 percent while the increased traveling incurred an increased energy output of 3–4 percent, which suggests that a management action based on avoiding interference with foraging might be particularly effective.

On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant for fitness if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than 1 day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). It is important to note the difference between behavioral reactions lasting or recurring over multiple days and anthropogenic activities lasting or recurring over multiple days. For example, just because certain activities last for multiple days does not necessarily mean that individual animals will be either exposed to those activity-related stressors (*i.e.,* sonar) for multiple days or further exposed in a manner that would result in sustained multi-day substantive behavioral responses. However, special attention is warranted where longer-duration activities overlay areas in which animals are known to congregate for longer durations for biologically important behaviors.

There are few studies that directly illustrate the impacts of disturbance on marine mammal populations. Lusseau and Bejder (2007) present data from three long-term studies illustrating the connections between disturbance from whale-watching boats and population-level effects in cetaceans. In Shark Bay, Australia, the abundance of bottlenose dolphins was compared within adjacent control and tourism sites over three consecutive 4.5-year periods of increasing tourism levels. Between the second and third time periods, in which tourism doubled, dolphin abundance decreased by 15 percent in the tourism area and did not change significantly in the control area. In Fiordland, New Zealand, two populations (Milford and Doubtful Sounds) of bottlenose dolphins with tourism levels that differed by a factor of seven were observed and significant increases in traveling time and decreases in resting time were documented for both. Consistent short-term avoidance strategies were observed in response to tour boats until a threshold of disturbance was reached (average of 68 minutes between interactions), after which the response switched to a longer-term habitat displacement strategy. For one population, tourism only occurred in a part of the home range. However, tourism occurred throughout the home range of the Doubtful Sound population and once boat traffic increased beyond the 68-minute threshold (resulting in abandonment of their home range/preferred habitat), reproductive success drastically decreased (increased stillbirths) and abundance decreased significantly (from 67 to 56 individuals in a short period).

In order to understand how the effects of activities may or may not impact species and stocks of marine mammals, it is necessary to understand not only what the likely disturbances are going to be but how those disturbances may affect the reproductive success and survivorship of individuals, and then how those impacts to individuals translate to population-level effects. Following on the earlier work of a committee of the U.S. NRC (NRC, 2005), New *et al.* (2014), in an effort termed the Potential Consequences of Disturbance (PCoD), outline an updated conceptual model of the relationships linking disturbance to changes in behavior and physiology, health, vital rates, and population dynamics. This framework is a four-step process progressing from changes in individual behavior and/or physiology, to changes in individual health, then vital rates, and finally to population-level effects. In this framework, behavioral and physiological changes can have direct (acute) effects on vital rates, such as when changes in habitat use or increased stress levels raise the probability of mother-calf separation or predation; indirect and long-term (chronic) effects on vital rates, such as when changes in time/energy budgets or increased disease susceptibility affect health, which then affects vital rates; or no effect to vital rates (New *et al.,* 2014).

Since the PCoD general framework was outlined and the relevant supporting literature compiled, multiple studies developing state-space energetic models for species with extensive long-term monitoring (*e.g.,* southern elephant seals, North Atlantic right whales, Ziphiidae beaked whales, and bottlenose dolphins) have been conducted and can be used to effectively forecast longer-term, population-level impacts from behavioral changes. While these are very specific models with very specific data requirements that cannot yet be applied broadly to project-specific risk assessments for the majority of species, they are a critical first step towards being able to quantify the likelihood of a population level effect. Since New *et al.* (2014), several publications have described models developed to examine the long-term effects of environmental or anthropogenic disturbance of foraging on various life stages of selected species (*e.g.,* sperm whale, Farmer *et al.,* 2018; California sea lion, McHuron *et al.,* 2018; blue whale, Pirotta *et al.,* 2018a; humpback whale, Dunlop *et al.,* 2021). These models continue to add to refinement of the approaches to the PCoD framework. Such models also help identify what data inputs require further investigation. Pirotta *et al.* (2018b) provides a review of the PCoD framework with details on each step of the process and approaches to applying real data or simulations to achieve each step.

Despite its simplicity, there are few complete PCoD models available for any marine mammal species due to a lack of data available to parameterize many of the steps. To date, no PCoD model has

been fully parameterized with empirical data (Pirotta *et al.,* 2018a) due to the fact they are data intensive and logistically challenging to complete. Therefore, most complete PCoD models include simulations, theoretical modeling, and expert opinion to move through the steps. For example, PCoD models have been developed to evaluate the effect of wind farm construction on the North Sea harbor porpoise populations (*e.g.,* King *et al.,* 2015; Nabe-Nielsen *et al.,* 2018). These models include a mix of empirical data, expert elicitation (King *et al.,* 2015) and simulations of animals' movements, energetics, and/or survival (New *et al.,* 2014; Nabe-Nielsen *et al.,* 2018).

PCoD models may also be approached in different manners. Dunlop *et al.* (2021) modeled migrating humpback whale mother-calf pairs in response to seismic surveys using both a forwards and backwards approach. While a typical forwards approach can determine if a stressor would have population-level consequences, Dunlop *et al.* demonstrated that working backwards through a PCoD model can be used to assess the ''worst case'' scenario for an interaction of a target species and stressor. This method may be useful for future management goals when appropriate data becomes available to fully support the model. In another example, harbor porpoise PCoD model investigating the impact of seismic surveys on harbor porpoise included an investigation on underlying drivers of vulnerability. Harbor porpoise movement and foraging were modeled for baseline periods and then for periods with seismic surveys as well; the models demonstrated that temporal (*i.e.,* seasonal) variation in individual energetics and their link to costs associated with disturbances was key in predicting population impacts (Gallagher *et al.,* 2021).

Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. However, as described above, individuals may be able to compensate for some types and degrees of shifts in behavior, preserving their health and thus their vital rates and population dynamics. For example, New *et al.* (2013) developed a model simulating the complex social, spatial, behavioral, and motivational interactions of coastal bottlenose dolphins in the Moray Firth, Scotland, to assess the biological significance of increased rate of behavioral disruptions caused by vessel traffic. Despite a modeled scenario in which vessel traffic increased from 70 to 470 vessels a year (a six-fold increase in vessel traffic) in response to the construction of a proposed offshore renewables' facility, the dolphins' behavioral time budget, spatial distribution, motivations, and social structure remain unchanged. Similarly, two bottlenose dolphin populations in Australia were also modeled over 5 years against a number of disturbances (Reed *et al.,* 2020), and results indicated that habitat/noise disturbance had little overall impact on population abundances in either location, even in the most extreme impact scenarios modeled.

By integrating different sources of data (*e.g.,* controlled exposure data, activity monitoring, telemetry tracking, and prey sampling) into a theoretical model to predict effects from sonar on a blue whale's daily energy intake, Pirotta *et al.* (2021) found that tagged blue whales' activity budgets, lunging rates, and ranging patterns caused variability in their predicted cost of disturbance. This method may be useful for future management goals when appropriate data becomes available to fully support the model. Harbor porpoise movement and foraging were modeled for baseline periods and then for periods with seismic surveys as well; the models demonstrated that the seasonality of the seismic activity was an important predictor of impact (Gallagher *et al.,* 2021).

In their table 1, Keen *et al.* (2021) summarize the emerging themes in PCoD models that should be considered when assessing the likelihood and duration of exposure and the sensitivity of a population to disturbance (see table 1 from Keen *et al.,* 2021, below). The themes are categorized by life history traits (movement ecology, life history strategy, body size, and pace of life), disturbance source characteristics (overlap with biologically important areas, duration and frequency, and nature and context), and environmental conditions (natural variability in prey availability and climate change). Keen *et al.* (2021) then summarize how each of these features influence an assessment, noting, for example, that individual animals with small home ranges have a higher likelihood of prolonged or year-round exposure, that the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present, and that continuous disruption will have a greater impact than intermittent disruption.

Nearly all PCoD studies and experts agree that infrequent exposures of a single day or less are unlikely to impact individual fitness, let alone lead to population level effects (Booth *et al.,* 2016; Booth *et al.,* 2017; Christiansen and Lusseau, 2015; Farmer *et al.,* 2018; Wilson *et al.,* 2020; Harwood and Booth, 2016; King *et al.,* 2015; McHuron *et al.,* 2018; National Academies of Sciences, Engineering, and Medicine (NAS), 2017; New *et al.,* 2014; Pirotta *et al.,* 2018a; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015). As described through this proposed rule, NMFS expects that any behavioral disturbance that would occur due to animals being exposed to construction activity would be of a relatively short duration, with behavior returning to a baseline state shortly after the acoustic stimuli ceases or the animal moves far enough away from the source. Given this, and NMFS' evaluation of the available PCoD studies, and the required mitigation discussed later, any such behavioral disturbance resulting from US Wind's activities is not expected to impact individual animals' health or have effects on individual animals' survival or reproduction, thus no detrimental impacts at the population level are anticipated. Marine mammals may temporarily avoid the immediate area but are not expected to permanently abandon the area or their migratory or foraging behavior. Impacts to breeding, feeding, sheltering, resting, or migration are not expected nor are shifts in habitat use, distribution, or foraging success.

Potential Effects From Vessel Strike

Vessel collisions with marine mammals, also referred to as vessel strikes or ship strikes, can result in death or serious injury of the animal. Wounds resulting from ship strike may include massive trauma, hemorrhaging, broken bones, or propeller lacerations (Knowlton and Kraus, 2001). An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. Superficial strikes may not kill or result in the death of the animal. Lethal interactions are typically associated with large whales, which are occasionally found draped across the bulbous bow of large commercial ships upon arrival in port. Although smaller cetaceans are more maneuverable in relation to large vessels than are large whales, they may also be susceptible to strike. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). Impact forces increase with speed, as does the probability of a strike at a given distance (Silber *et al.,* 2010; Gende *et al.,* 2011).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow-moving whales. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike occurs and, if so, whether it results in injury, serious injury, or mortality (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Jensen and Silber, 2003; Pace and Silber, 2005; Vanderlaan and Taggart, 2007; Conn and Silber, 2013). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 kn.

Jensen and Silber (2003) detailed 292 records of known or probable ship strikes of all large whale species from 1975 to 2002. Of these, vessel speed at the time of collision was reported for 58 cases. Of these 58 cases, 39 (or 67 percent) resulted in serious injury or death (19 of those resulted in serious injury as determined by blood in the water, propeller gashes or severed tailstock, and fractured skull, jaw, vertebrae, hemorrhaging, massive bruising, or other injuries noted during necropsy and 20 resulted in death). Operating speeds of vessels that struck various species of large whales ranged from 2 to 51 kn. The majority (79 percent) of these strikes occurred at speeds of 13 kn or greater. The average speed that resulted in serious injury or death was 18.6 kn. Pace and Silber (2005) found that the probability of death or serious injury increased rapidly with increasing vessel speed. Specifically, the predicted probability of serious injury or death increased from 45 to 75 percent as vessel speed increased from 10 to 14 kn and exceeded 90 percent at 17 kn. Higher speeds during collisions result in greater force of impact and also appear to increase the chance of severe injuries or death. While modeling studies have suggested that hydrodynamic forces pulling whales toward the vessel hull increase with increasing speed (Clyne, 1999; Knowlton *et al.,* 1995), this is inconsistent with Silber *et al.* (2010), which demonstrated that there is no such relationship (*i.e.,* hydrodynamic forces are independent of speed).

In a separate study, Vanderlaan and Taggart (2007) analyzed the probability of lethal mortality of large whales at a given speed, showing that the greatest rate of change in the probability of a lethal injury to a large whale as a function of vessel speed occurs between 8.6 and 15 kn. The chances of a lethal injury decline from approximately 80 percent at 15 kn to approximately 20 percent at 8.6 kn. At speeds below 11.8 kn, the chances of lethal injury drop below 50 percent, while the probability asymptotically increases toward 100 percent above 15 kn.

The Jensen and Silber (2003) report notes that the Large Whale Ship Strike Database represents a minimum number of collisions, because the vast majority probably goes undetected or unreported. In contrast, the Project's personnel are likely to detect any strike that does occur because of the required personnel training and lookouts, along with the inclusion of Protected Species Observers (as described in the Proposed Mitigation section), and they are required to report all ship strikes involving marine mammals.

There are no known vessel strikes of marine mammals by any offshore wind energy vessel in the United States. Given the extensive mitigation and monitoring measures (see the Proposed Mitigation and Proposed Monitoring and Reporting section) that would be required of US Wind, NMFS believes that a vessel strike is not likely to occur.

Potential Effects to Marine Mammal Habitat

US Wind's proposed activities could potentially affect marine mammal habitat through the introduction of impacts to the prey species of marine mammals (through noise, oceanographic processes, or reef effects), acoustic habitat (sound in the water column), water quality, and biologically important habitat for marine mammals.

Effects on Prey

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, and zooplankton). Marine mammal prey varies by species, season, and location and, for some, is not well documented. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). The most likely effects on fishes exposed to loud, intermittent, low-frequency sounds are behavioral responses (*i.e.,* flight or avoidance). Short duration, sharp sounds (such as pile driving or airguns) can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to acoustic sources depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality. While it is clear that the behavioral responses of individual prey, such as displacement or other changes in distribution, can have direct impacts on the foraging success of marine mammals, the effects on marine mammals of individual prey that experience hearing damage, barotrauma, or mortality is less clear, though obviously population scale impacts that meaningfully reduce the amount of prey available could have more serious impacts.

Fishes, like other vertebrates, have a variety of different sensory systems to glean information from ocean around them (Astrup and Mohl, 1993; Astrup, 1999; Braun and Grande, 2008; Carroll *et al.,* 2017; Hawkins and Johnstone, 1978; Ladich and Popper, 2004; Ladich and Schulz-Mirbach, 2016; Mann, 2016; Nedwell *et al.,* 2004; Popper *et al.,* 2003; Popper *et al.,* 2005). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008) (terrestrial vertebrates generally only detect pressure). Most marine fishes primarily detect particle motion using the inner ear and lateral line system while some fishes possess additional morphological adaptations or specializations that can enhance their sensitivity to sound pressure, such as a gas-filled swim bladder (Braun and Grande, 2008; Popper and Fay, 2011).

Hearing capabilities vary considerably between different fish species with data only available for just over 100 species out of the 34,000 marine and freshwater fish species (Eschmeyer and Fong, 2016). In order to better understand acoustic impacts on fishes, fish hearing groups are defined by species that possess a similar continuum of anatomical features, which result in varying degrees of hearing sensitivity

(Popper and Hastings, 2009a). There are four hearing groups defined for all fish species (modified from Popper *et al.,* 2014) within this analysis, and they include: fishes without a swim bladder (*e.g.,* flatfish, sharks, rays, *etc.*); fishes with a swim bladder not involved in hearing (*e.g.,* salmon, cod, pollock, *etc.*); fishes with a swim bladder involved in hearing (*e.g.,* sardines, anchovy, herring, *etc.*); and fishes with a swim bladder involved in hearing and high-frequency hearing (*e.g.,* shad and menhaden). Most marine mammal fish prey species would not be likely to perceive or hear mid- or high-frequency sonars. While hearing studies have not been done on sardines and northern anchovies, it would not be unexpected for them to have hearing similarities to Pacific herring (up to 2–5 kHz) (Mann *et al.,* 2005). Currently, less data are available to estimate the range of best sensitivity for fishes without a swim bladder.

In terms of physiology, multiple scientific studies have documented a lack of mortality or physiological effects to fish from exposure to low- and mid-frequency sonar and other sounds (Halvorsen *et al.,* 2012a; Jørgensen *et al.,* 2005; Juanes *et al.,* 2017; Kane *et al.,* 2010; Kvadsheim and Sevaldsen, 2005; Popper *et al.,* 2007; Popper *et al.,* 2016; Watwood *et al.,* 2016). Techer *et al.* (2017) exposed carp in floating cages for up to 30 days to low-power 23 and 46 kHz source without any significant physiological response. Other studies have documented either a lack of TTS in species whose hearing range cannot perceive sonar (such as Navy sonar), or for those species that could perceive sonar-like signals, any TTS experienced would be recoverable (Halvorsen *et al.,* 2012a; Ladich and Fay, 2013; Popper and Hastings, 2009a, 2009b; Popper *et al.,* 2014; Smith, 2016). Only fishes that have specializations that enable them to hear sounds above about 2,500 Hz (2.5 kHz), such as herring (Halvorsen *et al.,* 2012a; Mann *et al.,* 2005; Mann, 2016; Popper *et al.,* 2014), would have the potential to receive TTS or exhibit behavioral responses from exposure to mid-frequency sonar. In addition, any sonar induced TTS to fish whose hearing range could perceive sonar would only occur in the narrow spectrum of the source (*e.g.,* 3.5 kHz) compared to the fish's total hearing range (*e.g.,* 0.01 kHz to 5 kHz).

In terms of behavioral responses, Juanes *et al.* (2017) discuss the potential for negative impacts from anthropogenic noise on fish, but the author's focus was on broader based sounds, such as ship and boat noise sources. Watwood *et al.* (2016) also documented no behavioral responses by reef fish after exposure to mid-frequency active sonar. Doksaeter *et al.* (2009; 2012) reported no behavioral responses to mid-frequency sonar (such as naval sonar) by Atlantic herring; specifically, no escape reactions (vertically or horizontally) were observed in free swimming herring exposed to mid-frequency sonar transmissions. Based on these results (Doksaeter *et al.,* 2009; Doksaeter *et al.,* 2012; Sivle *et al.,* 2012), Sivle *et al.* (2014) created a model in order to report on the possible population-level effects on Atlantic herring from active sonar. The authors concluded that the use of sonar poses little risk to populations of herring regardless of season, even when the herring populations are aggregated and directly exposed to sonar. Finally, Bruintjes *et al.* (2016) commented that fish exposed to any short-term noise within their hearing range might initially startle but would quickly return to normal behavior.

Pile driving noise during construction is of particular concern as the very high sound pressure levels could potentially prevent fish from reaching breeding or spawning sites, finding food, and acoustically locating mates. A playback study in West Scotland revealed that there was a significant movement response to the pile driving stimulus in both species at relatively low received sound pressure levels (sole: 144–156 dB re 1µPa Peak; cod: 140–161 dB re 1 µPa Peak, particle motion between 6.51 * 10^3 and 8.62 * 10^4 m/s^2 peak) (Mueller-Blenkle *et al.,* 2010). The swimming speed of sole increased significantly during the playback of construction noise when compared to the playbacks of before and after construction. While not statistically significant, cod also displayed a similar behavioral response during before, during, and after construction playbacks. However, cod demonstrated a specific and significant freezing response at the onset and cessation of the playback recording. In both species, indications were present displaying directional movements away from the playback source. During wind farm construction in the eastern Taiwan Strait, Type 1 soniferous fish chorusing showed a relatively lower intensity and longer duration while Type 2 chorusing exhibited higher intensity and no changes in its duration. Deviation from regular fish vocalization patterns may affect fish reproductive success, cause migration, augmented predation, or physiological alterations.

Occasional behavioral reactions to activities that produce underwater noise sources are unlikely to cause long-term consequences for individual fish or populations. The most likely impact to fish from impact and vibratory pile driving activities at the project areas would be temporary behavioral avoidance of the area. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected.

SPLs of sufficient strength have been known to cause fish auditory impairment, injury, and mortality. Popper *et al.* (2014) found that fish with or without air bladders could experience TTS at 186 dB SEL_{cum}. Mortality could occur for fish without swim bladders at >216 dB SEL_{cum}. Those with swim bladders or at the egg or larvae life stage, mortality was possible at >203 dB SEL_{cum}. Other studies found that 203 dB SEL_{cum} or above caused a physiological response in other fish species (Casper *et al.,* 2012; Halvorsen *et al.,* 2012a; Halvorsen *et al.,* 2012b; Casper *et al.,* 2013a; Casper *et al.,* 2013b). However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013a).

As described in the Proposed Mitigation section below, US Wind would utilize a sound attenuation device which would reduce potential for injury to marine mammal prey. Other fish that experience hearing loss as a result of exposure to impulsive sound sources may have a reduced ability to detect relevant sounds such as predators, prey, or social vocalizations. However, PTS has not been known to occur in fishes and any hearing loss in fish may be as temporary as the timeframe required to repair or replace the sensory cells that were damaged or destroyed (Popper *et al.,* 2005; Popper *et al.,* 2014; Smith, 2006). It is not known if damage to auditory nerve fibers could

occur, and if so, whether fibers would recover during this process. In addition, most acoustic effects, if any, are expected to be short-term and localized. Long-term consequences for fish populations, including key prey species within the project area, would not be expected.

Required soft-starts would allow prey and marine mammals to move away from the source prior to any noise levels that may physically injure prey and the use of the noise attenuation devices would reduce noise levels to the degree any mortality or injury of prey is also minimized. Use of bubble curtains, in addition to reducing impacts to marine mammals, for example, is a key mitigation measure in reducing injury and mortality of ESA-listed salmon on the U.S. west coast. However, we recognize some mortality, physical injury and hearing impairment in marine mammal prey may occur, but we anticipate the amount of prey impacted in this manner is minimal compared to overall availability. Any behavioral responses to pile driving by marine mammal prey are expected to be brief. We expect that other impacts, such as stress or masking, would occur in fish that serve as marine mammals prey (Popper *et al.,* 2019); however, those impacts would be limited to the duration of impact pile driving, and, if prey were to move out the area in response to noise, these impacts would be minimized.

In addition to fish, prey sources such as marine invertebrates could potentially be impacted by noise stressors as a result of the proposed activities. However, most marine invertebrates' ability to sense sounds is limited. Invertebrates appear to be able to detect sounds (Pumphrey, 1950; Frings and Frings, 1967) and are most sensitive to low-frequency sounds (Packard *et al.,* 1990; Budelmann and Williamson, 1994; Lovell *et al.,* 2005; Mooney *et al.,* 2010). Data on response of invertebrates such as squid, another marine mammal prey species, to anthropogenic sound is more limited (de Soto, 2016; Sole *et al.,* 2017). Data suggest that cephalopods are capable of sensing the particle motion of sounds and detect low frequencies up to 1–1.5 kHz, depending on the species, and so are likely to detect airgun noise (Kaifu *et al.,* 2008; Hu *et al.,* 2009; Mooney *et al.,* 2010; Samson *et al.,* 2014). Sole *et al.* (2017) reported physiological injuries to cuttlefish in cages placed at-sea when exposed during a controlled exposure experiment to low-frequency sources (315 Hz, 139 to 142 dB *re 1* μPa^2; 400 Hz, 139 to 141 dB *re 1* μPa^2). Fewtrell and McCauley (2012) reported squids maintained in cages displayed startle responses and behavioral changes when exposed to seismic airgun sonar (136–162 re 1 $\mu Pa^2 \cdot s$). Jones *et al.* (2020) found that when squid (*Doryteuthis pealeii*) were exposed to impulse pile driving noise, body pattern changes, inking, jetting, and startle responses were observed and nearly all squid exhibited at least one response. However, these responses occurred primarily during the first eight impulses and diminished quickly, indicating potential rapid, short-term habituation.

Cephalopods have a specialized sensory organ inside the head called a statocyst that may help an animal determine its position in space (orientation) and maintain balance (Budelmann, 1992). Packard *et al.* (1990) showed that cephalopods were sensitive to particle motion, not sound pressure, and Mooney *et al.* (2010) demonstrated that squid statocysts act as an accelerometer through which particle motion of the sound field can be detected. Auditory injuries (lesions occurring on the statocyst sensory hair cells) have been reported upon controlled exposure to low-frequency sounds, suggesting that cephalopods are particularly sensitive to low-frequency sound (Andre *et al.,* 2011; Sole *et al.,* 2013). Behavioral responses, such as inking and jetting, have also been reported upon exposure to low-frequency sound (McCauley *et al.,* 2000; Samson *et al.,* 2014). Squids, like most fish species, are likely more sensitive to low-frequency sounds and may not perceive mid- and high-frequency sonars.

With regard to potential impacts on zooplankton, McCauley *et al.* (2017) found that exposure to airgun noise resulted in significant depletion for more than half the taxa present and that there were two to three times more dead zooplankton after airgun exposure compared with controls for all taxa, within 1 km of the airguns. However, the authors also stated that in order to have significant impacts on r-selected species (*i.e.,* those with high growth rates and that produce many offspring) such as plankton, the spatial or temporal scale of impact must be large in comparison with the ecosystem concerned, and it is possible that the findings reflect avoidance by zooplankton rather than mortality (McCauley *et al.,* 2017). In addition, the results of this study are inconsistent with a large body of research that generally finds limited spatial and temporal impacts to zooplankton as a result of exposure to airgun noise (*e.g.,* Dalen and Knutsen, 1987; Payne, 2004; Stanley *et al.,* 2011). Most prior research on this topic, which has focused on relatively small spatial scales, has showed minimal effects (*e.g.,* Kostyuchenko, 1973; Booman *et al.,* 1996; Sætre and Ona, 1996; Pearson *et al.,* 1994; Bolle *et al.,* 2012).

A modeling exercise was conducted as a follow-up to the McCauley *et al.* (2017) study (as recommended by McCauley *et al.*), in order to assess the potential for impacts on ocean ecosystem dynamics and zooplankton population dynamics (Richardson *et al.,* 2017). Richardson *et al.* (2017) found that a full-scale airgun survey would impact copepod abundance within the survey area, but that effects at a regional scale were minimal (2 percent decline in abundance within 150 km of the survey area and effects not discernible over the full region). The authors also found that recovery within the survey area would be relatively quick (3 days following survey completion) and suggest that the quick recovery was due to the fast growth rates of zooplankton, and the dispersal and mixing of zooplankton from both inside and outside of the impacted region. The authors also suggest that surveys in areas with more dynamic ocean circulation in comparison with the study region and/or with deeper waters (*i.e.,* typical offshore wind locations) would have less net impact on zooplankton.

Notably, a recently described study produced results inconsistent with those of McCauley *et al.* (2017). Researchers conducted a field and laboratory study to assess if exposure to airgun noise affects mortality, predator escape response, or gene expression of the copepod *Calanus finmarchicus* (Fields *et al.,* 2019). Immediate mortality of copepods was significantly higher, relative to controls, at distances of 5 m or less from the airguns. Mortality 1 week after the airgun blast was significantly higher in the copepods placed 10 m from the airgun but was not significantly different from the controls at a distance of 20 m from the airgun. The increase in mortality, relative to controls, did not exceed 30 percent at any distance from the airgun. Moreover, the authors caution that even this higher mortality in the immediate vicinity of the airguns may be more pronounced than what would be observed in free-swimming animals due to increased flow speed of fluid inside bags containing the experimental animals. There were no sub-lethal effects on the escape performance, or the sensory threshold needed to initiate an escape response, at any of the distances from the airgun that were tested. Whereas McCauley *et al.* (2017) reported an SEL

of 156 dB at a range of 509–658 m, with zooplankton mortality observed at that range, Fields *et al.* (2019) reported an SEL of 186 dB at a range of 25 m, with no reported mortality at that distance.

The presence of large numbers of turbines has been shown to impact meso- and sub-meso-scale water column circulation, which can affect the density, distribution, and energy content of zooplankton and thereby, their availability as marine mammal prey. Topside, atmospheric wakes result in wind speed reductions influencing upwelling and downwelling in the ocean while underwater structures such as WTG and OSS foundations may cause turbulent current wakes, which impact circulation, stratification, mixing, and sediment resuspension (Daewel *et al.,* 2022). Overall, the presence of structures such as wind turbines is, in general, likely to result in certain oceanographic effects in the marine environment and may alter marine mammal prey, such as aggregations and distribution of zooplankton through changing the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Chen *et al.,* 2021; Johnson *et al.,* 2021; Christiansen *et al.,* 2022; Dorrell *et al.,* 2022).

US Wind intends to install up to 114 WTG and 4 OSS foundations, with turbine operations commencing in 2025 and all turbines being operational in 2027. As described above, there is scientific uncertainty around the scale of oceanographic impacts (meters to kilometers) associated with turbine operation. The Project is located offshore of Maryland along the mid-Atlantic Bight, and the project area does not include key foraging grounds for marine mammals with planktonic diets (*e.g.,* North Atlantic right whale), as all known prime foraging habitat is located much further north, off southern New England and north into Canada. This foraging area is approximately 544.1 km (338.1 mi) north of the project area, and it would be highly unlikely for this foraging area to be influenced by activities related to the proposed Project.

Although the project area does not provide high-quality foraging habitat for plankton-feeding marine mammals, such as North Atlantic right whales, coastal Maryland may provide seasonal high-quality foraging habitat for piscivorous marine mammals, such as humpback whales. Generally speaking, and depending on the extent, impacts on prey could impact the distribution of marine mammals in an area, potentially necessitating additional energy expenditure to find and capture prey. However, at the temporal and spatial scales anticipated for this activity, any such impacts on prey are not expected to impact the reproduction or survival of any individual marine mammals. Although studies assessing the impacts of offshore wind development on marine mammals are limited, the repopulation of wind energy areas by harbor porpoises (Brandt *et al.,* 2016; Lindeboom *et al.,* 2011) and harbor seals (Lindeboom *et al.,* 2011; Russell *et al.,* 2016) following the installation of wind turbines are promising. Overall, any impacts to marine mammal foraging capabilities due to effects on prey aggregation from the turbine presence and operation during the effective period of the proposed rule is likely to be limited.

In general, impacts to marine mammal prey species are expected to be relatively minor and temporary due to the expected short daily duration of individual pile driving events and the relatively small areas being affected. In addition, NMFS does not expect HRG acoustic sources to impact fish and most sources are likely outside the hearing range of the primary prey species in the project area.

Overall, the combined impacts of sound exposure and oceanographic impacts on marine mammal habitat resulting from the proposed activities would not be expected to have measurable effects on populations of marine mammal prey species. Prey species exposed to sound might move away from the sound source, experience TTS, experience masking of biologically relevant sounds, or show no obvious direct effects.

Reef Effects

The presence of monopile, post-piled jacket, and pin pile foundations, scour protection, and cable protection will result in a conversion of the existing sandy bottom habitat to a hard bottom habitat with areas of vertical structural relief. This could potentially alter the existing habitat by creating an ''artificial reef effect'' that results in colonization by assemblages of both sessile and mobile animals within the new hard-bottom habitat (Wilhelmsson *et al.,* 2006; Reubens *et al.,* 2013; Bergström *et al.,* 2014; Coates *et al.,* 2014). This colonization by marine species, especially hard-substrate preferring species, can result in changes to the diversity, composition, and/or biomass of the area thereby impacting the trophic composition of the site (Wilhelmsson *et al.,* 2010; Krone *et al.,* 2013; Bergström *et al.,* 2014; Hooper *et al.,* 2017; Raoux *et al.,* 2017; Harrison and Rousseau, 2020; Taormina *et al.,* 2020; Buyse *et al.,* 2022a; ter Hofstede *et al.,* 2022).

Artificial structures can create increased habitat heterogeneity important for species diversity and density (Langhamer, 2012). The WTG, OSS, and meteorological tower foundations will extend through the water column, which may serve to increase settlement of meroplankton or planktonic larvae on the structures in both the pelagic and benthic zones (Boehlert and Gill, 2010). Fish and invertebrate species are also likely to aggregate around the foundations and scour protection which could provide increased prey availability and structural habitat (Boehlert and Gill, 2010; Bonar *et al.,* 2015). Further, instances of species previously unknown, rare, or nonindigenous to an area have been documented at artificial structures, changing the composition of the food web and possibly the attractability of the area to new or existing predators (Adams *et al.,* 2014; de Mesel, 2015; Bishop *et al.,* 2017; Hooper *et al.,* 2017; Raoux *et al.,* 2017; van Hal *et al.,* 2017; Degraer *et al.,* 2020; Fernandez-Betelu *et al.,* 2022). Notably, there are examples of these sites becoming dominated by marine mammal prey species, such as filter-feeding species and suspension-feeding crustaceans (Andersson and Öhman, 2010; Slavik *et al.,* 2019; Hutchison *et al.,* 2020; Pezy *et al.,* 2020; Mavraki *et al.,* 2022).

Numerous studies have documented significantly higher fish concentrations including species like cod and pouting (*Trisopterus luscus*), flounder (*Platichthys flesus*), eelpout (*Zoarces viviparus*), and eel (*Anguilla anguilla*) near in-water structures than in surrounding soft bottom habitat (Langhamer and Wilhelmsson, 2009; Bergström *et al.,* 2013; Reubens *et al.,* 2013). In the German Bight portion of the North Sea, fish were most densely congregated near the anchorages of jacket foundations, and the structures extending through the water column were thought to make it more likely that juvenile or larval fish encounter and settle on them (Rhode Island Coastal Resources Management Council, 2010; Krone *et al.,* 2013). In addition, fish can take advantage of the shelter provided by these structures while also being exposed to stronger currents created by the structures, which generate increased feeding opportunities and decreased potential for predation (Wilhelmsson *et al.,* 2006). The presence of the foundations and resulting fish aggregations around the foundations is

expected to be a long-term habitat impact, but the increase in prey availability could potentially be beneficial for some marine mammals.

The most likely impact on marine mammal habitats from the project is expected to be from pile driving, which may affect marine mammal food sources such as forage fish and could also affect acoustic habitat effects on marine mammal prey (*e.g.,* fish).

Water Quality

Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during pile driving and installation of the cables, including auxiliary work such as dredging and scour placement. These activities will disturb bottom sediments and may cause a temporary increase in suspended sediment in the project area. Currents should quickly dissipate any raised total suspended sediment (TSS) levels, and levels should return to background levels once the project activities in that area cease. No direct impacts on marine mammals are anticipated due to increased TSS and turbidity; however, turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary.

Equipment used by US Wind within the project area, including ships and other marine vessels, potentially aircrafts, and other equipment, are also potential sources of by-products (*e.g.,* hydrocarbons, particulate matter, heavy metals). All equipment is properly maintained in accordance with applicable legal requirements. All such operating equipment meets Federal water quality standards, where applicable. Given these requirements, impacts to water quality are expected to be minimal.

Acoustic Habitat

Acoustic habitat is the soundscape, which encompasses all of the sound present in a particular location and time, as a whole when considered from the perspective of the animals experiencing it. Animals produce sound for, or listen for sounds produced by, conspecifics (communication during feeding, mating, and other social activities), other animals (finding prey or avoiding predators), and the physical environment (finding suitable habitats, navigating). Together, sounds made by animals and the geophysical environment (*e.g.,* produced by earthquakes, lightning, wind, rain, waves) make up the natural contributions to the total acoustics of a place. These acoustic conditions, termed acoustic habitat, are one attribute of an animal's total habitat.

Soundscapes are also defined by, and acoustic habitat influenced by, the total contribution of anthropogenic sound. This may include incidental emissions from sources such as vessel traffic or may be intentionally introduced to the marine environment for data acquisition purposes (as in the use of airgun arrays) or for Navy training and testing purposes (as in the use of sonar and explosives and other acoustic sources). Anthropogenic noise varies widely in its frequency, content, duration, and loudness and these characteristics greatly influence the potential habitat-mediated effects to marine mammals (please also see the previous discussion on Masking), which may range from local effects for brief periods of time to chronic effects over large areas and for long durations. Depending on the extent of effects to habitat, animals may alter their communications signals (thereby potentially expending additional energy) or miss acoustic cues (either conspecific or adventitious). Problems arising from a failure to detect cues are more likely to occur when noise stimuli are chronic and overlap with biologically relevant cues used for communication, orientation, and predator/prey detection (Francis and Barber, 2013). For more detail on these concepts, see: Barber *et al.,* 2009; Pijanowski *et al.,* 2011; Francis and Barber, 2013; Lillis *et al.,* 2014.

The term ''listening area'' refers to the region of ocean over which sources of sound can be detected by an animal at the center of the space. Loss of communication space concerns the area over which a specific animal signal, used to communicate with conspecifics in biologically important contexts (*e.g.,* foraging, mating), can be heard, in noisier relative to quieter conditions (Clark *et al.,* 2009). Lost listening area concerns the more generalized contraction of the range over which animals would be able to detect a variety of signals of biological importance, including eavesdropping on predators and prey (Barber *et al.,* 2009). Such metrics do not, in and of themselves, document fitness consequences for the marine animals that live in chronically noisy environments. Long-term population-level consequences mediated through changes in the ultimate survival and reproductive success of individuals are difficult to study, and particularly so underwater. However, it is increasingly well documented that aquatic species rely on qualities of natural acoustic habitats, with researchers quantifying reduced detection of important ecological cues (*e.g.,* Francis and Barber, 2013; Slabbekoorn *et al.,* 2010) as well as survivorship consequences in several species (*e.g.,* Simpson *et al.,* 2014; Nedelec *et al.,* 2014).

Potential Effects From Offshore Wind Farm Operational Noise

Although this proposed rulemaking primarily covers the noise produced from construction activities relevant to the Maryland Offshore Wind Project offshore wind facility, operational noise was a consideration in NMFS' analysis of the project, as all turbines would become operational within the effective dates of the rule (if issued). It is expected that all turbines would be operational in Q1 2028. Once operational, offshore wind turbines are known to produce continuous, non-impulsive underwater noise, primarily below 1 kHz (Tougaard *et al.,* 2020; Stöber and Thomsen, 2021).

In both newer, quieter, direct-drive systems and older generation, geared turbine designs, recent scientific studies indicate that operational noise from turbines is on the order of 110 to 125 dB re 1 µPa root-mean-square sound pressure level (SPL_{rms}) at an approximate distance of 50 m (Tougaard *et al.,* 2020). Recent measurements of operational sound generated from wind turbines (direct drive, 6 MW, jacket foundations) at Block Island wind farm (BIWF) indicate average broadband levels of 119 dB at 50 m from the turbine, with levels varying with wind speed (HDR, Inc., 2019). Interestingly, measurements from BIWF turbines showed operational sound had less tonal components compared to European measurements of turbines with gear boxes.

Tougaard *et al.* (2020) further stated that the operational noise produced by WTGs is static in nature and lower than noise produced by passing ships. This is a noise source in this region to which marine mammals are likely already habituated. Furthermore, operational noise levels are likely lower than those ambient levels already present in active shipping lanes, such that operational noise would likely only be detected in very close proximity to the WTG (Thomsen *et al.,* 2006; Tougaard *et al.,*

2020). Similarly, recent measurements from a wind farm (3 MW turbines) in China found at above 300 Hz, turbines produced sound that was similar to background levels (Zhang *et al.,* 2021). Other studies by Jansen and de Jong (2016) and Tougaard *et al.* (2009) determined that, while marine mammals would be able to detect operational noise from offshore wind farms (again, based on older 2 MW models) for several kilometers, they expected no significant impacts on individual survival, population viability, marine mammal distribution, or the behavior of the animals considered in their study (harbor porpoises and harbor seals). In addition, Madsen *et al.* (2006) found the intensity of noise generated by operational wind turbines to be much less than the noises present during construction, although this observation was based on a single turbine with a maximum power of 2 MW.

More recently, Stöber and Thomsen (2021) used monitoring data and modeling to estimate noise generated by more recently developed, larger (10 MW) direct-drive WTGs. Their findings, similar to Tougaard *et al.* (2020), demonstrate that there is a trend that operational noise increases with turbine size. Their study predicts broadband source levels could exceed 170-dB SPL_{rms} for a 10-MW WTG; however, those noise levels were generated based on geared turbines; newer turbines operate with direct drive technology. The shift from using gear boxes to direct drive technology is expected to reduce the levels by 10 dB. The findings in the Stöber and Thomsen (2021) study have not been experimentally validated, though the modeling (using largely geared turbines) performed by Tougaard *et al.* (2020) yields similar results for a hypothetical 10 MW WTG.

Recently, Holme *et al.* (2023) cautioned that Tougaard *et al.* (2020) and Stöber and Thomsen (2021) extrapolated levels for larger turbines should be interpreted with caution since both studies relied on data from smaller turbines (0.45 to 6.15 MW) collected over a variety of environmental conditions. They demonstrated that the model presented in Tougaard *et al.* (2020) tends to potentially overestimate levels (up to approximately 8 dB) measured to those in the field, especially with measurements closer to the turbine for larger turbines. Holme *et al.* (2023) measured operational noise from larger turbines (6.3 and 8.3 MW) associated with three wind farms in Europe and found no relationship between turbine activity (power production, which is proportional to the blade's revolutions per minute) and noise level, though it was noted that this missing relationship may have been masked by the area's relatively high ambient noise sound levels. Sound levels (RMS) of a 6.3-MW direct-drive turbine were measured to be 117.3 dB at a distance of 70 m. However, measurements from 8.3 MW turbines were inconclusive as turbine noise was deemed to have been largely masked by ambient noise.

Finally, operational turbine measurements are available from the Coastal Virginia Offshore Wind (CVOW) pilot pile project, where two 7.8 m monopile WTGs were installed (HDR, 2023). Compared to BIWF, levels at CVOW were higher (10–30 dB) below 120 Hz, believed to be caused by the vibrations associated with the monopile structure, while above 120 Hz levels were consistent among the two wind farms.

Overall, noise from operating turbines would raise ambient noise levels in the immediate vicinity of the turbines; however, the spatial extent of increased noise levels would be limited. NMFS proposes to require US Wind to measure operational noise levels. US Wind did not request, and NMFS is not proposing to authorize, take incidental to operational noise from WTGs. Therefore, the topic is not discussed or analyzed further herein.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through the regulations, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise from pile driving and HRG surveys, could result in behavioral disturbance of marine mammals that qualifies as take. Impacts such as masking and TTS can contribute to the disruption of behavioral patterns and are accounted for within those takes proposed for authorization. There is also some potential for auditory injury (Level A harassment) of all marine mammals except North Atlantic right whales. However, the amount of Level A harassment that US Wind requested, and NMFS proposes to authorize, is low. While NMFS is proposing to authorize Level A harassment and Level B harassment, the proposed mitigation and monitoring measures are expected to minimize the amount and severity of such taking to the extent practicable (see Proposed Mitigation and Proposed Monitoring and Reporting).

As described previously, no serious injury or mortality is anticipated or proposed to be authorized incidental to the specified activities. Even without mitigation, both pile driving activities and HRG surveys would not have the potential to directly cause marine mammal mortality or serious injury. However, NMFS is proposing measures to more comprehensively reduce impacts to marine mammal species. While, in general, there is a low probability that mortality or serious injury of marine mammals could occur from vessel strikes, the mitigation and monitoring measures contained within this proposed rule are expected to avoid vessel strikes (see Proposed Mitigation section). No other activities have the potential to result in mortality or serious injury.

For acoustic impacts, we estimate take by considering: (1) acoustic thresholds above which the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

As described below, there are multiple methods available to predict density or occurrence and, for each species and activity, the largest value resulting from the three take estimation methods described below (*i.e.,* density-based, PSO-based, or mean group size) was carried forward as the amount of take proposed for authorization, by Level B harassment. The amount of take

proposed for authorization, by Level A harassment, reflects the density-based exposure estimates and, for some species and activities, consideration of other data such as mean group size.

Below, we describe NMFS' acoustic thresholds, acoustic and exposure modeling methodologies, marine mammal density calculation methodology, occurrence information, and the modeling and methodologies applied to estimate take for each of the Project's proposed construction activities. NMFS has carefully considered all information and analysis presented by US Wind, as well as all other applicable information and, based on the best available science, concurs that the estimates of the types and amounts of take for each species and stock are reasonable, and is proposing to authorize the amount requested. NMFS notes the take estimates described herein for foundation installation can be considered conservative as the estimates do not reflect the implementation of clearance and shutdown zones for any marine mammal species or stock.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (Level B harassment) or to incur PTS of some degree (Level A harassment). A summary of all NMFS' thresholds can be found at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

Level B Harassment

Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source, ambient noise, and the receiving animal's hearing, motivation, experience, demography, behavior at time of exposure, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021; Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment.

NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above the received sound pressure levels (SPL_{RMS}) of 120 dB for continuous sources (*e.g.,* vibratory pile driving, drilling) and above the received SPL_{RMS} 160 dB for non-explosive impulsive or intermittent sources (*e.g.,* impact pile driving, scientific sonar). Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavioral patterns that would not otherwise occur.

The proposed Project's construction activities include the use of impulsive or intermittent sources (*i.e.,* impact pile driving, some HRG acoustic sources); therefore, the 160-dB re 1 μPa (rms) threshold is applicable to our analysis.

Level A Harassment

NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0, Technical Guidance) (NMFS, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.,* metric resulting in the largest isopleth). As described above, US Wind's proposed activities include the use of impulsive sources. NMFS' thresholds identifying the onset of PTS are provided in table 8. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 8—PERMANENT THRESHOLD SHIFT (PTS) ONSET THRESHOLDS

[NMFS, 2018]

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	$L_{p,0\text{-pk,flat}}$: 219 dB; $L_{E,p,\ LF,24h}$: 183 dB	$L_{E,p,\ LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	$L_{p,0\text{-pk,flat}}$: 230 dB; $L_{E,p,\ MF,24h}$: 185 dB	$L_{E,p,\ MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	$L_{p,0\text{-pk,flat}}$: 202 dB; $L_{E,p,\ HF,24h}$: 155 dB	$L_{E,p,\ HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	$L_{p,0\text{-pk.flat}}$: 218 dB; $L_{E,p,\ PW,24h}$: 185 dB	$L_{E,p,\ PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-pk,flat}}$: 232 dB; $L_{E,p,\ OW,24h}$: 203 dB	*Cell 10:* $L_{E,p,\ OW,24h}$: 219 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0\text{-pk}}$) has a reference value of 1 μPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1 μPa^2s. In this table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO, 2017). The subscript "flat" is included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.,* 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Below, we describe the assumptions and methodologies used to estimate take, in consideration of acoustic thresholds and appropriate marine mammals density and occurrence information, for WTG, OSS, and meteorological tower installation, and HRG surveys. Resulting distances to thresholds, densities used, activity-specific exposure estimates (as relevant to the analysis), and activity-specific take estimates can be found in each activity subsection below. At the end of this section, we present the amount of annual and 5-year take that US Wind requested, and NMFS proposes to authorize, from all activities combined.

Acoustic and Exposure Modeling

The predominant underwater noise associated with the construction of the Project results from impact pile driving. US Wind employed Marine Acoustic, Inc., (MAI) to conduct acoustic modeling to better understand sound fields produced during these activities (see appendix A of ITA Application). The basic acoustic modeling approach is to characterize the sounds produced by the source and determine how the sounds propagate within the surrounding water column. MAI derived surrogate source spectra for each pile type and conducted sophisticated propagation modeling (as described below). To assess the potential for take from impact pile driving, MAI also conducted animal movement modeling; MAI estimated species-specific exposure probability by considering the range- and depth-dependent sound fields in relation to animal movement in simulated representative construction scenarios. More details on these acoustic source modeling, propagation modeling and exposure modeling methods are described below.

The amount of sound generated during pile driving varies with the energy required to drive piles to a desired depth and depends on the sediment resistance encountered. Sediment types with greater resistance require hammers that deliver higher energy strikes and/or an increased number of strikes relative to installations in softer sediment. Maximum sound levels usually occur during the last stage of impact pile driving where the greatest resistance is encountered (Betke, 2008). Therefore, variations in hammer energies must be taken into account during acoustic source modeling.

For impact pile driving, MAI derived surrogate source spectra for each impact pile driving scenario based upon available measured or modeled source spectra for hammer energies and pile diameters similar to those expected for the Project impact pile driving activities (table 9). Source spectra (or a representative of sound by frequency) were then adjusted based upon pile diameters and hammer energies that would be used by US Wind using pile driving scaling laws (Von Pein *et al.,* 2022), which are derived from a large number of measurements for wide ranges of hammer energies, pile diameters, and other parameters.

MAI used the predicted spectrum of an 11-m diameter monopile developed for the South Fork Wind Farm (Denes *et al.,* 2018; Denes *et al.,* 2021) as a surrogate source signature in modeling of the 11-m monopile for the WTG foundations for the Project. The surrogate spectrum was predicted assuming an IHC S-4000 hammer with a maximum strike energy of 4,000 kJ, while the planned scenario includes an 11-m monopile with a hammer capable of a 4,400-kJ maximum strike energy of 4,400 kJ. Hence, MAI adjusted the spectra accordingly to account for slightly higher maximum source levels. The expected difference in sound level between 4,000 and 4,400 kJ can be approximated using energy scaling laws (Von Pein *et al.,* 2022), and is estimated to be minimal (0.4 dB).

MAI used a 3-m post-piled pin pile source spectrum in the modeling for impact pile driving of OSS foundations that was based upon the mean of the measured spectra of a 6-m pile reported by Bruns *et al.* (2014) and a 3.5-m FINO2 pile reported by Matuschek and Betke (2009) (see appendix A of the LOA application for additional detail on deriving source spectra for the 3-m pin pile). The resulting representative source level for the 3-m pin pile (208 dB_{SEL}) is comparable to the estimated value for a 2.4-m diameter post-piled pin pile driven by a 1,700-kJ Menck hammer (209 dB_{SEL}) measured by Molnar *et al.* (2020). Molnar *et al.* (2020) estimated this value by back calculating the source level assuming transmission loss of 15 * $\log_{10}$ (range) based upon a measured SEL of 188 dB at a range of 25 m from the pile during uninitiated impact pile driving. This suggests that the modeling for the 3-m pin pile is representative of a post-piled pin pile.

The spectrum derived for the 3-m pin pile was scaled to represent the 1.8 m pin piles for the Met tower based upon the maximum hammer energy and pile diameter using relationships presented in Von Pein *et al.* (2022). The 3-m post-piled pin pile source levels being scaled down by 8 dB and a SEL source level of 199 dB for the 1.8-m pin pile (see section 4.4, ''Source Characterization,'' in appendix A of the ITA application for a full description of scaling) (table 11).

Once acoustic modeling for the monopile at a maximum hammer energy of 4,400 kJ was performed, the modeled sound fields were then adjusted by a broadband sound reduction to represent the lower strike energy levels (*i.e.,* 1,100 kJ, 2,200 kJ, and 3,300 kJ) planned for portions of the monopile installation. To account for the differences in hammer energies planned for use and the maximum hammer energy (4,400 kJ), the modeled spectra for the 4,400-kJ hammer was scaled using $10*\log_{10}(E_1/E_2)$ (where E_1 is the lower strike energy level and E_2 is the modeled energy level), to represent each of the lower proposed hammer energies (Von Pein *et al.,* 2022). This resulted in the application of scaling factors of -6, -3, and -1 dB to represent the 1,100 kJ, 2,200 kJ, and 3,300 kJ hammer energies, respectively, as shown in table 10. The ramp up of hammer energy is accounted for when calculating the cumulative SEL over the installation of each monopile using the number of strikes at each energy level. The broadband scaling factor (table 10) was subtracted from the modeled received levels for the indicated number of strikes before the cumulative SEL was calculated. This hammer strike energy progression for monopile installation was considered in the calculation of the acoustic ranges and acoustic exposures. Although US Wind originally considered and modeled maximum hammer strikes at an energy of 4,400 kJ, the final hammer schedule (table 10) did not include any strikes at the 4,400 kJ energy level as US Wind has indicated they do not plan to use hammer energies above 3,300 kJ. SEL acoustic ranges assume a hammer schedule up to a maximum energy of 3,300 kJ, however, peak and RMS acoustic ranges assume a hammer schedule up to a maximum energy of 4, 400 kJ (tables 14 and 15). For additional details on surrogate source spectra development and scaling, please see section 4.4, ''Source Characterization,'' in appendix A of US Wind's ITA application.

US Wind would use at least two noise abatement systems (NAS) during all pile driving associated with foundation installations, such as a double bubble curtain or single bubble curtain and an encapsulated bubble or foam sleeve, to reduce sound levels. NAS, such as bubble curtains, are often used to decrease the sound levels radiated from a source. Hence, hypothetical broadband attenuation levels of 0 dB, 10 dB, and 20 dB were incorporated into the foundation source models to gauge effects on the ranges to thresholds given

these levels of attenuation (appendix A of the ITA application). Although two attenuation levels were evaluated, NMFS anticipates that the noise attenuation systems ultimately chosen will be capable of reliably reducing source levels by 10 dB; therefore, this assumption was carried forward in this analysis for monopile, jacket, and Met tower foundation pile driving installation. See the Proposed Mitigation section for more information regarding the justification for the 10-dB assumption.

Key modeling assumptions for the monopiles and pin piles are listed in table 10 (additional modeling details and input parameters can be found in appendix A of the ITA application). Hammer energy schedules for monopiles (11-m), 3-m pin piles, and 1.8-m pin piles (are also provided in table 10 and the resulting broadband source levels of the monopiles and pin piles are presented in table 11.

TABLE 9—SURROGATE SPECTRA HAMMER ENERGIES AND PILE DIAMETERS

Foundation type	Maximum hammer energy (kJ)	Representative foundation	Representative hammer energy (kJ)	Reference
11-m Monopile	[1] 4,400	11-m monopile	4,400	Denes *et al.,* 2021.
3-m Pin Pile	1,500	6-m pin pile [2]	([4])	Bruns *et al.,* 2014.
		3.5-m FINO2 pile [3]		Matuschek and Betke, 2009.
1.8-m Pin Pile	500	3-m Skirt Pile	1,500	MAI, 2022.

[1] US Wind confirmed with NMFS that their maximum hammer energy will not exceed 3,300 kJ (Jodziewicz, 2023).
[2] Measured at a distance of 15 m.
[3] Measured at a distance of 500 m.
[4] Hammer energies were not available.

TABLE 10—KEY PILING ASSUMPTIONS AND HAMMER ENERGY SCHEDULES FOR MONOPILES AND PIN PILES

Foundation type	Hammer energy (kJ)	Duration at energy level (min)	Strikes per minute	Strike count	Hammer energy scaling factor (dB)	Seabed penetration depth (m)	Piling time per day (min)	Number of piles per day
11-m Monopile [1]	1,100	30	20	600	−6	50	120	1
	2,200	60	40	2,400	−3			
	3,300	30	60	1,800	−1			
	[1] 4,400				0			
3-m Pin Pile	[3] 1,500	480	40	19,200	n/a	[5] 50–60	[6] 480	4
1.8-m Pin Pile	[3] 500	360	[4] 8.3	2,988	n/a	[5] 51–53	[6] 360	3

[1] While US Wind would use a hammer capable of striking the pile at 4,400 kJ, US Wind has committed to not using hammer energies about 3,300 kJ (Jodziewicz, 2023). Modeled sound fields were adjusted by broadband sound reduction to represent the lower strike energy levels planned for monopile installation.
[2] Assumed this maximum hammer energy for the duration of installation.
[3] Although the fractional number of 8.3 hammer strikes per minute is unlikely to be accomplished during installation, this number instead of the rounded, more realistic value of 8 strikes per minute is included as it results in a higher number of total hammer blows than if the rounded blows per minute value were used.
[4] Subject to final design.
[5] Piling time refers to all pin piles installed within a 24-hour period.

TABLE 11—BROADBAND SOURCE LEVELS, ASSUMING 10-dB ATTENUATION, DERIVED FROM SOURCE MODELING

Pile type	Max hammer energy (kJ) [a]	Source level (dB) at 1 m			Source
		SEL_{ss} SPL (dB) re 1µ Pa^2 m^2	Peak SPL (dB) re 1µ Pa	RMS SPL (dB) re 1µ Pa	
11-m Monopile	4,400	214	262	224	Denes *et al.* (2018; 2021).
3-m Pin Pile [b c]	1,500	198	249	208	Bruns *et al.,* 2014; Matuschek and Betke, 2009.
1.8 m Pin Pile [c]	500	189	237	199	MAI, 2022.

SELss = single strike SEL.
[a] Assumes MHU 4400 hammer.
[b] Based upon measured spectra of a 6-m pile reported by Bruns *et al.* (2014).
[c] Based upon measured spectra of a 3.5-m pile reported by Matuschek and Betke (2009).

After calculating source levels, MAI used the Navy Standard Parabolic Equation (NSPE) propagation model to estimate distances to NMFS' harassment thresholds. The NSPE is a modern iteration of the well-known Range-dependent Acoustic Model (RAM) (Collins, 1993). The propagation of sound through the environment can be modeled by predicting the acoustic propagation loss—a measure, in decibels, of the decrease in sound level between a source and a receiver some distance away. Geometric spreading of acoustic waves is the predominant way by which propagation loss occurs. Propagation loss also happens when the sound is absorbed and scattered within the water column, as well as absorbed, scattered, and reflected at the water surface and within the seabed. Propagation loss depends on the acoustic properties of the ocean and seabed and its value changes with frequency.

A single representative location of intermediate water depth (27 m) was selected for the underwater acoustic propagation modeling analysis. A sensitivity analysis was conducted to assess the differences in acoustic propagation at the selected intermediate-depth model location (27 m), the deepest location (42 m), and shallowest location (13 m) within the

Project Area. The results of the sensitivity analysis indicated that although acoustic propagation was not significantly different between the sites, lower received levels were predicted at the shallowest and deepest locations relative to the intermediate depth modeling location. Therefore, of the three considered modeling locations, the intermediate depth (27 m) location was selected to provide the most conservative and representative modeling results. MAI included physical site parameters, such as bathymetry, water surface roughness, seasonal sound velocity profiles, wind speed, and sediment type/size into the acoustic propagation model. The model generated the predicted noise during impact pile driving scenarios for the 11-m monopiles, 3-m pin piles, and 1.8-m pin piles. The May sound velocity profile was selected to be representative of the proposed pile driving construction period as this profile represented the largest acoustic propagation ranges (see appendix A of the ITA application). Pile driving sources were included in the propagation model as vertical line arrays. The pile beampattern was created from a vertical line array of elements with 1-m spacing from the surface to the seafloor. This representative array was used to create a frequency-specific beampattern (see appendix A of the ITA application). MAI followed this propagation process for each one-third octave center frequency in the bands from 10 Hz to 25 kHz with radials running at 10° intervals to a range of 50 km. Based upon the source levels derived for each pile driving source (table 11), the one-third octave band source levels were added to each transmission loss value to produce a received level value at each range, depth, and bearing point. The combined sound fields for each frequency were then summed to generate a representative broadband sound field. This process was followed for each radial around each pile driving source to produce an *N* * two-dimensional grid of received sound levels in range, depth and bearing. The resulting predicted acoustic SEL field was assessed with the appropriate marine mammal weighting functions for low-frequency, mid-frequency, and high-frequency cetaceans as well as pinnipeds in water (NMFS, 2018). These weighting functions were applied to individual sound received levels to reflect the susceptibility of each hearing group to noise-induced threshold shifts.

To estimate the probability of exposure of animals to sound above NMFS' harassment thresholds during foundation installation, MAI integrated the sound fields generated from the source and propagation models described above with marine mammal species-typical behavioral parameters (*e.g.,* dive parameters, swimming speed, and course/direction changes) using the Acoustic Integration Model (AIM) (Frankel *et al.,* 2002). AIM is a Monte Carlo based statistical model in which multiple iterations of realistic predictions of acoustic source use as well as animal distribution and movement patterns are conducted to provide statistical predictions of estimated effects from exposure to underwater sound transmissions. For each species, separate AIM simulations were developed and iterated for each modeling scenario and activity location. During the simulations, animats (modeled receivers representing individual marine mammals) were randomly distributed in the model simulation area and the predicted received sound level was estimated every 30 seconds to create a history over a 24-hour period. Animats were programmed to reflect off the boundaries of the model simulation area and remain within this simulation area. The model simulation area was delineated by four boundaries consisting of lines of latitude (37.5° to 39° N) and lines of longitude (73.75° to 75.5° W). These lines extended one latitude or longitude beyond the model simulation area to ensure that the region was large enough to capture anticipated substantial behavior reactions and an adequate number of animats would be modeled in all directions. This model area box, which included the model simulation area, was approximately 20,000 km^2 in size. Animats were also pre-programmed to move every 30 seconds based upon species-specific behaviors, yet were limited in movements by the coastline and minimum occurrence depth for each species, based upon scientific literature. Animat movement behavior parameters included diving, swimming, aversion, and residency patterns based upon existing scientific literature for each species in the model (see table B–1 in appendix A of the ITA application). Animat movement behavior parameters for seals were modeled based upon harbor seal parameters (see table B–1 in appendix A of the ITA application). At the end of each 30-second interval, the received sound level (in dB RMS) for each animat was recorded.

The output of the simulation is the exposure history for each animat within the simulation, and the combined history of all animats gives a probability density function of exposure during the project. The acoustic exposure history for each animat was analyzed to produce Level A harassment and Level B harassment exposure estimates. MAI estimated the amount of potential acoustic exposures above NMFS' Level A (PTS) harassment and Level B (behavioral) harassment thresholds predicted to occur within the Project area from any pile driving event (see below in section WTG, OSS, and Met tower Foundation Installation for more details). Once an animat received an exposure from a sound field greater than the Level A harassment (PTS) threshold, the animat was eliminated from further analysis; animats not exposed to sound fields greater than the Level A harassment threshold were further analyzed to determine whether the animat would be exposed to sound fields greater than the Level B harassment (behavioral) threshold. Therefore, animats were not counted as both Level A harassment and Level B harassment exposures.

To obtain acoustic exposure estimates for each species per pile, the numbers of modeled animat sound exposures were multiplied by the ratio of the modeled animat density to the real-world marine mammal density estimate for the buffered Lease Area (Roberts *et al.,* 2023, see below for more details on how a 5.25-km buffer zone around the Lease Area was calculated and densities were estimated). The animat exposure estimates per pile are the product of the number of modeled exposures multiplied by the ratio of real-world density per month (Roberts *et al.,* 2023) to model density. The daily exposures were then multiplied by the planned number of piles driven each month and then summed for the year for each of years 1–3 when pile driving would take place. US Wind plans to install only one monopile per day, four 3-m pin piles per day, and three 1.8-m pin piles per day (for Met tower).

Density and Occurrence

In this section, we provide the information about marine mammal density, presence, and group dynamics that informed the take calculations for all activities. US Wind applied the 2022 Duke University Marine Geospatial Ecology Laboratory Habitat-based Marine Mammal Density Models for the U.S. Atlantic (Duke Model-Roberts *et al.,* 2016; Roberts *et al.,* 2023) to estimate take from foundation installation and HRG surveys (please see each activity subsection below for the resulting densities). The models estimate absolute density (individuals/

100 km^2) by statistically correlating sightings reported on shipboard and aerial surveys with oceanographic conditions. For most marine mammal species, densities are provided on a monthly basis. Where monthly densities are not available (*e.g.,* pilot whales), annual densities are provided. Moreover, some species are represented as guilds (*e.g.,* seals (representing *Phocidae spp.,* primarily harbor and gray seals and pilot whales (representing short-finned and long-finned pilot whales)).

The Duke habitat-based density models delineate species' density into 5 * 5 km (3.1 * 3.1 mi) grid cells. US Wind calculated mean monthly (or annual) densities for each species for each grid cell within the Lease Area and 5.25 km buffer perimeter around the Lease Area that represented the largest 10-dB attenuated expected range to NMFS' harassment thresholds. The buffer perimeter was calculated based upon the largest range to Level B harassment threshold, which was 5.25 km for impact pile driving of 11-m monopiles at a maximum hammer energy of 4,400 kJ. This distance was added as a buffer surrounding the Lease Area for all pile driving and HRG activities, and marine mammal densities were compiled for this buffered area (see figure 6–1 in the LOA application). All 5 × 5 km grid cells in the models that fell within the analysis polygon were considered in the calculations. If the centroid of the grid cell, or a minimum of half the cell, fell within the buffered lease area boundary, the cell was included in the density analysis (see section 3.2 of appendix A of the ITA application for additional information on how the centroid of each grid cell was determined).

Densities were computed monthly for each species where monthly densities were available. For the pilot whale guild (*i.e.,* long-finned and short-finned), monthly densities are unavailable, so annual mean densities were used instead. Additionally, the models provide density for pilot whales and seals as guilds. To obtain density estimates for long-finned and short-finned pilot whales, US Wind scaled the guild density by the relative abundance of each species in the Project Area based upon sighting, biopsy, and stranding data (Garrison and Rosel, 2017; Palka *et al.,* 2021; Hayes *et al.,* 2023; Maryland Marine Mammal Stranding Program, 2023). Biopsy and stranding data indicated that short-finned pilot whales are more likely than long-finned pilot whales to occur along the Maryland coast (Garrison and Rosel, 2017; Hayes *et al.,* 2023). Based on these data, US Wind partitioned total pilot whale exposures based upon the assumption that 60 percent of exposures would be to short-finned pilot whales and 40 percent of exposures would be to long-finned pilot whales.

The equation below shows how local occurrence scaling is applied to compute density for pilot whales.

$$D_{\text{short-finned}} = D_{\text{both}} \times (N_{\text{short-finned}} / (N_{\text{short-finned}} + N_{\text{long-finned}}))$$

where D represents density and N represents occurrence.

Density estimates for gray seals, harbor seals, and harp seals were not scaled by local occurrence as limited at-sea data was available for these seal species in the Project Area (*i.e.,* no local abundance estimates could be calculated). Although harp seals are considered extralimital in the Project Area, the MD DNR and National Aquarium at Baltimore (NAB) have documented harp seal strandings inshore of the Lease Area (NAB, 2023a). Over the past 10 years, stranding reports of harp seals in Maryland have become more common in areas such as Ocean City (NAB, 2023b). Although stranding records for harbor and gray seals exist as well for coastal Maryland, stranding records may not accurately reflect the numbers and distribution of seals offshore in the vicinity of the Project Area. In addition, the Roberts *et al.* (2023) density data includes all three species of seals in the seal guild. MAI conducted animat modeling using harbor seal behavior parameters (see appendix B, ''Animat Modeling Parameters,'' of appendix A of the ITA application) and, while behavioral parameters may differ slightly between seal species, NMFS concurs that harbor seal behavior is a suitable proxy for all seals as any behavioral differences between seal species are not likely to be large enough to require separate modeling. Harbor seals are likely to be the prevalent seal species in the Project Area and, given the difficulty predicting the likely proportion of exposures by species, exposure estimates for seals are presented for gray seals, harbor seals, and harp seals collectively.

The density models (Roberts *et al.,* 2023) also do not distinguish between bottlenose dolphin stocks and only provide densities for bottlenose dolphins as a species. For impact pile driving, take of each bottlenose dolphin stock was allocated based upon the progression of pile driving from the southeastern corner of Lease Area in year 1 (2025) towards the western portion of the Lease Area in years 2 and 3, as described further in the *WTG, OSS, and Met Tower Foundation Installation* section. Mean monthly density estimates are provided in table 12.

TABLE 12—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS PER 100 km^2) CONSIDERING A 5.25-km BUFFER AROUND THE LEASE AREA [1]

Species	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
North Atlantic right whale	0.075	0.076	0.063	0.045	0.008	0.003	0.001	0.001	0.002	0.004	0.011	0.036
Fin whale	0.214	0.184	0.154	0.135	0.094	0.111	0.041	0.028	0.04	0.037	0.045	0.151
Humpback whale	0.091	0.062	0.083	0.187	0.142	0.102	0.02	0.011	0.027	0.112	0.143	0.088
Minke whale	0.069	0.089	0.114	0.687	0.750	0.155	0.05	0.02	0.01	0.055	0.025	0.064
Sei whale	0.029	0.021	0.034	0.061	0.02	0.005	0.001	0	0.001	0.006	0.017	0.046
Killer whale [2]	0.002											
Atlantic spotted dolphin	0.003	0.001	0.002	0.013	0.046	0.09	0.396	1.505	0.475	0.335	0.243	0.032
Pantropical spotted dolphin [2]	0.004											
Bottlenose dolphin [3]	3.855	1.316	1.659	5.668	15.225	15.92	18.323	20.608	16.47	14.689	17.13	11.705
Short-finned pilot whale and long-finned pilot whale [4]	0.039											
Common dolphin	4.298	1.869	1.972	3.268	3.289	1.471	1.301	0.501	0.044	0.765	5.746	7.939
Risso's dolphin	0.045	0.006	0.006	0.056	0.051	0.018	0.017	0.018	0.01	0.023	0.092	0.169

TABLE 12—MEAN MONTHLY MARINE MAMMAL DENSITY ESTIMATES (ANIMALS PER 100 km^2) CONSIDERING A 5.25-km BUFFER AROUND THE LEASE AREA [1]—Continued

Species	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Rough-toothed dolphin [2]	0.002											
Striped dolphin [2]	0.004											
Harbor porpoise	3.653	3.336	2.586	3.191	0.615	0.002	0.001	0.001	0	0	0.002	2.025
Seals [4]	16.993	12.084	7.569	11.879	9.843	1.087	0.408	0.236	0.405	2.158	3.222	15.741

[1] Species that were modeled as a representative group rather than as individual species.
[2] Annual densities are shown for species with insufficient sightings to derive density estimates by month.
[3] Two stocks of common bottlenose dolphin (the western North Atlantic migratory coastal stock and the western North Atlantic offshore stock) may occur in the Project area. Both stocks are presented here.
[4] Densities are only available for the combined seal and pilot whale groups in the Roberts *et al.* (2023) dataset. Seals include harbor seals, gray seals, and harp seals were in the seal guild.
[5] Density estimates are presented yet take is not requested for these species due to low density estimates and few occurrences in the Project area.

For some species and activities, PSO survey data for the Lease Area (RPS, 2023; Smultea, 2022) and group size data compiled from RPS (2013) and DoN (2017b) indicate that the density-based exposure estimates may be insufficient to account for the number of individuals of a species that may be encountered during the planned activities. This is particularly true for uncommon or rare species with very low densities in the models. Hence, consideration of other data is required to ensure the potential for take is adequately assessed.

In cases where the acoustic exposure estimate for a species was less than the mean group size, the take request was increased to the mean group size (in some cases multiple groups were assumed) and rounded to the nearest integer (table 13). Requested take for pile driving activities was adjusted according to average group size in table 13 and rounded to the nearest whole number.

Additional detail regarding the density and occurrence as well as the assumptions and methodology used to estimate take for specific activities is included in the activity-specific subsections below and in section 6.1 of the ITA application. Average group sizes used in take estimates, where applicable, for all activities are provided in table 13.

TABLE 13—AVERAGE MARINE MAMMAL GROUP SIZES USED IN TAKE ESTIMATE CALCULATIONS

Species	Mean group size	Source [1]
Fin whale [2 3]	1.64	RPS, 2023.
North Atlantic right whale [3]	2.00	RPS, 2023.
Humpback whale [3]	1.95	RPS, 2023.
Atlantic spotted dolphin [3]	5.89	RPS, 2023.
Pantropical spotted dolphin [3]	4.33	RPS, 2023.
Common dolphin [3]	7.00	RPS, 2023.
Killer whale [4]	2.5	DoN, 2017.
Long-finned pilot whale [3]	11.0	DoN, 2017.
Short-finned pilot whale [3]	16.0	DoN, 2017.
Risso's dolphin [3]	8.47	DoN, 2017.
Rough-toothed dolphin [4]	5.50	DoN, 2017.
Striped dolphin [4]	45.59	DoN, 2017.
Harbor porpoise [5]	3.00	RPS, 2023.

[1] PSO data from the Smultea Associate PSO interim report (Smultea, 2022) was not used to assess group sizes as the activity documented in the report occurred outside the pile driving and HRG micro-siting periods planned for the Project.
[2] For fin whales, US Wind adjusted take by Level A harassment according to group size for years 1 and 3.
[3] US Wind adjusted take by Level B harassment for these species according to group size.
[4] For killer whales, rough-toothed dolphins, and striped dolphins, NMFS adjusted take by Level B harassment according to the assumption that one group of each species would be encountered per year of impact pile driving.
[5] For harbor porpoises, US Wind adjusted take by Level A harassment according to group size for years 2 and 3 and take by Level B harassment according to group size for years 1 and 3.

WTG, OSS, and Met Tower Foundation Installation

Here, we describe the results from the acoustic, exposure, and take estimate methodologies outlined above for WTG, OSS, and meteorological tower installation pile driving activities that have the potential to result in harassment of marine mammals. We present acoustic ranges to Level A harassment and Level B harassment thresholds, densities, exposure estimates and take estimates following the aforementioned assumptions (*e.g.,* construction and hammer schedules).

As previously described, MAI integrated the results from acoustic source and propagation modeling into an animal movement model to calculate acoustic ranges for 16 marine mammal species considered common in the project area. The acoustic ranges represent distances to NMFS' harassment isopleths independent of movement of a receiver. The pile progression schedule (refer back to table 3) was taken into account when calculating the acoustic ranges to SEL thresholds (see appendix A of the ITA application of additional details on calculations). The modeled sound fields represented the single strike SELs at the modeled strike energies (table 11). The single strike SEL fields were converted to cumulative SEL fields based on the different strike energy levels and the number of expected hammer blows at each energy. The difference between a single strike SEL and the cumulative SEL was calculated using 10 * $\log_{10}$ (number of strikes). MAI calculated

acoustic ranges for the 11-m monopile assuming one monopile would be installed per day using 4,800 impact hammer strikes (table 3). For the 3-m pin piles for the OSSs scenario, MAI calculated the acoustic ranges assuming 4 pin piles would be installed per day with 19,200 hammer strikes each day (table 3). MAI calculated acoustic ranges for the 1.8-m pin piles for the Met tower foundation assuming 3 pin piles would be installed per day with an associated 2,998 impact hammer strikes that day (table 3). The maximum received level-over-depth was calculated at each range step and along each radial. The maximum and 95th percentile acoustic range to the marine mammal regulatory thresholds were then calculated for each of the modeling scenarios (table 14). The maximum acoustic range value represents the greatest distance along any single radial. The 95th percentile acoustic range ($R_{95\%}$) is an improved representation of the range to the threshold as it eliminates major outliers and better represents all the modeled radials. All acoustic ranges presented to regulatory thresholds are the 95th percentile range. PTS peak sound pressure level thresholds and the Level B behavioral harassment threshold (160-dB RMS sound pressure level) represent instantaneous exposures. The distances to the PTS dB SEL threshold are likely an overestimate as it assumes an animal remains at the distance for the entire duration of pile driving (however, an animal could come closer for a shorter period of time and still incur PTS or an animal could move further away and, thus, not be exposure to the entire duration of piling in a 24-hour period that would result in the exceedance of the PTS SELcum threshold). Acoustic ranges to the Level A harassment and Level B harassment thresholds are shown in tables 14 and 15, respectively.

TABLE 14—ACOUSTIC RANGES ($R_{95\%}$) IN METERS (m) TO MARINE MAMMAL LEVEL A HARASSMENT THRESHOLDS (SEL AND PEAK [1]) DURING IMPACT PILE DRIVING 11-m MONOPILES, 3-m PIN PILES, AND 1.8-m PIN PILES, ASSUMING 10-dB ATTENUATION

Pile installed	Maximum hammer energy (kJ)	Activity duration (min/day)	Distances to Level A harassment thresholds (m)							
			Low-frequency cetaceans		Mid-frequency cetaceans		High-frequency cetaceans		Phocids	
			219 $L_{p,\ pk}$	183 $L_{E,\ 24hr}$	230 $L_{p,\ pk}$	185 $L_{E,\ 24hr}$	202 $L_{p,\ pk}$	155 $L_{E,\ 24hr}$	218 $L_{p,\ pk}$	185 $L_{E,\ 24hr}$
11 m Monopile	[2] 3,300	120	<50	2,900	<50	0	200	250	<50	100
3 m Pin Piles	1,500	480	<50	1,400	<50	0	<50	100	<50	50
1.8 m Pin Pile	500	240	<50	50	<50	0	<50	0	<50	0

[1] SEL acoustic ranges assumed a maximum hammer energy of 3,300 kJ while peak acoustic ranges assumed a maximum hammer energy of 4,400 kJ. US Wind confirmed with NMFS that they would not utilize hammer energies above 3,300 kJ (Jodziewicz, 2023).

TABLE 15—ACOUSTIC RANGES ($R_{95\%}$) IN METERS (m) TO MARINE MAMMAL LEVEL B HARASSMENT THRESHOLDS (160-dB SPL) DURING IMPACT PILE DRIVING 11-m MONOPILES, 3-m PIN PILES, AND 1.8-m PIN PILES, ASSUMING 10-dB ATTENUATION

Pile installed	Hammer energy (kJ)	Distance to Level B harassment threshold (m) (160 dB)
11-m Monopile	4,400	5,250
3-m Pin Piles	1,500	500
1.8-m Pin Pile	500	100

To estimate take from foundation installation activities, US Wind used the pile installation construction schedule shown in table 16, assuming 22 total days of foundation installation activities during the MarWin campaign, 58 total days of pile installation activities during the Momentum Wind campaign, and 39 total days of pile installation during the Future Development campaign.

TABLE 16—PILE INSTALLATION CONSTRUCTION SCHEDULE USED FOR TAKE ESTIMATION

Campaign	Year	Structure	Foundation type	Number of piles	Expected number of days to install foundation type	Installation rate per day	Total number of installation days for campaign
MarWin	2025	WTG	11-m Monopile	21	21	1	22
		OSS	3-m Pin Piles	4	1	4	
Momentum Wind	2026	WTG	11-m Monopile	55	55	1	58
		OSS	3-m Pin Piles	8	2	4	
		Met tower	1.8-m Pin Piles	3	1	3	
Future Development	2027	WTG	11-m Monopile	38	38	1	39
		OSS	3-m Pin Piles	4	1	4	

To estimate the amount of Level A harassment and Level B harassment that may occur incidental to foundation installation, US Wind used the animat modeling described above to integrate the predicted received sound level fields of the impact pile driving resulting from the acoustic modeling of the impact pile driving sources (acoustic ranges) with the four-dimensional movements of marine mammals. US Wind used the modeled SEL and peak

SEL received by each individual animat over the duration of the model simulation (24 hours) to calculate the potential for that animat to have been exposed to sound levels exceeding the Level A harassment threshold. To estimate the amount of Level B (behavioral) harassment that may occur incidental to foundation installation, US Wind used the modeled root mean square (RMS) sound pressure levels to estimate the potential for marine mammal behavioral responses for animats that did not experience exposure to sound levels that exceeded Level A harassment thresholds. Modeled results for Level A harassment and Level B harassment exposure estimates were subsampled to reflect the duty cycle of each construction activity's source to create multiple estimates of sound exposure for each source and marine mammal combinations. The number of modeled exposures were multiplied by the ratio of real-world density and animat model densities to obtain per pile animat exposure estimates. US Wind calculated maximum acoustic exposure estimates on an annual basis according to the annual installation schedule (table 16) for the 11-m monopile, 3-m skirt pile, and 1.8-m pin pile, assuming a 10-dB sound level attenuation each year. As described above, MAI multiplied the final acoustic per pile exposure estimate for each modeled species by the number of piles to be installed per month to obtain a monthly exposure estimate for each species. To obtain annual exposure estimates, MAI summed the monthly exposure estimates for each modeled species for each year of pile driving (years 1–3). MAI conducted these calculations for both Level A harassment and Level B harassment exposure estimates for each modeled species. Table 17 identifies the amount of take calculated for impact installation of monopiles for WTGs, table 18 identifies the amount of take calculated for impact installation of 3-m pin piles for jacket foundations for OSSs, and table 19 identifies the amount of take calculated for impact installation of 1.8-m pin piles for the Met tower. No take by Level A harassment is anticipated or proposed for authorization during impact pile driving of 3-m pin piles for OSSs (table 18) or 1.8-m pin piles for the Met tower (table 19). Take proposed for authorization for all impact pile driving activities combined across years 1–3 and carried forward for this proposed rule as shown in table 20.

Bottlenose dolphin estimated take by Level B harassment was distributed between the coastal stock and offshore stock based upon the where impact pile driving would take place within the Lease Area throughout years 1–3 and how pile driving locations may overlap the expected ranges of the coastal and offshore stocks. North of Cape Hatteras, NC, the coastal stocks of bottlenose dolphins are expected to occur in waters less than 25 m deep and within 34 km of shore (Kenney, 1990; Torres *et al.,* 2003). Impact pile driving would progress from the southeastern corner of the Lease Area in year 1 and extend west during years 2 and 3. During year 1, impact pile driving would occur furthest offshore, with the ensonified zone above NMFS harassment threshold beyond the expected range of the coastal stock, therefore, US Wind allocated 100 percent of estimated take by Level B harassment during year 1 to the offshore stock. During years 2 and 3, pile driving would take place further west than year 1 and within the range of the coastal stock as well. As pile driving is expected to progress westward into shallower waters and further into the range of the coastal stock during years 2 and 3, estimated take by Level B harassment would increase for the coastal stock as compared to the offshore stock as the pile driving locations progress west. US Wind distributed estimated take by Level B harassment between stocks for years 2 and 3 as follows: year 2 (70 percent offshore stock, 30 percent coastal stock) and year 3 (15 percent offshore stock; 85 percent coastal stock).

For Atlantic spotted dolphins, it was expected that five groups would be observed during pile driving activities in year 1 and 10 groups would be observed in years 2 and 3 (RPS, 2023). Although acoustic exposures were calculated as zero for each species of pilot whales each year, based upon sighting data in the area (DoN, 2017), it was assumed that one pilot whale group of each species may be encountered. US Wind adjusted pilot whale requested take by Level B harassment for years 1 to 3. For Risso's dolphin, it was expected that two groups of nine would be observed for each year of pile driving (years 1 through 3) and taken by Level B harassment. Although killer whales, rough-toothed dolphins, and striped dolphins are expected to be rare in the Project Area due to habitat preferences, a very small amount of exposures (*e.g.,* 0.22) were modeled; therefore, it was assumed one group of each species may be encountered during the LOA period. For harbor porpoises, it was expected that one group of three (RPS, 2023) would be taken by Level A harassment in years 2 and 3 and one group of three would be taken by Level B harassment in years 1 and 3. US Wind adjusted requested take for harbor porpoises, accordingly. Year 2 request for take by Level B harassment for harbor porpoises during pile driving activities was not adjusted for group size as the estimated acoustic exposure was greater than the average expected group size, and the acoustic exposure estimate was rounded up to the nearest whole number. Correcting for group size for these species is used as a conservative measure to ensure all animals in a group are accounted for in the take request.

TABLE 17—MODELED LEVEL A HARASSMENT AND LEVEL B HARASSMENT EXPOSURES ASSUMING 10-dB SOUND ATTENUATION DURING IMPACT PILE DRIVING OF 11-m MONOPILE FOUNDATIONS IN THE BUFFERED LEASE AREA OVER 3 YEARS AND PROPOSED TAKE (IN PARENTHESES)

Marine mammal species	Level A harassment (SEL_{cum}) [6]			Level B harassment (160 dB_{rms})		
	Year 1 (2025) [8]	Year 2 (2026) [9]	Year 3 (2027) [10]	Year 1 (2025) [8]	Year 2 (2026) [9]	Year 3 (2027) [10]
North Atlantic right whale [1 2]	0.01 (0)	0.05 (0)	0.02 (0)	[3] 0.06 (2)	[3] 0.24 (2)	[3] 0.08 (2)
Fin whale [1]	[3] 0.39 (2)	[3] 1.16 (2)	[3] 0.68 (2)	[4] 3.94 (4)	[4] 11.57 (12)	[4] 6.83 (7)
Humpback whale	[3] 0.42 (2)	[3] 1.55 (2)	[3] 0.67 (2)	[4] 2.52 (3)	[4] 9.29 (10)	[4] 4.05 (5)
Minke whale	[4] 0.49 (1)	[4] 5.55 (6)	[4] 1.11 (2)	[4] 2.96 (3)	[4] 33.31 (34)	[4] 6.66 (7)
Sei whale [1]	[4] 0.1 (1)	[4] 0.12 (1)	[4] 0.02 (1)	[4] 0.11 (1)	[4] 0.83 (1)	[4] 0.17 (1)
Killer whale	0 (0)	0 (0)	0 (0)	[3] 0.08 (3)	[3] 0.22 (3)	[3] 0.15 (3)
Atlantic spotted dolphin	0 (0)	0 (0)	0 (0)	[3] 14.07 (24)	[3] 38.86 (54)	[3] 50.75 (54)
Bottlenose dolphin (offshore stock/coastal stock) [5]	0 (0)	0 (0)	0 (0)	[4] 846.85 (847)	[4] 2,320.67 (2,321)	[4] 1,711.04 (1,721)
Common dolphin	0 (0)	0 (0)	0 (0)	[4] 28.63 (29)	[4] 233.12 (234)	[4] 96.48 (97)
Long-finned pilot whale	0 (0)	0 (0)	0 (0)	[3] 0 (11)	[3] 0 (11)	[3] 0 (11)
Short-finned pilot whale	0 (0)	0 (0)	0 (0)	[3] 0 (16)	[3] 0 (16)	[3] 0 (16)

TABLE 17—MODELED LEVEL A HARASSMENT AND LEVEL B HARASSMENT EXPOSURES ASSUMING 10-dB SOUND ATTENUATION DURING IMPACT PILE DRIVING OF 11-m MONOPILE FOUNDATIONS IN THE BUFFERED LEASE AREA OVER 3 YEARS AND PROPOSED TAKE (IN PARENTHESES)—Continued

Marine mammal species	Level A harassment (SEL_{cum}) [6]			Level B harassment (160 dB_{rms})		
	Year 1 (2025) [8]	Year 2 (2026) [9]	Year 3 (2027) [10]	Year 1 (2025) [8]	Year 2 (2026) [9]	Year 3 (2027) [10]
Pantropical spotted dolphin	0 (0)	0 (0)	0 (0)	[3] 0.17 (5)	[3] 0.45 (5)	[3] 0.31 (5)
Risso's dolphin	0 (0)	0 (0)	0 (0)	[3] 0.79 (9)	[3] 4.33 (9)	[3] 1.94 (9)
Rough toothed dolphin	0 (0)	0 (0)	0 (0)	[3] 0.04 (6)	[3] 0.11 (6)	[3] 0.08 (6)
Striped dolphin	0 (0)	0 (0)	0 (0)	[3] 0.17 (46)	[3] 0.45 (46)	[3] 0.31 (46)
Harbor porpoise [6]	0 (0)	[3] 1.19 (3)	[3] 0.01 (3)	[3] 0.03 (3)	[3] 15.83 (16)	[3] 0.08 (3)
Gray seal [5]	0 (0)	0 (0)	0 (0)	[4] 17.87 (18)	[4] 234.31 (235)	[4] 30.02 (31)
Harbor seal [5].						
Harp seal [5].						

[1] Listed as Endangered under the Endangered Species Act (ESA)
[2] Level A harassment exposures were initially estimated for this species, but due to the mitigation measures that US Wind will be required to abide by, no Level A harassment take is expected, nor proposed to be authorized.
[3] Proposed take adjusted according to group size in table 13.
[4] Proposed take rounded to the nearest whole number.
[5] Two stocks of common bottlenose dolphin (the western North Atlantic migratory coastal stock and the western North Atlantic offshore stock) may occur in the Project area. Both stocks are presented together here.
[6] Peak levels were not considered because SEL distances were larger than peak in all cases, with the exception of harbor porpoise. Peak exposure estimates were greater than the cumulative SEL exposure estimates for harbor porpoises due to the frequency weighting of the SEL-based metric and a lower peak threshold for high-frequency cetaceans compared to other marine mammal hearing groups.
[7] Exposure estimates include harbor seals, gray seals, and harp seals combined.
[8] During the MarWin campaign in year 1, US Wind plans to install 21 11-m monopiles and 4 3-m pin piles.
[9] During the Momentum Wind campaign in year 2, US Wind plans to install 55 11-m monopiles, 8 3-m pin piles, and 3 1.8-m pin piles.
[10] During the Future Development campaign in year 3, US Wind plans to install 38 11-m monopiles and 4 3-m pin piles.

TABLE 18—MODELED LEVEL B HARASSMENT EXPOSURES (ASSUMING 10-dB SOUND ATTENUATION) DUE TO IMPACT PILE DRIVING OF 3-m PIN PILES IN THE BUFFERED LEASE AREA OVER 3 YEARS [1] AND PROPOSED TAKE [8]

Marine mammal species	Level B harassment (160 dB_{rms})					
	Year 1 (2025) [5]		Year 2 (2026) [6]		Year 3 (2027) [7]	
	Exposure estimate	Proposed take	Exposure estimate	Proposed take	Exposure estimate	Proposed take
North Atlantic right whale [2]	0	0	0	0	0	0
Fin whale [2] [3]	0.03	2	0.06	2	0.03	2
Humpback whale [3]	0.01	2	0.01	2	0.01	2
Minke whale [4]	0.04	1	0.08	1	0.04	1
Sei whale [2]	0	0	0	0	0	0
Killer whale	0	0	0	0	0	0
Atlantic spotted dolphin [3]	0.17	[6]	0.35	6	0.17	6
Bottlenose dolphin (offshore stock/coastal stock) [4] [5]	9.53	10	19.06	19	9.53	10
Common dolphin [3]	0.57	7	1.14	7	0.57	7
Long-finned pilot whale	0	0	0	0	0	0
Short-finned pilot whale	0	0	0	0	0	0
Pantropical spotted dolphin	0	0	0	0	0	0
Risso's dolphin [3]	0.01	9	0.03	9	0.01	9
Rough toothed dolphin	0	0	0	0	0	0
Striped dolphin	0	0	0	0	0	0
Harbor porpoise	0	0	0	0	0	0
Gray seal [6]	0.08	0	0.16	0	0.08	0
Harbor seal [6].						
Harp seal [6].						

[1] Modeled acoustic exposure estimates for all species were zero for take by Level A harassment. Therefore, no take by Level A harassment is anticipated or proposed for authorization.
[2] Listed as Endangered under the Endangered Species Act (ESA)
[3] Proposed take is adjusted according to group size in table 13.
[4] Proposed take is rounded to the nearest whole number.
[5] Two stocks of common bottlenose dolphin (the western North Atlantic migratory coastal stock and the western North Atlantic offshore stock) may occur in the Project area. Both stocks are presented together here.
[6] Exposure estimates include harbor seals, gray seals, and harp seals combined.
[7] During the MarWin campaign in year 1, US Wind plans to install 21 11-m monopiles and 4 3-m pin piles.
[8] During the Momentum Wind campaign in year 2, US Wind plans to install 55 11-m monopiles, 8 3-m pin piles, and 3 1.8-m pin piles.
[9] During the Future Development campaign in year 3, US Wind plans to install 38 11-m monopiles and 4 3-m pin piles.

TABLE 19—MODELED LEVEL B HARASSMENT EXPOSURES (ASSUMING 10-dB SOUND ATTENUATION) DUE TO IMPACT PILE DRIVING OF 1.8-m PIN PILES (ASSUME THREE TOTAL PIN PILES FOR THE MET TOWER) IN THE BUFFERED LEASE AREA DURING YEAR 2 [1] [2] AND PROPOSED TAKE [8]

Marine mammal species	Level B harassment acoustic exposure estimate (160 dB_{rms})	Level B harassment proposed take estimate
North Atlantic right whale [3]	0	0
Fin whale [3] [4]	0.01	2
Humpback whale [4]	0.01	2
Minke whale [5]	0.01	1
Sei whale [3]	0	0
Killer whale	0	0
Atlantic spotted dolphin	0	0
Bottlenose dolphin (offshore stock/coastal stock) [5] [6]	1.91	2
Common dolphin [4]	0.18	7
Long-finned pilot whale	0	0
Short-finned pilot whale	0	0
Pantropical spotted dolphin	0	0
Risso's dolphin	0	0
Rough toothed dolphin	0	0
Striped dolphin	0	0
Harbor porpoise	0	0
Gray seal [7]	0.09	0
Harbor seal [7].		
Harp seal [7].		

[1] In-water construction activities to install the Met tower would take place only during year 2.
[2] Modeled acoustic exposure estimates for all species were zero for take by Level A harassment. Therefore, no take by Level A harassment is anticipated or proposed for authorization.
[3] Listed as Endangered under the Endangered Species Act (ESA).
[4] Proposed take is adjusted according to group size in table 13.
[5] Proposed take is rounded to the nearest whole number.
[6] Two stocks of common bottlenose dolphin (the western North Atlantic migratory coastal stock and the western North Atlantic offshore stock) may occur in the Project area. Both stocks are presented together here.
[7] Exposure estimates include harbor seals, gray seals, and harp seals.
[8] During the Momentum Wind campaign in year 2, US Wind plans to install 55 11-m monopiles, 8 3-m pin piles, and 3 1.8-m pin piles.

TABLE 20—PROPOSED TAKES BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT FOR ALL IMPACT PILE DRIVING ACTIVITIES IN THE BUFFERED LEASE AREA OVER 3 YEARS

Marine mammal species	Population estimate	Proposed take by Level A harassment			Proposed take by Level B harassment		
		Year 1 (2025)	Year 2 (2026)	Year 3 (2027)	Year 1 (2025)	Year 2 (2026)	Year 3 (2027)
North Atlantic right whale [1]	338	0	0	0	2	2	2
Fin whale [1] [2]	6,802	2	2	2	6	16	9
Humpback whale [2]	1,396	2	2	2	5	14	7
Minke whale	21,968	1	6	2	4	36	8
Sei whale [1]	6,292	1	1	1	1	1	1
Killer whale [3]	UNK	0	0	0	3	3	3
Atlantic spotted dolphin [4]	39,921	0	0	0	30	60	60
Bottlenose dolphin (coastal stock) [5]	6,639	0	0	0	0	703	1,462
Bottlenose dolphin (offshore stock) [5]	62,851	0	0	0	857	1,639	259
Common dolphin	172,974	0	0	0	36	248	104
Long-finned pilot whale [6]	39,215	0	0	0	11	11	11
Short-finned pilot whale [6]	28,924	0	0	0	16	16	16
Pantropical spotted dolphin	6,593	0	0	0	5	5	5
Risso's dolphin [7]	35,215	0	0	0	18	18	18
Rough toothed dolphin [3]	136	0	0	0	6	6	6
Striped dolphin [3]	67,306	0	0	0	46	46	46
Harbor porpoise [8]	95,543	0	3	3	3	16	3
Gray seal [9]	27,300	0	0	0	18	235	31
Harbor seal [9]	61,336						
Harp seal [9]	7.6M						

[1] Listed as Endangered under the Endangered Species Act (ESA).
[2] Total proposed take by Level A harassment was increased according to average group size (table 13), rounded to the nearest whole number, for years 1 and 3.
[3] Total proposed take by Level B harassment was increased according to average group size for each year of pile driving activities (table 13). It was assumed that one group would be encountered per year.
[4] Total proposed take by Level B harassment was increased according to average group size for each year of pile driving activities. Proposed takes for Atlantic spotted dolphins are based upon the assumption that 5 groups of 6 (RPS, 2023) will be observed during year 1 of pile driving activities, and 10 groups of 6 would be observed during each of years 2 and 3 pile driving activities.
[5] Bottlenose dolphin take by Level B harassment was allocated to each stock based upon the direction of the progression of pile driving throughout project years 1–3 as follows: year 1 (100 percent offshore stock); year 2 (70 percent offshore stock; 30 percent coastal stock); year 3 (15 percent offshore stock; 85 percent coastal stock).

[6] Total pilot whale acoustic exposures were low, and apportioning take as 60 percent short-finned pilot whale and 40 percent long-finned pilot whale resulted in calculated takes of less than one for both species. As these calculated acoustic exposure estimates were less than average group size for both species, requested take by Level B harassment was based upon the assumption of one group of each species being encountered during each year of pile driving activities (table 13).

[7] Total proposed take by Level B harassment was increased according to average group size for each year of pile driving activities. Proposed take by Level B harassment for Risso's dolphins is based upon the assumption that two groups of nine (DoN, 2017) would be observed during each year of pile driving.

[8] Total proposed take was increased according to average group size. It is expected that one group of harbor porpoises would be taken by Level A harassment during years 2 and 3 and by Level B harassment in years 1 and 3. Proposed take represents monopile installation only as exposure estimates for pin pile installation were zero.

[9] Total proposed take by Level B harassment for seals includes harbor seals, gray seals, and harp seals.

HRG Surveys

US Wind's proposed HRG survey activity includes the use of impulsive sources (*i.e.,* boomers, sparkers) that have the potential to harass marine mammals. The list of equipment proposed is in table 4 (see Detailed Description of the Specified Activity).

Authorized takes would be by Level B harassment only in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated nor proposed to be authorized. Therefore, the potential for Level A harassment is not evaluated further in this document. US Wind did not request, and NMFS is not proposing to authorize, take by Level A harassment incidental to HRG surveys. No serious injury or mortality is anticipated to result from HRG survey activities.

Specific to HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has developed a tool, available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance,* for determining the distances at which sound pressure level (SPLrms) generated from HRG surveys reach the 160-dB threshold. The equations in the tool consider water depth, frequency-dependent absorption, and some directionality to refine estimated ensonified zones. The isopleth distances corresponding to the Level B harassment threshold for each type of HRG equipment with the potential to result in harassment of marine mammals were calculated per NOAA Fisheries' Interim Recommendation for Sound Source Level and Propagation Analysis for High Resolution Geophysical Sources. Input for HRG equipment specifications are provided in table 4. Micro-siting HRG surveys could occur throughout the Lease Area, therefore, US Wind assumed a maximum depth of 42 m (137.8 ft) which corresponds to the maximum depth of the Lease Area. The distances to the 160-dB RMS re 1 µPa isopleth for Level B harassment are presented in table 21.

TABLE 21—DISTANCES CORRESPONDING TO THE LEVEL B HARASSMENT THRESHOLD FOR HRG EQUIPMENT [1]

HRG survey equipment	Equipment type	Horizontal distance (m) to Level B harassment threshold
Applied Acoustics S Boomer	SBP: Boomer	35.2
AA Dura Spark 400 tip	SBP: Sparker	200

[1] Of note, NMFS has performed a preliminary review of a report submitted by Rand (2023), that includes measurements of the Geo-Marine Geo-Source 400 sparker (400 tip, 800 J), and suggests that NMFS is assuming lower source and received levels than appropriate in its assessments of HRG impacts. NMFS has determined that the values in our assessment remain appropriate, based on the model methodology (*i.e.,* source level propagated using spherical spreading) here predicting a peak level 3 dB louder than the maximum measured peak levels at the closest measurement range in Rand (2023). NMFS will continue reviewing Rand (2023) and other available data relevant to these sources.

The survey activities that have the potential to result in Level B harassment (160-dB SPL) include the noise produced by Applied Acoustics S Boomer or AA Dura Spark sparker (table 21), of which the Dura Spark sparker results in the greatest calculated distance to the Level B harassment criteria at 200 m (656 ft). US Wind has applied the estimated distance of 200 m (656 ft) to the 160 dB_{RMS90} percent re 1 µPa Level B harassment criteria as the basis for determining potential take from all HRG sources. All noise-producing survey equipment is assumed to be operated concurrently. One vessel will operate at a time during HRG surveys.

The zone of influence (ZOI) is the total ensonified area around the sound source over a 24-hour period. The maximum ZOI was estimated by considering the distance of the daily vessel track line (111.2 km) and the largest distance from the sound source to the isopleth for the Level B harassment threshold (200 m for the Dura Spark sparker). US Wind calculated the distance of the daily vessel track line by multiplying the estimated average speed of the vessel (4 kn; 2.06 m/s) by a maximum of 15 hours per survey per day. The following equation was used to calculate the maximum ZOI:

$$ZOI = (\text{Distance traveled/day} * 2r) + r^2,$$

where

r is the maximum distance to the Level B threshold (200 m) and the maximum ZOI was 44.6 km^2.

Exposure calculations assumed that there would be 14 days of HRG surveying per year during years 2 (2026) and 3 (2027). As described in the ITA application, density data were mapped within the buffered Lease Area using geographic information systems, and these data were updated based upon the revised data from the Duke Model (Roberts *et al.,* 2023). Although HRG surveys are expected to occur between April and June each year, to be conservative, the maximum monthly average density for each species for an entire year was used and carried forward in the take calculations (table 21). Calculations assume a daylight-only schedule for HRG surveys. NMFS rounded exposure estimates to the nearest whole number to generate take estimates, except for species for which take is not proposed due to mitigation measures (table 22).

TABLE 22—MARINE MAMMAL DENSITIES (ANIMALS/100 km²), EXPOSURE ESTIMATES, AND PROPOSED TAKES BY LEVEL B HARASSMENT FROM HRG SURVEYS DURING YEARS 2 AND 3 [1] [2]

Marine mammal species	Maximum monthly density (No./km²)	Year 2		Year 3	
		Exposure estimate	Proposed take	Exposure estimate	Proposed take
North Atlantic right whale [3]	0.00076	0.5	[4] 2	0.5	[4] 2
Fin whale [3]	0.214	1.3	[4] 2	1.3	[4] 2
Humpback whale	0.187	1.2	[4] 02	1.2	[4] 2
Minke whale	0.75	4.7	5	4.7	5
Sei whale [3]	0.061	0.4	0	0.4	0
Killer whale	0.002	0.01	0	0.01	0
Atlantic spotted dolphin	1.505	9.4	9	9.4	9
Bottlenose dolphin [5]	20.608	128.7	129	128.7	129
Common dolphin	7.939	49.6	50	49.6	50
Pilot whale species [6]	0.039	0.2	0	0.2	0
Pantropical spotted dolphin	0.004	0.02	0	0.02	0
Risso's dolphin	0.169	1.1	[4] 8	1.1	[4] 8
Rough-toothed dolphin	0.002	0.01	0	0.01	0
Striped dolphin	0.004	0.02	0	0.02	0
Harbor porpoise	3.653	22.8	23	22.8	23
Gray seal [7]	16.993	106.1	106	106.1	106
Harbor seal [7]					
Harp seal [7]					

[1] Density estimates are calculated from the 2022 Duke Habitat-Based Marine Mammal Density Models (Roberts *et al.,* 2016; Roberts *et al.,* 2023). Maximum monthly average density for each marine mammal species was used for take calculations.
[2] The survey area accounts for waters within and around the Lease Area.
[3] Listed as Endangered under the ESA.
[4] Proposed take adjusted for group size. See table 13 for average group size estimates.
[5] Two stocks of common bottlenose dolphin (the western North Atlantic migratory coastal stock and the western North Atlantic offshore stock) may occur in the Project area. Both stocks are presented here.
[6] Densities are only available for the combined seal and pilot whale groups in the Roberts *et al.* (2023) dataset.
[7] Proposed take by Level B harassment is for harbor seals, gray seals, and harp seals.

Total Take Across All Activities

The amount of Level A harassment and Level B harassment NMFS proposes to authorize incidental to all Project activities combined (*i.e.,* pile driving to install WTG, OSS, and Met tower foundations, and HRG surveys are shown in table 24. The annual amount of take that is expected to occur in each year based on US Wind's current schedules is provided in table 24. The year 1 proposed take includes impact pile driving of monopiles for WTGs and 3-m pin piles for the OSSs. Proposed take during year 2 includes all activities occurring: WTG, OSS, and Met tower foundation installation and HRG surveys. Year 3 proposed take includes WTG and OSS foundation installation and HRG surveys. As mentioned above, the timing of installation activities and HRG surveys would depend upon vessel availability, contractor selection, weather, and additional factors. However, in the event that activities are delayed or spread over 4–5 years (instead of 3 years), the maximum annual amount of take for each species would not exceed the numbers listed in table 25.

For each species, if the acoustic exposure (for pile driving activities or HRG surveys) was less than the average group size (table 13), the average group size was rounded to the nearest integer and used as the proposed take estimate by Level A harassment or Level B harassment. If the acoustic exposure was greater than the average group size (table 13), the acoustic exposure was rounded to the nearest integer and used as the proposed take estimate by Level A harassment or Level B harassment.

For the species for which modeling was conducted, the take estimates are considered conservative for a number of reasons. The amount of take proposed to be authorized assumes the most impactful scenario with respect to project design and schedules. As described in the Description of Specified Activity section, US Wind may use suction-buckets to install OSS foundations. Should US Wind use suction-bucket foundations, take would not occur from OSS foundation installation as noise levels would not be elevated to the degree there is a potential for take (*i.e.,* no pile driving is involved with installing suction buckets). All calculated take incorporated the highest densities for any given species in any given month. In addition, the amount of proposed Level A harassment does not fully account for the likelihood that marine mammals would avoid a stimulus when possible before the individual accumulates enough acoustic energy to potentially cause auditory injury, or the effectiveness of the proposed monitoring and mitigation measures (with exception of North Atlantic right whales given the enhanced mitigation measures proposed for this species).

TABLE 23—PROPOSED TAKES BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED ANNUALLY OVER 3 YEARS [1]

Marine mammal species	Year 1		Year 2		Year 3	
	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
North Atlantic right whale [2] [3]	0	2	0	4	0	4
Fin whale [2] [3]	2	6	2	18	2	11

TABLE 23—PROPOSED TAKES BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED ANNUALLY OVER 3 YEARS [1]—Continued

Marine mammal species	Year 1		Year 2		Year 3	
	Level A harassment	Level B harassment	Level A harassment	Level B harassment	Level A harassment	Level B harassment
Humpback whale [3]	2	5	2	16	2	9
Minke whale [3]	1	4	6	41	2	13
Sei whale [3]	1	1	1	1	1	1
Killer whale [3]	0	3	0	3	0	3
Atlantic spotted dolphin [3]	0	30	0	69	0	69
Coastal bottlenose dolphin [4]	0	0	0	703	0	1,462
Offshore bottlenose dolphin [4]	0	857	0	1,639	0	259
Bottlenose dolphin [5]	0	0	0	129	0	129
Common dolphin	0	36	0	298	0	154
Long-finned pilot whale [3]	0	16	0	16	0	16
Short-finned pilot whale [3]	0	11	0	11	0	11
Pantropical spotted dolphin [3]	0	5	0	5	0	5
Risso's dolphin	0	18	0	26	0	26
Rough-toothed dolphin [3]	0	6	0	6	0	6
Striped dolphin [3]	0	46	0	46	0	46
Harbor porpoise [3]	0	3	3	39	3	26
Gray seal [6]	0	18	0	341	0	147
Harbor seal [6]						
Harp seal [6]						

[1] The final rule and LOA, if issued, would be effective from January 1, 2025 through December 31, 2029.
[2] Listed as Endangered under the ESA.
[3] Average group size applied to the proposed take estimate.
[4] Proposed take represents take from impact pile driving activities.
[5] Proposed take numbers represent requested take from HRG survey activities. Assumes take from the coastal and offshore stock of bottlenose dolphins.
[6] Proposed take includes harbor seals, gray seals, and harp seals.

TABLE 24—PROPOSED TAKES OF MARINE MAMMALS (BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT) FOR ALL ACTIVITIES PROPOSED TO BE CONDUCTED DURING THE CONSTRUCTION OF THE PROJECT AND OVER THE COURSE OF THE RULE

Marine mammal species	Total proposed take by Level A harassment	Total proposed take by Level B harassment
North Atlantic right whale [1 2]	0	10
Fin whale [1 2]	6	35
Humpback whale [2]	6	30
Minke whale [2]	9	58
Sei whale [2]	3	3
Killer whale [3]	0	9
Atlantic spotted dolphin [2]	0	168
Coastal bottlenose dolphin [3]	0	2,165
Offshore bottlenose dolphin [3]	0	2,755
Bottlenose dolphin [4]	0	258
Common dolphin	0	488
Long-finned pilot whale [2]	0	48
Short-finned pilot whale [2]	0	33
Pantropical spotted dolphin [2]	0	15
Risso's dolphin	0	70
Rough-toothed dolphin [3]	0	18
Striped dolphin [3]	0	138
Harbor porpoise [2]	6	68
Gray seal [5]	0	496
Harbor seal.[5]		
Harp seal.[5]		

[1] The final rule and LOA, if issued, would be effective from January 1, 2025 through December 31, 2029.
[2] Listed as Endangered under the ESA.
[3] Total 3-year proposed take by Level B harassment includes impact pile driving activities only.
[4] Total 3-year proposed take by Level B harassment includes HRG survey activities for both stocks combined.
[5] Proposed take includes harbor seals, gray seals, and harp seals.

To inform both the negligible impact analysis and the small numbers determination, NMFS assesses the maximum number of takes of marine mammals that could occur within any given year. In this calculation, the maximum estimated number of Level A harassment takes in any one year is summed with the maximum estimated

number of Level B harassment takes in any one year for each species to yield the highest number of estimated take that could occur in any year (table 25). Table 25 also depicts the number of takes proposed relative to the abundance of each stock. The takes enumerated here represent daily instances of take, not necessarily individual marine mammals taken. One take represents a day in which an animal was exposed to noise above the associated harassment threshold at least once. Some takes represent a brief exposure above a threshold, while in some cases takes could represent a longer, or repeated, exposure of one individual animal above a threshold within a 24-hour period. Whether or not every take assigned to a species represents a different individual depends on the daily and seasonal movement patterns of the species in the area. For example, activity areas with continuous activities (all or nearly every day) overlapping known feeding areas (where animals are known to remain for days or weeks on end) or areas where species with small home ranges live (*e.g.,* some pinnipeds) are more likely to result in repeated takes to some individuals. Alternatively, activities that are not occurring on consecutive days for the duration of the project (*e.g.,* foundation installation) or occurring in an area where animals are migratory and not expected to remain for multiple days, represent circumstances where repeat takes of the same individuals are less likely. For example, 100 takes could represent 100 individuals each taken on one day within the year, or it could represent 5 individuals each taken on 20 days within the year. The combination of number of individuals each taken and number of days on which take would occur would depend upon the activity, the presence of biologically important areas in the project area, and the movement patterns of the marine mammal species exposed. Where information to better contextualize the enumerated takes for a given species is available, it is discussed in the Negligible Impact Analysis and Determination and/or Small Numbers sections, as appropriate.

TABLE 25—MAXIMUM NUMBER OF PROPOSED TAKES (BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT) THAT COULD OCCUR IN ANY ONE YEAR OF THE PROJECT RELATIVE TO STOCK POPULATION SIZE [1]

Marine mammal species	NMFS stock abundance	Maximum annual Level A harassment	Maximum annual Level B harassment	Maximum annual take	Maximum proposed take (instances) as a percentage of stock abundance) [1 2]
North Atlantic right whale [3 4]	338	0	4	4	1.18
Fin whale [3 4]	6,802	2	18	20	0.29
Humpback whale [4]	1,396	2	16	18	1.29
Minke whale	21,968	6	41	47	0.21
Sei whale [3 4]	6,292	1	1	2	0.03
Killer whale [4]	UNK	0	3	3	UNK
Atlantic spotted dolphin [4]	39,921	0	69	69	0.17
Coastal bottlenose dolphin [5]	6,639	0	1,591	1,591	24.0
Offshore bottlenose dolphin [5]	62,851	0	1,768	1,768	2.81
Common dolphin	172,974	0	298	298	0.17
Long-finned pilot whale [4]	39,215	0	16	16	0.04
Short-finned pilot whale [4]	28,924	0	11	11	0.04
Pantropical spotted dolphin [4]	6,593	0	5	5	0.08
Risso's dolphin [4]	35,215	0	26	26	0.07
Rough-toothed dolphin [4]	136	0	6	6	4.41
Striped dolphin [4]	67,036	0	46	46	0.07
Harbor porpoise [4]	95,543	3	39	42	0.04
Gray seal [6]	27,300	0	341	341	1.25
Harbor seal [6]	61,336				0.56
Harp seal [6]	7.6M				0.0004

[1] Year 2 (2026) represents the most impactful year overall.
[2] The values in this column represent the assumption that each take proposed to be authorized would occur to a unique individual. Given the scope of work proposed, this is highly unlikely for species common to the project area (*e.g.,* North Atlantic right whales, humpback whales) such that the actual percentage of the population taken is less than the percentages identified here.
[3] Listed as Endangered under the ESA.
[4] Proposed take is based on average group size.
[5] Maximum proposed take for each bottlenose dolphin species includes the maximum proposed take by Level B harassment of any year for HRG surveys.
[6] Assumes 100 percent of the take by Level B harassment is from either the gray seal stock, harbor seal stock, or harp seal stock.

Proposed Mitigation

In order to promulgate a rulemaking under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS' regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is

expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and,

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The mitigation strategies described below are consistent with those required and successfully implemented under previous incidental take authorizations issued in association with in-water construction activities (*e.g.,* soft-start, establishing shutdown zones). Additional measures have also been incorporated to account for the fact that the proposed construction activities would occur offshore. Modeling was performed to estimate harassment zones, which were used to inform mitigation measures for the Project's activities to minimize Level A harassment and Level B harassment to the extent practicable, while providing estimates of the areas within which Level B harassment might occur.

Generally speaking, the mitigation measures considered and proposed to be required here fall into three categories: temporal (seasonal and daily) work restrictions, real-time measures (shutdown, clearance, and vessel strike avoidance), and noise attenuation/reduction measures. Seasonal work restrictions are designed to avoid or minimize operations when marine mammals are concentrated or engaged in behaviors that make them more susceptible or make impacts more likely, in order to reduce both the number and severity of potential takes and are effective in reducing both chronic (longer-term) and acute effects. Real-time measures, such as implementation of shutdown and clearance zones, as well as vessel strike avoidance measures, are intended to reduce the probability or severity of harassment by taking steps in real time once a higher-risk scenario is identified (*e.g.,* once animals are detected within an impact zone). Noise attenuation measures, such as bubble curtains, are intended to reduce the noise at the source, which reduces both acute impacts, as well as the contribution to aggregate and cumulative noise that may result in longer-term chronic impacts.

Below, we briefly describe the required training, coordination, and vessel strike avoidance measures that apply to all activity types, and then in the following subsections we describe the measures that apply specifically to foundation installation, nearshore installation and removal activities for cable laying, and HRG surveys. Details on specific requirements can be found in Part 217—Regulations Governing The Taking And Importing Of Marine Mammals at the end of this proposed rulemaking.

Training and Coordination

NMFS requires all US Wind's employees and contractors conducting activities on the water, including, but not limited to, all vessel captains and crew, to be trained in marine mammal detection and identification, communication protocols, and all required measures to minimize impacts on marine mammals and support US Wind's compliance with the LOA, if issued. Additionally, all relevant personnel and the marine mammal species monitoring team(s) are required to participate in joint, onboard briefings prior to the beginning of project activities. The briefing must be repeated whenever new relevant personnel (*e.g.,* new PSOs, construction contractors, relevant crew) join the project before work commences. During this training, US Wind is required to instruct all project personnel regarding the authority of the marine mammal monitoring team(s). For example, the HRG acoustic equipment operator, pile driving personnel, *etc.,* are required to immediately comply with any call for a delay or shut down by the Lead PSO. Any disagreement between the Lead PSO and the project personnel must only be discussed after delay or shutdown has occurred. In particular, all captains and vessel crew must be trained in marine mammal detection and vessel strike avoidance measures to ensure marine mammals are not struck by any project or project-related vessel.

Prior to the start of in-water construction activities, vessel operators and crews would receive training about marine mammals and other protected species known or with the potential to occur in the Project Area, making observations in all weather conditions, and vessel strike avoidance measures. In addition, training would include information and resources available regarding applicable Federal laws and regulations for protected species. US Wind will provide documentation of training to NMFS.

North Atlantic Right Whale Awareness Monitoring

US Wind would be required to use available sources of information on North Atlantic right whale presence, including daily monitoring of the Right Whale Sightings Advisory System, monitoring of U.S. Coast Guard very high-frequency (VHF) Channel 16 throughout each day to receive notifications of any sightings, and information associated with any regulatory management actions (*e.g.,* establishment of a zone identifying the need to reduce vessel speeds). Maintaining daily awareness and coordination affords increased protection of North Atlantic right whales by understanding North Atlantic right whale presence in the area through ongoing visual and passive acoustic monitoring efforts and opportunities (outside of US Wind's efforts), and allows for planning of construction activities, when practicable, to minimize potential impacts on North Atlantic right whales.

Vessel Strike Avoidance Measures

This proposed rule contains numerous vessel strike avoidance measures that reduce the risk that a vessel and marine mammal could collide. While the likelihood of a vessel strike is generally low, they are one of the most common ways that marine mammals are seriously injured or killed by human activities. Therefore, enhanced mitigation and monitoring measures are required to avoid vessel strikes, to the extent practicable. While many of these measures are proactive, intending to avoid the heavy use of vessels during times when marine mammals of particular concern may be in the area, several are reactive and occur when a project personnel sights a marine mammal. The mitigation requirements we propose are described generally here and in detail in the regulation text at the end of this proposed rule (see 50 CFR 217.264(b)). US Wind would be required to comply with these measures except under circumstances when doing so would create an imminent and serious threat to a person or vessel or to the extent that a vessel is unable to maneuver and, because of the inability to maneuver, the vessel cannot comply.

While underway, US Wind's personnel would be required to monitor for and maintain a minimum separation distance from marine mammals and operate vessels in a manner that reduces the potential for vessel strike.

Regardless of the vessel's size, all vessel operators, crews, and dedicated visual observers (*i.e.,* PSO or trained crew member) must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course (as appropriate) to avoid striking any marine mammal. The dedicated visual observer, equipped with suitable monitoring technology (*e.g.,* binoculars, night vision devices), must be located at an appropriate vantage point for ensuring vessels are maintaining required vessel separation distances from marine mammals (*e.g.,* 500 m from North Atlantic right whales).

All project vessels, regardless of size, must maintain the following minimum separation zones: 500 m from North Atlantic right whales; 100 m from sperm whales and non-North Atlantic right whale baleen whales; and 50 m from all delphinid cetaceans and pinnipeds (an exception is made for those species that approach the vessel such as bow-riding dolphins) (table 26). All reasonable steps must be taken to not violate minimum separation distances. If any of these species are sighted within their respective minimum separation zone, the underway vessel must shift its engine to neutral (if safe to do so) and the engines must not be engaged until the animal(s) have been observed to be outside of the vessel's path and beyond the respective minimum separation zone. If a North Atlantic right whale is observed at any distance by any project personnel or acoustically detected, project vessels must reduce speeds to 10 kn. Additionally, in the event that any project-related vessel, regardless of size, observes any large whale (other than a North Atlantic right whale) within 500 m of an underway vessel, the vessel is required to immediately reduce speeds to 10 kn or less. The 10 kn speed restriction will remain in effect as outlined in 50 CFR 217.344(b).

TABLE 26—HRG VESSEL STRIKE AVOIDANCE SEPARATION ZONES

Marine mammal species	Vessel separation zone (m)
North Atlantic right whale	500
Other ESA-listed species and large whales	100
Other marine mammals [1]	50

[1] With the exception of seals and delphinid(s) from the genera *Delphinus, Lagenorhynchus, Stenella* or *Tursiops,* as described below.

All of the project-related vessels would be required to comply with existing NMFS vessel speed restrictions for North Atlantic right whales and the measures within this rulemaking for operating vessels around North Atlantic right whales and other marine mammals. When NMFS vessel speed restrictions are not in effect and a vessel is traveling at greater than 10 kn, in addition to the required dedicated visual observer, US Wind would be required to monitor the crew transfer vessel transit corridor (the path crew transfer vessels take from port to any work area) in real-time with PAM prior to and during transits. To maintain awareness of North Atlantic right whale presence, vessel operators, crew members, and the marine mammal monitoring team will monitor U.S. Coast Guard VHF Channel 16, WhaleAlert, the Right Whale Sighting Advisory System (RWSAS), and the PAM system. Any marine mammal observed by project personnel must be immediately communicated to any on-duty PSOs, PAM operator(s), and all vessel captains. Any North Atlantic right whale or large whale observation or acoustic detection by PSOs or PAM operators must be conveyed to all vessel captains. All vessels would be equipped with an AIS and US Wind must report all Maritime Mobile Service Identity (MMSI) numbers to NMFS Office of Protected Resources prior to initiating in-water activities. US Wind will submit a NMFS-approved North Atlantic Right Whale Vessel Strike Avoidance Plan at least 90 days prior to commencement of vessel use.

US Wind's compliance with these proposed measures would reduce the likelihood of vessel strike to the extent practicable. These measures increase awareness of marine mammals in the vicinity of project vessels and require project vessels to reduce speed when marine mammals are detected (by PSOs, PAM, and/or through another source, *e.g.,* RWSAS) and maintain separation distances when marine mammals are encountered. While visual monitoring is useful, reducing vessel speed is one of the most effective, feasible options available to reduce the likelihood of and effects from a vessel strike. Numerous studies have indicated that slowing the speed of vessels reduces the risk of lethal vessel collisions, particularly in areas where right whales are abundant and vessel traffic is common and otherwise traveling at high speeds (Vanderlaan and Taggart, 2007; Conn and Silber, 2013; Van der Hoop *et al.,* 2014; Martin *et al.,* 2015; Crum *et al.,* 2019).

Seasonal and Daily Restrictions

Temporal restrictions in places where marine mammals are concentrated, engaged in biologically important behaviors, and/or present in sensitive life stages are effective measures for reducing the magnitude and severity of human impacts. The temporal restrictions required here are built around North Atlantic right whale protection. Based upon the best scientific information available (Roberts *et al.,* 2023), the highest densities of North Atlantic right whales in the specified geographic region are expected during the months of January through April, with an increase in density starting in December. However, North Atlantic right whales may be present in the specified geographic region throughout the year.

NMFS is proposing to require seasonal work restrictions to minimize risk of noise exposure to the North Atlantic right whales incidental to certain specified activities to the extent practicable. These seasonal work restrictions are expected to greatly reduce the number of takes of North Atlantic right whales. These seasonal restrictions also afford protection to other marine mammals that are known to use the Project Area with greater frequency during winter months, including other baleen whales.

As described previously, no impact pile driving activities may occur December 1 through April 30. NMFS is not proposing any seasonal restrictions to HRG surveys; however, US Wind has planned a limited amount of surveys (over 14 days) during daylight within the proposed effective period of these regulations.

NMFS is also proposing temporal restrictions for some activities. Within any 24-hour period, NMFS proposes to limit installing up to one monopile foundation or four 3-m pin piles during daylight hours only unless US Wind requests to install additional piles per

day in order to complete construction more quickly, provided the modeling information necessary to adaptively manage mitigation zone sizes as well as information identifying the change to the pile driving schedule would not result in more take (annual or 5-year total) than analyzed in the final rule or authorized in any associated LOA, and such request is approved by NMFS. US Wind does not plan to initiate pile driving later than 1.5 hours after civil sunset or continue pile driving after or1 hour before civil sunrise. However, if US Wind determines that they may initiate pile driving after the aforementioned time frame, they must submit a sufficient nighttime pile driving plan for NMFS review and approval to do so. A sufficient nighttime pile driving plan would demonstrate that proposed detection systems would be capable of detecting marine mammals, particularly large whales, at distances necessary to ensure mitigation measures are effective. US Wind would also be encouraged to investigate and test advanced technology to support their request. NMFS proposes to condition the LOA such that nighttime pile driving would only be allowed if US Wind submitted an Alternative Monitoring Plan to NMFS for approval that proved the efficacy of their night vision devices (*e.g.,* mounted thermal/infrared (IR) camera systems, hand-held or wearable night vision devices (NVDs), IR spotlights) in detecting protected marine mammals. If the plan did not include a full description of the proposed technology, monitoring methodology, and data supporting that marine mammals could reliably and effectively be detected within the clearance and shutdown zones for monopiles and pin piles before and during impact pile driving, nighttime pile driving (unless a pile was initiated 1.5 hours prior to civil sunset) would not be allowed. The Plan should identify the efficacy of the technology at detecting marine mammals in the clearance and shutdown zones under all of the various conditions anticipated during construction, including varying weather conditions, sea states, and in consideration of the use of artificial lighting. Given the very small Level B harassment zone associated with HRG survey activities and no anticipated or authorized Level A harassment, NMFS is not proposing any daily restrictions for HRG surveys.

More information on activity-specific seasonal and daily restrictions can be found in the regulatory text at the end of this proposed rulemaking.

Noise Attenuation Systems

US Wind would be required to employ noise abatement systems (NAS), also known as noise attenuation systems, during all foundation installation (*i.e.,* impact pile driving) activities to reduce the sound pressure levels that are transmitted through the water in an effort to reduce acoustic ranges to the Level A harassment and Level B harassment acoustic thresholds and minimize, to the extent practicable, any acoustic impacts resulting from these activities. US Wind would be required to use at least two NAS to ensure that measured sound levels do not exceed the levels modeled for a 10-dB sound level reduction for foundation installation, which is likely to include a double big bubble curtain combined with another NAS (other available NAS technologies are the hydro-sound damper, or an AdBm Helmholz resonator), as well as the adjustment of operational protocols to minimize noise levels. A single bubble curtain, alone or in combination with another NAS device, may not be used for pile driving as received SFV data reveals this approach is unlikely to attenuate sound sufficiently to be consistent with the modeling underlying our take analysis here, which incorporates expected ranges to the Level A and Level B harassment isopleths assuming 10 dB of attenuation and appropriate NAS use. Should the research and development phase of newer systems demonstrate effectiveness, as part of adaptive management, US Wind may submit data on the effectiveness of these systems and request approval from NMFS to use them during foundation installation activities.

Two categories of NAS exist: primary and secondary. A primary NAS would be used to reduce the level of noise produced by foundation installation activities at the source, typically through adjustments to the equipment (*e.g.,* hammer strike parameters). Primary NAS are still evolving and will be considered for use during mitigation efforts when the NAS has been demonstrated as effective in commercial projects. However, as primary NAS are not fully effective at eliminating noise, a secondary NAS would be employed. The secondary NAS is a device or group of devices that would reduce noise as it was transmitted through the water away from the pile, typically through a physical barrier that would reflect or absorb sound waves and, therefore, reduce the distance the higher energy sound propagates through the water column. Together, these systems must reduce noise levels to those not exceeding modeled ranges to Level A harassment and Level B harassment isopleths corresponding to those modeled assuming 10-dB sound attenuation, pending results of SFV (see *Sound Field Verification* section below and Part 217—Regulations Governing The Taking And Importing Of Marine Mammals).

Noise abatement systems, such as bubble curtains, are used to decrease the sound levels radiated from a source. Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. Small bubble curtains have been measured to reduce sound levels, but effective attenuation is highly dependent on depth of water, current, and configuration and operation of the curtain (Austin *et al.,* 2016; Koschinski and Lüdemann, 2013). Bubble curtains vary in terms of the sizes of the bubbles and those with larger bubbles tend to perform a bit better and more reliably, particularly when deployed with two separate rings (Bellmann, 2014; Koschinski and Lüdemann, 2013; Nehls *et al.,* 2016). Encapsulated bubble systems (*i.e.,* Hydro Sound Dampers (HSDs)), can be effective within their targeted frequency ranges (*e.g.,* 100–800 Hz), and when used in conjunction with a bubble curtain appear to create the greatest attenuation. The literature presents a wide array of observed attenuation results for bubble curtains. The variability in attenuation levels is the result of variation in design as well as differences in site conditions and difficulty in properly installing and operating in-water attenuation devices.

For example, Dähne *et al.* (2017) found that single bubble curtains that reduce sound levels by 7 to 10 dB reduced the overall sound level by approximately 12 dB when combined as a double bubble curtain for 6-m steel monopiles in the North Sea. During installation of monopiles (consisting of approximately 8-m in diameter) for more than 150 WTGs in comparable water depths (>25 m) and conditions in Europe indicate that attenuation of 10 dB is readily achieved (Bellmann, 2019; Bellmann *et al.,* 2020) using single big bubble curtains (BBCs) for noise attenuation. When a double big bubble curtain is used (noting a single bubble curtain is not allowed), US Wind would be required to maintain numerous

operational performance standards. These standards are defined in the regulatory text at the end of this proposed rulemaking and include but are not limited to construction contractors must train personnel in the proposed balancing of airflow to the bubble ring and US Wind would be required to submit a performance test and maintenance report to NMFS within 72 hours following the performance test. Corrections to the attenuation device to meet regulatory requirements must occur prior to use during foundation installation activities. In addition, a full maintenance check (*e.g.,* manually clearing holes) must occur prior to each pile being installed. If US Wind uses a noise mitigation device in addition to a double big bubble curtain, similar quality control measures are required.

US Wind would be required to conduct SFV and submit an SFV plan to NMFS for approval at least 180 days prior to installing foundations. They would also be required to submit interim and final SFV data results to NMFS and make corrections to the noise attenuation systems in the case that any SFV measurements demonstrate noise levels are above those modeled assuming 10 dB of attenuation. These frequent and immediate reports would allow NMFS to better understand the sound fields to which marine mammals are being exposed and require immediate corrective action should they be misaligned with anticipated noise levels within our analysis.

Noise abatement devices are not required during HRG surveys. NAS cannot practicably be employed around a moving survey ship, but US Wind would be required to make efforts to minimize source levels by using the lowest energy settings on equipment that has the potential to result in harassment of marine mammals (*e.g.,* sparkers, boomers) and turn off equipment when not actively surveying. Overall, minimizing the amount and duration of noise in the ocean from any of the project's activities through use of all means necessary (*e.g.,* noise abatement, turning off power) will effect the least practicable adverse impact on marine mammals.

Clearance and Shutdown Zones

NMFS is proposing to require the establishment of both clearance and shutdown zones during project activities that have the potential to result in harassment of marine mammals. The purpose of ''clearance'' of a particular zone is to minimize potential instances of auditory injury and more severe behavioral disturbances by delaying the commencement of an activity if marine mammals are near the activity. The purpose of a shutdown is to prevent a specific acute impact, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity.

All relevant clearance and shutdown zones during project activities would be monitored by NMFS-approved PSOs and/or PAM operators (as described in the regulatory text at the end of this proposed rulemaking). At least one PAM operator must review data from at least 24 hours prior to foundation installation and actively monitor hydrophones for 60 minutes prior to commencement of these activities. Any sighting or acoustic detection of a North Atlantic right whale triggers a delay to commencing pile driving and shutdown.

Prior to the start of certain specified activities (foundation installation and HRG surveys), US Wind would be required to ensure designated areas (*i.e.,* clearance zones, tables 26, 27, and 28) are clear of marine mammals prior to commencing activities to minimize the potential for and degree of harassment. For foundation installation, PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes, where the zone must be confirmed free of marine mammals at least 30 minutes directly prior to commencing these activities. For monopile foundation installation, the minimum visibility zone, defined as the area over which PSOs must be able to visually detect marine mammals, would extend 2,900 m (9,514 ft) for monopile installation, 1,400 m for 3-m pin pile installation, and 200 m for 1.8-m pin pile installation (table 26). Clearance zones are defined and provided in table 26 for all species.

For any other in-water construction heavy machinery activities (*e.g.,* trenching, cable laying, *etc.*), if a marine mammal is on a path towards or comes within 10 m (32.8 ft) of equipment, US Wind would be required to cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment.

Once an activity begins, any marine mammal entering their respective shutdown zone would trigger the activity to cease. In the case of pile driving, the shutdown requirement may be waived if is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals, or if the lead engineer determines there is pile refusal or pile instability.

In situations when shutdown is called for, but US Wind determines shutdown is not practicable due to aforementioned emergency reasons, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal, and a shut-down would lead to a stuck pile which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to ''let go.'' During these periods of instability, the lead engineer may determine a shut-down is not feasible because the shut-down combined with impending weather conditions may require the piling vessel to ''let go'' which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. US Wind must document and report to NMFS all cases where the emergency exemption is taken.

After shutdown, impact pile driving may be reinitiated once all clearance zones are clear of marine mammals for the minimum species-specific periods, or, if required to maintain pile stability, impact pile driving may be reinitiated but must be used to maintain stability. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving must not restart until the North Atlantic right whale has not been visually or acoustically detected for 30 minutes. Upon re-starting pile driving, soft-start protocols must be followed if pile driving has ceased for 30 minutes or longer.

The clearance and shutdown zone sizes vary by species and are shown in tables 27 and 28. US Wind would be allowed to request modification to these zone sizes pending results of sound field verification (see regulatory text at the end of this proposed rulemaking). Any changes to zone size would be part of adaptive management and would require NMFS' approval.

TABLE 27—MINIMUM VISIBILITY, CLEARANCE, SHUTDOWN, AND LEVEL B HARASSMENT ZONES DURING IMPACT PILE DRIVING, ASSUMING 10 dB OF ATTENUATION

Monitoring zone	North Atlantic right whales	Other large whales	Delphinids and pilot whales	Harbor porpoises	Seals
Minimum Visibility Zone [1]	Monopiles: 2,900 m. 3-m pin piles: 1,400 m. 1.8-m pin piles: 200 m.				
Clearance Zone	Any distance (visual) or within PAM Monitoring Zone.	Monopiles: 5,250 m ..... 3-m pin piles: 1,400 m ... 1.8-m Pin piles: 200 m [2].	Monopiles: 500 m. 3-m pin piles: 200 m. 1.8 m pin piles: 200 m [3].		
Shutdown Zone	Any distance (visual) or within PAM Monitoring Zone.	Monopiles: 2,900 m ..... 3-m pin piles: 1,400 m ... 1.8-m Pin piles: 100 m [4].	Monopiles: 250 m. 3-m pin piles, 1.8-m pin piles: 100 m [5].		
PAM Monitoring Zone [6] ...	10,000 m				
Level B Harassment (Acoustic Range, $R_{95\%}$)	Monopiles: 5,250 m. 3-m pin piles: 500 m. 1.8-m pin piles: 100 m.				

[1] The minimum visibility zone is equal to the modeled maximum $R_{95\ percent}$ distances to the Level A harassment threshold for low-frequency cetaceans for monopiles and 3-m pin piles. The minimum visibility zone for 1.8-m pin piles is equal to the clearance zone, which is double the modeled maximum $R_{95\ percent}$ distance to the Level B harassment threshold (100 m) and four times the modeled maximum $R_{95\ percent}$ distance to the Level A harassment threshold (50 m) for low-frequency cetaceans. NMFS increased the 1.8-m pin pile minimum visibility zone given the very small zone sizes from this short (3 piles total) activity.

[2] The clearance zone for other large whales from monopile installation is equal to the modeled maximum $R_{95\ percent}$ distance to the Level B harassment threshold (5,250 m). The clearance zone for other large whales from 3-m pin pile installation is equal to the modeled maximum $R_{95\ percent}$ distance to the Level A harassment threshold (1,400 m), given the Level B harassment zone (500 m) is less than this distance. The clearance zone for other large whales from 1.8-m pin pile installation is equal to twice the modeled maximum $R_{95\ percent}$ distance to the Level B harassment threshold given the very small Level B harassment zone (100 m), which could be encompassed by the bubble curtains.

[3] The clearance zone for non-large whales (*i.e.,* delphinids and pilot whales, harbor porpoises, and seals) from monopile and 3-m pin pile installation is equal to double the modeled maximum $R_{95\ percent}$ distances to the Level A harassment threshold for harbor porpoise (the most sensitive species). The clearance zone for 1.8-m pin pile installation is equal to double the modeled maximum $R_{95\ percent}$ distance to the Level B harassment threshold given Level A harassment thresholds were not exceeded for this activity (*i.e.,* 0 m). US Wind requested the clearance zone for non-large whales be identical for PSO implementation ease.

[4] The shutdown zones for other large whales from monopiles and 3-m pin piles are equal to the modeled maximum $R_{95\ percent}$ distances to the Level A harassment threshold for low-frequency cetaceans. The shutdown zone for other large whales from 1.8-m pin piles is equal to two times the modeled maximum $R_{95\ percent}$ distance to the Level A harassment threshold for low-frequency cetaceans.

[5] The shutdown zones for non-large whales from monopile and 3-m pin pile installation are equal to the modeled maximum $R_{95\ percent}$ distances to the Level A harassment threshold for harbor porpoise (the most sensitive species). The shutdown zone for non-large whales from 1.8-m pin pile installation is equal to the modeled maximum $R_{95\ percent}$ distance to the Level B harassment threshold, given the Level A harassment thresholds were not exceeded for this activity (*i.e.,* 0 m). US Wind requested the shutdown zone for non-large whales be identical for PSO implementation ease.

[6] The PAM system must be capable of detecting baleen whales at 10,000 m during pile driving. The system should also be designed to detect other marine mammals; however, it is not required these other species be detected out to 10,000 m given higher frequency calls and echolocation clicks are not typically detectable at large distances.

TABLE 28—HRG SURVEY CLEARANCE AND SHUTDOWN ZONES

Marine mammal species	Clearance zone (m^2)	Shutdown zone (m)
North Atlantic right whale	500	500
Other ESA-listed species (*i.e.,* fin, sei, sperm whale)	500	100
Other marine mammals [1]	200	100

[1] With the exception of seals and delphinid(s) from the genera Delphinus, Lagenorhynchus, Stenella or Tursiops, as described below.

Soft-Start/Ramp Up

The use of a soft-start or ramp up procedure is believed to provide additional protection to marine mammals by warning them or providing them with a chance to leave the area prior to the hammer or HRG equipment operating at full capacity. Soft-start typically involves initiating hammer operation at a reduced energy level (relative to full operating capacity) followed by a waiting period. US Wind would be required to utilize a soft-start protocol for impact pile driving of monopiles, 3-m pin piles, and 1.8-m pin piles by performing four to six strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes. NMFS notes that it is difficult to specify a reduction in energy for any given hammer because of variation across drivers and installation conditions. US Wind will reduce energy based on consideration of site-specific soil properties and other relevant operational considerations. HRG survey operators would be required to ramp-up sources when the acoustic sources are used unless the equipment operates on a binary on/off switch. The ramp up would involve starting from the smallest setting to the operating level over a period of approximately 30 minutes.

Soft-start and ramp up would be required at the beginning of each day's activity and at any time following a cessation of activity of 30 minutes or longer. Prior to soft-start or ramp up beginning, the operator must receive confirmation from the PSO that the clearance zone is clear of any marine mammals.

Fishery Monitoring Surveys

While the likelihood of US Wind's fishery monitoring surveys impacting marine mammals is minimal, NMFS proposed to require US Wind to adhere to gear and vessel mitigation measures to reduce potential impacts to the extent practicable. In addition, all crew undertaking the fishery monitoring survey activities would be required to receive protected species identification training prior to activities occurring and attend the aforementioned onboarding training. The specific requirements that NMFS would set for the fishery monitoring surveys can be found in the

regulatory text at the end of this proposed rulemaking.

Based on our evaluation of the mitigation measures, NMFS has preliminarily determined that these proposed measures would provide the means of affecting 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.

Proposed Monitoring and Reporting

In order to promulgate a rulemaking for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and/or
- Mitigation and monitoring effectiveness.

Separately, monitoring is also regularly used to support mitigation implementation, which is referred to as mitigation monitoring, and monitoring plans typically include measures that both support mitigation implementation and increase our understanding of the impacts of the activity on marine mammals.

During the planned activities, visual monitoring by NMFS-approved PSOs would be conducted before, during, and after all impact pile driving and HRG surveys. PAM would also be conducted during impact pile driving. Visual observations and acoustic detections would be used to support the activity-specific mitigation measures (*e.g.,* clearance zones). To increase understanding of the impacts of the activity on marine mammals, PSOs must record all incidents of marine mammal occurrence at any distance from the piling locations, near the HRG acoustic sources. PSOs would document all behaviors and behavioral changes, in concert with distance from an acoustic source. The required monitoring is described below, beginning with PSO measures that are applicable to all the aforementioned activities, followed by activity-specific monitoring requirements.

Protected Species Observer and PAM Operator Requirements

US Wind would be required to employ NMFS-approved PSOs and PAM operators. PSOs are trained professionals who are tasked with visual monitoring for marine mammals during pile driving and HRG surveys. The primary purpose of a PSO is to carry out the monitoring, collect data, and, when appropriate, call for the implementation of mitigation measures. In addition to visual observations, NMFS would require US Wind to conduct PAM using PAM operators during impact pile driving and vessel transit.

The inclusion of PAM, which would be conducted by NMFS-approved PAM operators, following a standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind alongside visual data collection is valuable to provide the most accurate record of species presence as possible, together with visual monitoring, and these two monitoring methods are well understood to provide best results when combined together (*e.g.,* Barlow and Taylor, 2005; Clark *et al.,* 2010; Gerrodette *et al.,* 2011; Van Parijs *et al.,* 2021). Acoustic monitoring (in addition to visual monitoring) increases the likelihood of detecting marine mammals within the shutdown and clearance zones of project activities, which when applied in combination with required shutdowns helps to further reduce the risk of marine mammals being exposed to sound levels that could otherwise result in acoustic injury or more intense behavioral harassment.

The exact configuration and number of PAM systems depends on the size of the zone(s) being monitored, the amount of noise expected in the area, and the characteristics of the signals being monitored. More closely spaced hydrophones would allow for more directionality, and perhaps, range to the vocalizing marine mammals; although, this approach would add additional costs and greater levels of complexity to the project. Larger baleen cetacean species (*i.e.,* mysticetes), which produce loud and lower-frequency vocalizations, may be able to be heard with fewer hydrophones spaced at greater distances. However, smaller cetaceans (such as mid-frequency delphinids or odontocetes) may necessitate more hydrophones and to be spaced closer together given the shorter range of the shorter, mid-frequency acoustic signals (*e.g.,* whistles and echolocation clicks). As there are no ''perfect fit'' single-optimal-array configurations, NMFS will consider and approve these set-ups, as appropriate, on a case-by-case basis. Specifically, US Wind will be required to provide a plan that describes an optimal configuration for collecting the required marine mammal data, based on the real-world circumstances in the project area, recognizing that we will continue to learn more as monitoring results from other wind projects are submitted.

NMFS does not formally administer any PSO or PAM operator training program or endorse specific providers but will approve PSOs and PAM operators that have successfully completed courses that meet the curriculum and trainer requirements referenced below and further specified in the regulatory text at the end of this proposed rulemaking.

NMFS will provide PSO and PAM operator approvals in the context of the need to ensure that PSOs and PAM operators have the necessary training and/or experience to carry out their duties competently. In order for PSOs and PAM operators to be approved, NMFS must review and approve PSO and PAM operator resumes indicating successful completion of an acceptable training course. PSOs and PAM operators must have previous

experience observing marine mammals and must have the ability to work with all required and relevant software and equipment. NMFS may approve PSOs and PAM operators as conditional or unconditional. Conditional approval may be given to one who is trained but has not yet attained the requisite experience. Unconditional approval is given to one who is trained and has attained the necessary experience. The specific requirements for conditional and unconditional approval can be found in the regulatory text at the end of this proposed rulemaking.

Conditionally approved PSOs and PAM operators would be paired with an unconditionally approved PSO (or PAM operator, as appropriate) to ensure that the quality of marine mammal observations and data recording is kept consistent. Additionally, activities requiring PSO and/or PAM operator monitoring must have a lead on duty. The visual PSO field team, in conjunction with the PAM team (*i.e.,* marine mammal monitoring team) would have a lead member (designated as the ''Lead PSO'' or ''Lead PAM operator'') who would be required to meet the unconditional approval standard.

Although PSOs and PAM operators must be approved by NMFS, third-party observer providers and/or companies seeking PSO and PAM operator staffing should expect that those having satisfactorily completed acceptable training and with the requisite experience (if required) will be quickly approved. US Wind is required to request PSO and PAM operator approvals 60 days prior to those personnel commencing work. An initial list of previously approved PSO and PAM operators must be submitted by US Wind at least 30 days prior to the start of the project. Should US Wind require additional PSOs or PAM operators throughout the project, US Wind must submit a subsequent list of pre-approved PSOs and PAM operators to NMFS at least 15 days prior to planned use of that PSO or PAM operator. A PSO may be trained and/or experienced as both a PSO and PAM operator and may perform either duty, pursuant to scheduling requirements (and vice versa).

A minimum number of PSOs would be required to actively observe for the presence of marine mammals during certain project activities with more PSOs required as the mitigation zone sizes increase. A minimum number of PAM operators would be required to actively monitor for the presence of marine mammals during foundation installation. The types of equipment required (*e.g.,* Big Eye binoculars on the pile driving vessel) are also designed to increase marine mammal detection capabilities. Specifics on these types of requirements can be found in the regulations at the end of this proposed rulemaking. At least three PSOs and one PAM operator per acoustic data stream (equivalent to the number of acoustic buoys) must be on-duty and actively monitoring per platform during foundation installation; and at least one PSO must be on-duty during HRG surveys conducted during daylight hours.

In addition to monitoring duties, PSOs and PAM operators are responsible for data collection. The data collected by PSO and PAM operators and subsequent analysis provide the necessary information to inform an estimate of the amount of take that occurred during the project, better understand the impacts of the project on marine mammals, address the effectiveness of monitoring and mitigation measures, and to adaptively manage activities and mitigation in the future. Data reported includes information on marine mammal sightings, activity occurring at time of sighting, monitoring conditions, and if mitigative actions were taken. Specific data collection requirements are contained within the regulations at the end of this proposed rulemaking.

US Wind would be required to submit a Pile Driving Marine Mammal Monitoring Plan to NMFS 180 days in advance of foundation installation activities. The Plan must include details regarding PSO and PAM monitoring protocols and equipment proposed for use. More specifically, the PAM portion of the plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind as described in *NOAA and BOEM Minimum Recommendations for Use of Passive Acoustic Listening Systems in Offshore Wind Energy Development Monitoring and Mitigation Programs* (Van Parijs *et al.,* 2021). NMFS must approve the plan prior to the commencement of foundation installation activities. Specific details on NMFS' PSO or PAM operator qualifications and requirements can be found in Part 217—Regulations Governing The Taking And Importing Of Marine Mammals at the end of this proposed rulemaking. Additional information can be found in US Wind Marine Mammal Monitoring and Mitigation Plan (appendix B) on the NMFS' website at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-wind-inc-construction-and-operation-maryland-offshore-wind*.

Sound Field Verification

US Wind would be required to conduct SFV measurements during all impact pile driving activities associated with the installation of, at minimum, the first three monopile foundations. SFV measurements must continue until at least three consecutive monopiles and three entire jacket foundations demonstrate noise levels are at or below those modeled, assuming 10-dB of attenuation. Subsequent SFV measurements would also be required should larger piles be installed or if additional piles are driven that are anticipated to produce louder sound fields than those previously measured (*e.g.,* higher hammer energy, greater number of strikes, *etc.*). The measurements and reporting associated with SFV can be found in the regulatory text at the end of this proposed rulemaking. The proposed requirements are extensive to ensure monitoring is conducted appropriately and the reporting frequency is such that US Wind would be required to make adjustments quickly (*e.g.,* add additional sound attenuation) to ensure marine mammals are not experiencing noise levels above those considered in this analysis. For recommended SFV protocols for impact pile driving, please consult International Organization for Standardization (ISO) 18406 *Underwater acoustics—Measurement of radiated underwater sound from percussive pile driving* (2017).

Reporting

Prior to any construction activities occurring, US Wind would provide a report to NMFS Office of Protected Resources that demonstrates that all US Wind personnel, which includes the vessel crews, vessel captains, PSOs, and PAM operators have completed all required trainings.

NMFS would require standardized and frequent reporting from US Wind during the life of the regulations and LOA. All data collected relating to the Project would be recorded using industry-standard software (*e.g.,* Mysticetus or a similar software) installed on field laptops and/or tablets. US Wind would be required to submit weekly, monthly, annual, and situational reports. The specifics of what we require to be reported can be found in the regulatory text at the end of this proposed rulemaking.

Weekly Report—During foundation installation activities, US Wind would be required to compile and submit weekly marine mammal monitoring reports for foundation installation pile driving to NMFS Office of Protected Resources that document the daily start and stop of all pile driving activities, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise abatement system(s) (*e.g.,* system type, distance deployed from the pile, bubble rate, *etc.*). Weekly reports will be due on Wednesday for the previous week (Sunday to Saturday). The weekly reports are also required to identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, weekly reports would no longer be required.

Monthly Report—US Wind would be required to compile and submit monthly reports to NMFS Office of Protected Resources that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, all detections of marine mammals, and any mitigative actions taken. Monthly reports would be due on the 15th of the month for the previous month. The monthly report would also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is complete, monthly reports would no longer be required.

Annual Reporting—US Wind would be required to submit an annual marine mammal monitoring (both PSO and PAM) report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year describing, in detail, all of the information required in the monitoring section above. A final annual report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report.

Final 5-Year Reporting—US Wind would be required to submit its draft 5-year report(s) to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS comments on the draft report. Information contained within this report is described at the beginning of this section.

Situational Reporting—Specific situations encountered during the development of the Project would require immediate reporting. For instance, if a North Atlantic right whale is observed at any time by PSOs or project personnel, the sighting must be immediately (if not feasible, as soon as possible, and no longer than 24 hours after the sighting) reported to NMFS. If a North Atlantic right whale is acoustically detected at any time via a project-related PAM system, the detection must be reported as soon as possible and no longer than 24 hours after the detection to NMFS via the 24-hour North Atlantic right whale Detection Template (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*). Calling the hotline is not necessary when reporting PAM detections via the template.

If a sighting of a stranded, entangled, injured, or dead marine mammal occurs, the sighting would be reported to NMFS Office of Protected Resources, the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866–755–6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, US Wind would be required to immediately cease all activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance consistent with the adaptive management provisions described below and codified at § 217.307. US Wind could not resume their activities until notified by NMFS Office of Protected Resources.

In the event of a vessel strike of a marine mammal by any vessel associated with the Project, US Wind must immediately report the strike incident. If the strike occurs in the Greater Atlantic Region (Maine to Virginia), US Wind must call the NMFS Office of Protected Resources and GARFO. US Wind would be required to immediately cease all on-water activities until NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. US Wind may, consistent with the adaptive management provisions described below and codified at § 217.307, not resume their activities until notified by NMFS.

In the event of any lost gear associated with the fishery surveys, US Wind must report to the GARFO as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

The specifics of what NMFS Office of Protected Resources requires to be reported is listed at the end of this proposed rulemaking in the regulatory text.

Sound Field Verification—US Wind would be required to submit interim SFV reports after each foundation installation within 48 hours. A final SFV report for all monopile, jacket foundation, and pin pile installation monitoring would be required within 90 days following completion of acoustic monitoring.

Adaptive Management

The regulations governing the take of marine mammals incidental to US Wind construction activities contain an adaptive management component. Our understanding of the effects of offshore wind construction activities (*e.g.,* acoustic stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of 5-year regulations.

The monitoring and reporting requirements in this final rule provide NMFS with information that helps us to better understand the impacts of the project's activities on marine mammals and informs our consideration of whether any changes to mitigation and monitoring are appropriate. The use of adaptive management allows NMFS to consider new information and modify mitigation, monitoring, or reporting requirements, as appropriate, with input from US Wind regarding practicability, if such modifications will have a reasonable likelihood of more effectively accomplishing the goal of the measures.

The following are some of the possible sources of new information to be considered through the adaptive management process: (1) results from monitoring reports, including the weekly, monthly, situational, and annual reports required; (2) results from marine mammal and sound research; and (3) any information which reveals

that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOA. During the course of the rule, US Wind (and other LOA Holders conducting offshore wind development activities) are required to participate in one or more adaptive management meetings convened by NMFS and/or BOEM, in which the above information will be summarized and discussed in the context of potential changes to the mitigation or monitoring measures.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' by mortality, serious injury, Level A harassment and Level B harassment, we consider other factors, such as the likely nature of any behavioral responses (*e.g.,* intensity, duration), the context of any such responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

In the Estimated Take section, we estimated the maximum number of takes by Level A harassment and Level B harassment that could occur from US Wind's specified activities based on the methods described. The impact that any given take would have is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, *etc.*). In this proposed rule, we evaluate the likely impacts of the enumerated harassment takes that are proposed to be authorized in the context of the specific circumstances surrounding these predicted takes. We also collectively evaluate this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific discussions that support our negligible impact conclusions for each stock. As described above, no serious injury or mortality is expected or proposed to be authorized for any species or stock.

The Description of the Specified Activities section describes US Wind specified activities proposed for the project that may result in take of marine mammals and an estimated schedule for conducting those activities. US Wind has provided a realistic construction schedule although we recognize schedules may shift for a variety of reasons (*e.g.,* weather or supply delays). However, the total amount of take would not exceed the 3-year totals and maximum annual total in any given year indicated in tables 24 and 25, respectively.

We base our analysis and preliminary negligible impact determination on the maximum number of takes that could occur and are proposed to be authorized annually and across the effective period of these regulations, and extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals and the number and context of the individuals affected. As stated before, the number of takes, both maximum annual and 5-year total, alone are only a part of the analysis.

To avoid repetition, we provide some general analysis in this Negligible Impact Analysis and Determination section that applies to all the species listed in table 6 given that some of the anticipated effects of US Wind's construction activities on marine mammals are expected to be relatively similar in nature. Then, we subdivide into more detailed discussions for mysticetes, odontocetes, and pinnipeds which have broad life history traits that support an overarching discussion of some factors considered within the analysis for those groups (*e.g.,* habitat-use patterns, high-level differences in feeding strategies).

Last, we provide a negligible impact determination for each species or stock, providing species or stock-specific information or analysis, where appropriate, for example, for North Atlantic right whales given the population status. Organizing our analysis by grouping species or stocks that share common traits or that would respond similarly to effects of US Wind's activities, and then providing species- or stock-specific information allows us to avoid duplication while ensuring that we have analyzed the effects of the specified activities on each affected species or stock. It is important to note that in the group or species sections, we base our negligible impact analysis on the maximum annual take that is predicted under the 5-year rule; however, the majority of the impacts are associated with WTG, Met tower, and OSS foundation installation, which are schedule to occur within the first 1 to 3 years (2025 through 2027) (tables 23, 24, and 25).

As described previously, no serious injury or mortality is anticipated or proposed to be authorized in this rule. Any Level A harassment proposed to be authorized would be in the form of auditory injury (*i.e.,* PTS) and not non-auditory injury (*e.g.,* lung injury or gastrointestinal injury from detonations). The amount of harassment US Wind has requested, and NMFS proposes to authorize, is based on exposure models that consider the outputs of acoustic source and propagation models and other data such as frequency of occurrence or group sizes. Several conservative parameters and assumptions are ingrained into these models, modeling the impact installation of all piles at a maximum hammer energy and application of the May sound speed profile to all months within a given season. The exposure model results do not reflect any mitigation measures (other than 10-dB sound attenuation) or avoidance response. The amount of take requested and proposed to be authorized also reflects careful consideration of other data (*e.g.,* group size data) and, for Level A harassment potential of some large whales, the consideration of mitigation measures. For all species, the amount of take proposed to be authorized represents the maximum amount of Level A harassment and Level B harassment that could occur.

Behavioral Disturbance

In general, NMFS anticipates that impacts on an individual that has been harassed are likely to be more intense when exposed to higher received levels and for a longer duration (though this is in no way a strictly linear relationship for behavioral effects across species, individuals, or circumstances) and less severe impacts result when exposed to lower received levels and for a brief

duration. However, there is also growing evidence of the importance of contextual factors such as distance from a source in predicting marine mammal behavioral response to sound—*i.e.,* sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (DeRuiter and Doukara, 2012; Falcone *et al.,* 2017). As described in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section, the intensity and duration of any impact resulting from exposure to US Wind's activities is dependent upon a number of contextual factors including, but not limited to, sound source frequencies, whether the sound source is moving towards the animal, hearing ranges of marine mammals, behavioral state at time of exposure, status of individual exposed (*e.g.,* reproductive status, age class, health) and an individual's experience with similar sound sources. Southall *et al.* (2021), Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.,* behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources. Harassment of marine mammals may result in behavioral modifications (*e.g.,* avoidance, temporary cessation of foraging or communicating, changes in respiration or group dynamics, masking) or may result in auditory impacts such as hearing loss. In addition, some of the lower-level physiological stress responses (*e.g.,* change in respiration, change in heart rate) discussed previously would likely co-occur with the behavioral modifications, although these physiological responses are more difficult to detect, and fewer data exist relating these responses to specific received levels of sound. Take by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect US Wind's activities to produce conditions of long-term and continuous exposure to noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

In the range of behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within 1 day), the less severe end might include exposure to comparatively lower levels of a sound, at a greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time or breaking off one or a few feeding bouts. More severe effects could occur if an animal gets close enough to the source to receive a comparatively higher level, is exposed continuously to one source for a longer time or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Many species perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than 1 day or recur on subsequent days (Southall *et al.,* 2007) due to diel and lunar patterns in diving and foraging behaviors observed in many cetaceans (Baird *et al.,* 2008; Barlow *et al.,* 2020; Henderson *et al.,* 2016; Schorr *et al.,* 2014). It is important to note the water depth in the Project Area is shallow (ranging up to 10–45 m in the ECRs, and 13 to 41.5 m in the Lease Area) and deep diving species, such as sperm whales, are not expected to be engaging in deep foraging dives when exposed to noise above NMFS harassment thresholds during the specified activities. Therefore, we do not anticipate impacts to deep foraging behavior to be impacted by the specified activities.

It is also important to identify that the estimated number of takes does not necessarily equate to the number of individual animals US Wind expects to harass (which is lower), but rather to the instances of take (*i.e.,* exposures above the Level B harassment thresholds) that may occur. These instances may represent either seconds to minutes for HRG surveys, or, in some cases, longer durations of exposure within a day (*e.g.,* pile driving). Some individuals of a species may experience recurring instances of take over multiple days throughout the year while some members of a species or stock may experience one exposure as they move through an area, which means that the number of individuals taken is smaller than the total estimated takes. In short, for species that are more likely to be migrating through the area and/or for which only a comparatively smaller number of takes are predicted (*e.g.,* some of the mysticetes), it is more likely that each take represents a different individual whereas for non-migrating species with larger amounts of predicted take, we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some would be taken across multiple days.

For US Wind, impact pile driving of foundation piles is most likely to result in a higher magnitude and severity of behavioral disturbance than HRG surveys. Impact pile driving has higher source levels and longer durations (on an annual basis) than HRG surveys. HRG survey equipment also produces much higher frequencies than pile driving, resulting in minimal sound propagation. While impact pile driving for foundation installation is anticipated to be most impactful for these reasons, impacts are minimized through implementation of mitigation measures, including use of a sound attenuation system, soft-starts, the implementation of clearance zones that would facilitate a delay to pile driving commencement, and implementation of shutdown zones. All these measures are designed to avoid or minimize harassment. For example, given sufficient notice through the use of soft-start, marine mammals are expected to move away from a sound source that is disturbing prior to becoming exposed to very loud noise levels. The requirement to couple visual monitoring and PAM before and during all foundation installation will increase the overall capability to detect marine mammals compared to one method alone.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes is in the form of a longer (several hours or a day) and more severe response, if they are not expected to be repeated over numerous or sequential days, impacts to individual fitness are not anticipated. Also, the effect of disturbance is strongly influenced by whether it overlaps with biologically important habitats when individuals are present—avoiding biologically important habitats will provide opportunities to compensate for reduced or lost foraging (Keen *et al.,* 2021). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.,* 2018; Harris *et al.,* 2017; King *et al.,* 2015; National Academy of Science, 2017; New *et al.,* 2014; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015).

Temporary Threshold Shift (TTS)

TTS is one form of Level B harassment that marine mammals may incur through exposure to US Wind's activities and, as described earlier, the proposed takes by Level B harassment may represent takes in the form of behavioral disturbance, TTS, or both. As discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section, in general, TTS can last from a few minutes to days, be of varying degree, and occur across different frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Impact pile driving is a broadband noise sources but generates sounds in the lower frequency ranges (with most of the energy below 1–2 kHz, but with a small amount energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS is higher in low-frequency cetaceans (*i.e.,* mysticetes) than other marine mammal hearing groups and would be more likely to occur in frequency bands in which they communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species given that the frequencies produced by these activities do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalizations, the frequency range of TTS from US Wind's pile driving activities would not typically span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. In addition, the proposed mitigation measures further reduce the potential for TTS in mysticetes.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously (refer back to Estimated Take). However, source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the proposed mitigation and the nominal speed of the receiving animal relative to the stationary sources such as impact pile driving. The recovery time of TTS is also of importance when considering the potential impacts from TTS. In TTS laboratory studies (as discussed in Potential Effects of Specified Activities on Marine Mammals and Their Habitat), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes) and we note that while the pile driving activities last for hours a day, it is unlikely that most marine mammals would stay in the close vicinity of the source long enough to incur more severe TTS. Overall, given the small number of instances that any individual might incur TTS, the low degree of TTS and the short, anticipated duration, and the unlikely scenario that any TTS overlapped the entirety of a critical hearing range, it is unlikely that TTS (of the nature expected to result from the project's activities) would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Permanent Threshold Shift (PTS)

NMFS proposes to authorize a very small amount of take by PTS to some marine mammal individuals. The numbers of proposed annual takes by Level A harassment are relatively low for all marine mammal stocks and species (table 23). The only activities incidental to which we anticipate PTS may occur is from exposure to impact pile driving, which produces sounds that are both impulsive and primarily concentrated in the lower frequency ranges (below 1 kHz) (David, 2006; Krumpel *et al.,* 2021).

There are no PTS data on cetaceans and only one instance of PTS being induced in older harbor seals (Reichmuth *et al.,* 2019). However, available TTS data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds (Southall *et al.,* 2007; NMFS, 2018; Southall *et al.,* 2019)) suggest that most threshold shifts occur in the frequency range of the source up to one octave higher than the source. We would anticipate a similar result for PTS. Further, no more than a small degree of PTS is expected to be associated with any of the incurred Level A harassment, given it is unlikely that animals would stay in the close vicinity of a source for a duration long enough to produce more than a small degree of PTS.

PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving (*i.e.,* the low-frequency region below 2 kHz) (Cody and Johnstone, 1981; McFadden, 1986; Finneran, 2015), not severe hearing impairment. If hearing impairment occurs from impact pile driving, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. In addition, during impact pile driving, given sufficient notice through use of soft-start prior to implementation of full hammer energy during impact pile driving, marine mammals are expected to move away from a sound source that is disturbing prior to it resulting in severe PTS.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual are similar to those discussed for TTS (*e.g.,* decreased ability to communicate, forage effectively, or detect predators), but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Also, though masking can result from the sum of exposure to multiple signals, none of which might individually cause TTS. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency).

As our analysis has indicated, for this project we expect that impact pile driving foundations have the greatest potential to mask marine mammal signals, and this pile driving may occur for several, albeit intermittent, hours per day, for multiple days per year. Masking is fundamentally more of a concern at lower frequencies (which are pile driving dominant frequencies), because low-frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower low-frequency calls of mysticetes, as well as many non-communication cues related to fish and invertebrate prey, and geologic sounds that inform navigation. However, the area in which masking would occur for all marine mammal species and stocks (*e.g.,* predominantly

in the vicinity of the foundation pile being driven) is small relative to the extent of habitat used by each species and stock. As mentioned above, the Project Area does not overlap critical habitat for any species, and temporary avoidance of the pile driving area by marine mammals would likely displace animals to areas of sufficient habitat. In summary, the nature of US Wind's activities, paired with habitat use patterns by marine mammals, does not support the likelihood that the level of masking that could occur would have the potential to affect reproductive success or survival. Therefore, we are not predicting take due to masking effects, and are not proposing to authorize such take.

Impacts on Habitat and Prey

Construction activities may result in fish and invertebrate mortality or injury very close to the source, and all of US Wind's activities may cause some fish to leave the area of disturbance. It is anticipated that any mortality or injury would be limited to a very small subset of available prey and the implementation of mitigation measures such as the use of a noise attenuation system during impact pile driving would further limit the degree of impact. Behavioral changes in prey in response to construction activities could temporarily impact marine mammals' foraging opportunities in a limited portion of the foraging range but, because of the relatively small area of the habitat that may be affected at any given time (*e.g.,* around a pile being driven) and the temporary nature of the disturbance on prey species, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Cable presence is not anticipated to impact marine mammal habitat as these would be buried, and any electromagnetic fields emanating from the cables are not anticipated to result in consequences that would impact marine mammals' prey to the extent they would be unavailable for consumption. Although many species of marine mammal prey can detect electromagnetic fields, previous studies have shown little impacts on habitat use (Hutchinson *et al.,* 2018). Burying the cables and the inclusion of protective shielding on cables will also minimize any impacts of electromagnetic fields on marine mammal prey.

The presence of wind turbines within the Lease Area could have longer-term impacts on marine mammal habitat, as the project would result in the persistence of the structures within marine mammal habitat for more than 30 years. The presence of structures such as wind turbines is, in general, likely to result in certain oceanographic effects in the marine environment, and may alter aggregations and distribution of marine mammal zooplankton prey through changing the strength of tidal currents and associated fronts, changes in stratification, primary production, the degree of mixing, and stratification in the water column (Schultze *et al.,* 2020; Chen *et al.,* 2021; Johnson *et al.,* 2021; Christiansen *et al.,* 2022; Dorrell *et al.,* 2022).

As discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section, the project would consist of no more than 119 foundations (114 WTGs, 4 OSSs, 1 Met tower) in the Lease Area, which will gradually become operational following construction completion. While there are likely to be oceanographic impacts from the presence of operating turbines, meaningful oceanographic impacts relative to stratification and mixing that would significantly affect marine mammal foraging and prey over large areas in key foraging habitats are not anticipated from the US Wind activities covered under these proposed regulations, nor is the Project area located in the vicinity of any key marine mammal foraging areas. For these reasons, if oceanographic features are affected by the project during the effective period of the proposed regulations, the impact on marine mammal habitat and their prey is likely to be comparatively minor.

Mitigation To Reduce Impacts on All Species

This proposed rulemaking includes a variety of mitigation measures designed to minimize impacts on all marine mammals, with a focus on North Atlantic right whales (the latter is described in more detail below). For impact pile driving of foundation piles, nine overarching mitigation measures are proposed, which are intended to reduce both the number and intensity of marine mammal takes: (1) seasonal/time of day work restrictions; (2) use of multiple PSOs to visually observe for marine mammals (with any detection within specifically designated zones triggering a delay or shutdown); (3) use of PAM to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering delay or shutdown); (4) implementation of clearance zones; (5) implementation of shutdown zones; (6) use of soft-start; (7) use of noise attenuation technology; (8) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by US Wind's personnel must be reported to PSOs; (9) sound field verification monitoring; and (10) Vessel Strike Avoidance measures to reduce the risk of a collision with a marine mammal and vessel. For HRG surveys, we are requiring six measures: (1) measures specifically for Vessel Strike Avoidance; (2) specific requirements during daytime HRG surveys; (3) implementation of clearance zones; (4) implementation of shutdown zones; (5) use of ramp-up of acoustic sources; and (6) maintaining situational awareness of marine mammal presence through the requirement that any marine mammal sighting(s) by US Wind's personnel must be reported to PSOs.

NMFS prescribes mitigation measures based on the following rationale. For activities with large harassment isopleths, US Wind would be required to reduce the noise levels generated to the lowest levels practicable and would be required to ensure that they do not exceed a noise footprint above that which was modeled, assuming a 10-dB attenuation. Use of a soft-start during impact pile driving will allow animals to move away from (*i.e.,* avoid) the sound source prior to applying higher hammer energy levels needed to install the pile (US Wind would not use a hammer energy greater than necessary to install piles). Similarly, ramp-up during HRG surveys would allow animals to move away and avoid the acoustic sources before they reach their maximum energy level. For all activities, clearance zone and shutdown zone implementation, which are required when marine mammals are within given distances associated with certain impact thresholds for all activities, would reduce the magnitude and severity of marine mammal take. Additionally, the use of multiple PSOs (WTG, OSS, and Met tower foundation installation; HRG surveys), PAM (for impact foundation installation), and maintaining awareness of marine mammal sightings reported in the region (WTG, OSS, and Met tower foundation installation; HRG surveys) would aid in detecting marine mammals that would trigger the implementation of the mitigation measures. The reporting requirements, including SFV reporting (for foundation installation and foundation operation), will assist NMFS in identifying if impacts beyond those analyzed in this proposed rule are occurring, potentially leading to the need to enact adaptive management

measures in addition to or in the place of the proposed mitigation measures.

Mysticetes

Five mysticete species (comprising five stocks) of cetaceans (North Atlantic right whale, humpback whale, fin whale, sei whale, and minke whale) may be taken by harassment. These species, to varying extents, utilize the specified geographic region, including the Project Area, for the purposes of migration, foraging, and socializing. Mysticetes are in the low-frequency hearing group.

Behavioral data on mysticete reactions to pile driving noise are scant. Kraus *et al.* (2019) predicted that the three main impacts of offshore wind farms on marine mammals would consist of displacement, behavioral disruptions, and stress. Broadly, we can look to studies that have focused on other noise sources such as seismic surveys and military training exercises, which suggest that exposure to loud signals can result in avoidance of the sound source (or displacement if the activity continues for a longer duration in a place where individuals would otherwise have been staying, which is less likely for mysticetes in this area), disruption of foraging activities (if they are occurring in the area), local masking around the source, associated stress responses, and impacts to prey, as well as TTS or PTS in some cases.

Mysticetes encountered in the Project Area are expected to primarily be migrating and, to a lesser degree, may be engaged in foraging behavior. The extent to which an animal engages in these behaviors in the area is species-specific and varies seasonally. Many mysticetes are expected to predominantly be migrating through the Project Area towards or from feeding grounds located further north (*e.g.,* southern New England region, Gulf of Maine, Canada). While we acknowledged above that mortality, hearing impairment, or displacement of mysticete prey species may result locally from impact pile driving, given the very short duration of and broad availability of prey species in the area and the availability of alternative suitable foraging habitat for the mysticete species most likely to be affected, any impacts on mysticete foraging is expected to be minor. Whales temporarily displaced from the Project Area are expected to have sufficient remaining feeding habitat available to them and would not be prevented from feeding in other areas within the biologically important feeding habitats found further north. In addition, any displacement of whales or interruption of foraging bouts would be expected to be relatively temporary in nature.

The potential for repeated exposures is dependent upon the residency time of whales, with migratory animals unlikely to be exposed on repeated occasions and animals remaining in the area to be more likely exposed repeatedly. For mysticetes, where relatively low amounts of species-specific take by Level B harassment are predicted (compared to the abundance of each mysticete species or stock, such as is indicated in table 25) and movement patterns suggest that individuals would not necessarily linger in a particular area for multiple days, each predicted take likely represents an exposure of a different individual; the behavioral impacts would, therefore, be expected to occur within a single day within a year—an amount that NMFS would not expect to impact reproduction or survival. Species with longer residence time in the Project Area may be subject to repeated exposures across multiple days.

In general, for this project, the duration of exposures would not be continuous throughout any given day, and pile driving would not occur on all consecutive days within a given year due to weather delays or any number of logistical constraints US Wind has identified. Species-specific analysis regarding potential for repeated exposures and impacts is provided below.

Fin, humpback, minke, and sei whales are the only mysticete species for which PTS is anticipated and proposed to be authorized. As described previously, PTS for mysticetes from some project activities may overlap frequencies used for communication, navigation, or detecting prey. However, given the nature and duration of the activity, the mitigation measures, and likely avoidance behavior, any PTS is expected to be of a small degree, would be limited to frequencies where pile driving noise is concentrated (*i.e.,* only a small subset of their expected hearing range) and would not be expected to impact reproductive success or survival.

North Atlantic Right Whale

North Atlantic right whales are listed as endangered under the ESA and as both depleted and strategic stocks under the MMPA. As described in the Potential Effects of the Specified Activities on Marine Mammals and Their Habitat section, North Atlantic right whales are threatened by a low population abundance, higher than average mortality rates, and lower than average reproductive rates. Recent studies have reported individuals showing high stress levels (*e.g.,* Corkeron *et al.,* 2017) and poor health, which has further implications on reproductive success and calf survival (Christiansen *et al.,* 2020; Stewart *et al.,* 2021; Stewart *et al.,* 2022). As described below, a UME has been designated for North Atlantic right whales. Given this, the status of the North Atlantic right whale population is of heightened concern and, therefore, merits additional analysis and consideration. No injury or mortality is anticipated or proposed for authorization for this species.

For North Atlantic right whales, this proposed rule would allow for the authorization of up to ten takes, by Level B harassment only, over the 5-year period, with a maximum annual allowable take by Level B harassment of four (equating to approximately 1.18 percent of the stock abundance, if each take were considered to be of a different individual). The Project Area is known as a migratory corridor for North Atlantic right whales and given the nature of migratory behavior (*e.g.,* continuous path), as well as the low number of total takes, we anticipate that few, if any, of the instances of take would represent repeat takes of any individual, though it could occur if whales are engaged in opportunistic foraging behavior. Barco *et al.* (2015) observed North Atlantic right whales engaging in open mouth behavior, which is suggestive, though not necessarily indicative, of feeding. While opportunistic foraging may occur in the Project area, the area does not support prime foraging habitat.

The highest density of North Atlantic right whales in the Project Area occurs in the winter (table 12). The Mid-Atlantic, including the Project Area, may be a stopover site for migrating North Atlantic right whales moving to or from southeastern calving grounds. North Atlantic right whales have been acoustically detected in the vicinity of the Project Area year-round (Bailey *et al.,* 2018) with the highest occurrences documented during late winter/early spring. Similarly, the waters off the coast of Maryland, including those surrounding the Project Area in the Maryland Wind Energy Area (MD WEA), have documented North Atlantic right whale presence as the area is an important migratory route for the species to the northern feeding areas near the Gulf of Maine and Georges Banks and to their southern breeding and calving grounds off the southeastern U.S. (CETAP, 1982; LaBrecque *et al.,* 2015; Salisbury *et al.,* 2016; Davis *et al.,* 2017). However, comparatively, the Project Area is not known as an

important area for feeding, breeding, or calving.

North Atlantic right whales range outside the Project Area for their main feeding, breeding, and calving activities (Hayes *et al.,* 2023). Additional qualitative observations include animals feeding and socializing in New England waters, north of the MD WEA (Quintana-Rizzo *et al.,* 2021). The North Atlantic right whales observed north of the MD WEA were primarily concentrated in the northeastern and southeastern sections of the Massachusetts WEA (MA WEA) during the summer (June–August) and winter (December–February). North Atlantic right whale distribution did shift to the west into the Rhode Island/Massachusetts (RI/MA WEA) in the spring (March–May). Quintana-Rizzo *et al.* (2021) found that approximately 23 percent of the right whale population is present from December through May, and the mean residence time has tripled to an average of 13 days during these months. The MD WEA is not in or near these areas important to feeding, breeding, and calving activities.

In general, North Atlantic right whales in the Project Area are expected to be engaging in migratory behavior. Given the species' migratory behavior in the Project Area, we anticipate individual whales would be typically migrating through the area during most months when foundation installation would occur (given the seasonal restrictions on foundation installation, rather than lingering for extended periods of time). Other work that involves much smaller harassment zones (*e.g.,* HRG surveys) may also occur during periods when North Atlantic right whales are using the habitat for migration. It is important to note the activities occurring from December through May that may impact North Atlantic right whale would be HRG surveys which are planned to take place during years 2 and 3 for only 14 days each year from April through June and would not result in very high received levels. Across all years, if an individual were to be exposed during a subsequent year, the impact of that exposure is likely independent of the previous exposure given the duration between exposures.

As described in the Description of Marine Mammals in the Geographic Area of Specified Activities, North Atlantic right whales are presently experiencing an ongoing UME (beginning in June 2017). Preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of North Atlantic right whales. Given the current status of the North Atlantic right whale, the loss of even one individual could significantly impact the population. No mortality, serious injury, or injury of North Atlantic right whales as a result of the project is expected or proposed to be authorized. Any disturbance to North Atlantic right whales due to US Wind's activities is expected to result in temporary avoidance of the immediate area of construction. As no injury, serious injury, or mortality is expected or proposed to be authorized, and Level B harassment of North Atlantic right whales will be reduced to the level of least practicable adverse impact through use of mitigation measures, the proposed number of takes of North Atlantic right whales would not exacerbate or compound the effects of the ongoing UME.

As described in the general *Mysticetes* section above, foundation installation is likely to result in the highest amount of annual take and is of greatest concern given loud source levels. This activity would likely be limited to up to 119 days (114 for WTG monopile foundations, 4 days for OSS jacket foundations, and 1 day for Met tower pin pile foundations) over a maximum of 3 years, during times when, based on the best available scientific data, North Atlantic right whales are less frequently encountered due to their migratory behavior. The potential types, severity, and magnitude of impacts are also anticipated to mirror that described in the general *Mysticetes* section above, including avoidance (the most likely outcome), changes in foraging or vocalization behavior, masking, a small amount of TTS, and temporary physiological impacts (*e.g.,* change in respiration, change in heart rate). Importantly, the effects of the proposed activities are expected to be sufficiently low-level and localized to specific areas as to not meaningfully impact important behaviors, such as migratory behavior of North Atlantic right whales. These takes are expected to result in temporary behavioral reactions, such as slight displacement (but not abandonment) of migratory habitat or temporary cessation of feeding.

Further, given these exposures are generally expected to occur to different individual right whales migrating through (*i.e.,* most individuals would not be expected to be impacted on more than 1 day in a year), with some subset potentially being exposed on no more than a few days within the year, they are unlikely to result in energetic consequences that could affect reproduction or survival of any individuals.

Overall, NMFS expects that any behavioral harassment of North Atlantic right whales incidental to the specified activities would not result in changes to their migration patterns or foraging success, as only temporary avoidance of an area during construction is expected to occur. As described previously, North Atlantic right whales migrating through the Project Area are not expected to remain in this habitat for extensive durations, and any temporarily displaced animals would be able to return to or continue to travel through and forage in these areas once activities have ceased.

Although acoustic masking may occur in the vicinity of the foundation installation activities, based on the acoustic characteristics of noise associated with pile driving (*e.g.,* frequency spectra, short duration of exposure) and construction surveys (*e.g.,* intermittent signals), NMFS expects masking effects to be minimal (*e.g.,* impact pile driving) to none (*e.g.,* HRG surveys). In addition, masking would likely only occur during the period of time that a North Atlantic right whale is in the relatively close vicinity of pile driving, which is expected to be intermittent within a day, and confined to the months in which North Atlantic right whales are at lower densities and primarily moving through the area, anticipated mitigation effectiveness, and likely avoidance behaviors. TTS is another potential form of Level B harassment that could result in brief periods of slightly reduced hearing sensitivity affecting behavioral patterns by making it more difficult to hear or interpret acoustic cues within the frequency range (and slightly above) of sound produced during impact pile driving; however, any TTS would likely be of low amount, limited duration, and limited to frequencies where most construction noise is centered (below 2 kHz). NMFS expects that right whale hearing sensitivity would return to pre-exposure levels shortly after migrating through the area or moving away from the sound source.

As described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, the distance of the receiver to the source influences the severity of response with greater distances typically eliciting less severe responses. NMFS recognizes North Atlantic right whales migrating could be pregnant females (in the fall) and cows with older calves (in spring) and that these animals may slightly alter their migration course in response to any foundation pile driving; however, as described in the Potential Effects of Specified Activities on Marine

Mammals and Their Habitat section, we anticipate that course diversion would be of small magnitude. Hence, while some avoidance of the pile driving activities may occur, we anticipate any avoidance behavior of migratory North Atlantic right whales would be similar to that of gray whales (Tyack *et al.,* 1983), on the order of hundreds of meters up to 1 to 2 km. This diversion from a migratory path otherwise uninterrupted by the proposed activities is not expected to result in meaningful energetic costs that would impact annual rates of recruitment of survival. NMFS expects that North Atlantic right whales would be able to avoid areas during periods of active noise production while not being forced out of this portion of their habitat.

North Atlantic right whale presence in the Project Area is year-round. However, abundance during summer months is lower compared to the winter months with spring and fall serving as ''shoulder seasons'' wherein abundance waxes (fall) or wanes (spring). Given this year-round habitat usage, in recognition that where and when whales may actually occur during project activities is unknown as it depends on the annual migratory behaviors, US Wind has proposed, and NMFS is proposing in this rule, to require a suite of mitigation measures designed to reduce impacts to North Atlantic right whales to the maximum extent practicable. These mitigation measures (*e.g.,* seasonal/daily work restrictions, vessel separation distances, reduced vessel speed) would not only avoid the likelihood of vessel strikes but also would minimize the severity of behavioral disruptions by minimizing impacts (*e.g.,* through sound reduction using attenuation systems and reduced temporal overlap of project activities and North Atlantic right whales). This would further ensure that the number of takes by Level B harassment that are estimated to occur are not expected to affect reproductive success or survivorship by detrimental impacts to energy intake or cow/calf interactions during migratory transit. However, even in consideration of recent habitat-use and distribution shifts, US Wind would still be installing foundations when the presence of North Atlantic right whales is expected to be lower.

As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, the Project would be constructed within the North Atlantic right whale migratory corridor BIA, which represent areas and months within which a substantial portion of a species or population is known to migrate. The area over which North Atlantic right whales may be harassed is relatively small compared to the width of the migratory corridor. The width of the migratory corridor in this area is approximately 163.8 km while the width of the Lease Area, at the longest point, is approximately 33.1 km. North Atlantic right whales may be displaced from their normal path and preferred habitat in the immediate activity area (primarily from pile driving activities), however, we do not anticipate displacement to be of high magnitude (*e.g.,* beyond a few kilometers); thereby, any associated bio-energetic expenditure is anticipated to be small. There are no known North Atlantic right whale feeding, breeding, or calving areas within the Project Area. Prey species are mobile (*e.g.,* calanoid copepods can initiate rapid and directed escape responses) and are broadly distributed throughout the Project Area (noting again that North Atlantic right whale prey is not particularly concentrated in the Project Area relative to nearby habitats). Therefore, any impacts to prey that may occur are also unlikely to impact marine mammals.

The most significant measure to minimize impacts to individual North Atlantic right whales is the seasonal moratorium on all foundation installation activities from December 1 through April 30, when North Atlantic right whale abundance in the Project Area is expected to be highest. NMFS also expects this measure to greatly reduce the potential for mother-calf pairs to be exposed to impact pile driving noise above the Level B harassment threshold during their annual spring migration through the Project Area from calving grounds to primary foraging grounds (*e.g.,* Cape Cod Bay). NMFS expects that exposures to North Atlantic right whales would be reduced due to the additional proposed mitigation measures that would ensure that any exposures above the Level B harassment threshold would result in only short-term effects to individuals exposed.

Pile driving may only begin in the absence of North Atlantic right whales (based on visual and passive acoustic monitoring). If pile driving has commenced, NMFS anticipates North Atlantic right whales would avoid the area, utilizing nearby waters to carry on pre-exposure behaviors. However, foundation installation activities must be shut down if a North Atlantic right whale is sighted at any distance unless a shutdown is not feasible due to risk of injury or loss of life. Shutdown may occur anywhere if North Atlantic right whales are seen within or beyond the Level B harassment zone, further minimizing the duration and intensity of exposure. NMFS anticipates that if North Atlantic right whales go undetected and they are exposed to foundation installation noise, it is unlikely a North Atlantic right whale would approach the sound source locations to the degree that they would expose themselves to very high noise levels. This is because typical observed whale behavior demonstrates likely avoidance of harassing levels of sound where possible (Richardson *et al.,* 1985). These measures are designed to avoid PTS and also reduce the severity of Level B harassment, including the potential for TTS. While some TTS could occur, given the proposed mitigation measures (*e.g.,* delay pile driving upon a sighting or acoustic detection and shutting down upon a sighting or acoustic detection), the potential for TTS to occur is low.

The proposed clearance and shutdown measures are most effective when detection efficiency is maximized, as the measures are triggered by a sighting or acoustic detection. To maximize detection efficiency, US Wind proposed, and NMFS is proposing to require, the combination of PAM and visual observers. NMFS is proposing to require communication protocols with other project vessels, and other heightened awareness efforts (*e.g.,* daily monitoring of North Atlantic right whale sighting databases) such that as a North Atlantic right whale approaches the source (and thereby could be exposed to higher noise energy levels), PSO detection efficacy would increase, the whale would be detected, and a delay to commencing foundation installation or shutdown (if feasible) would occur. In addition, the implementation of a soft-start for impact pile driving would provide an opportunity for whales to move away from the source if they are undetected, reducing received levels.

For HRG surveys, the maximum distance to the Level B harassment threshold is 200 m. The estimated take, by Level B harassment only, associated with HRG surveys is to account for any North Atlantic right whale sightings PSOs may miss when HRG acoustic sources are active. However, because of the short maximum distance to the Level B harassment threshold, the requirement that vessels maintain a distance of 500 m from any North Atlantic right whales, the fact that whales are unlikely to remain in close proximity to an HRG survey vessel for any length of time, and that the acoustic source would be shut down if a North Atlantic right whale is observed within 500 m of the source, any exposure to

noise levels above the harassment threshold (if any) would be very brief. To further minimize exposures, ramp-up of sub-bottom profilers must be delayed during the clearance period if PSOs detect a North Atlantic right whale (or any other ESA-listed species) within 500 m of the acoustic source. With implementation of the proposed mitigation requirements, take by Level A harassment is unlikely and, therefore, not proposed for authorization. Potential impacts associated with Level B harassment would include low-level, temporary behavioral modifications, most likely in the form of avoidance behavior. Given the high level of precautions taken to minimize both the amount and intensity of Level B harassment on North Atlantic right whales, it is unlikely that the anticipated low-level exposures would lead to reduced reproductive success or survival.

As described above, no serious injury or mortality, or Level A harassment, of North Atlantic right whale is anticipated or proposed for authorization. Extensive North Atlantic right whale-specific mitigation measures (beyond the robust suite required for all species) are expected to further minimize the amount and severity of Level B harassment. Given the documented habitat use within the area, the majority of the individuals predicted to be taken (including no more than ten instances of take, by Level B harassment only, over the course of the 5-year rule, with an annual maximum of no more than four) would be impacted on only 1, or maybe 2, days in a year as North Atlantic right whales utilize this area for migration and would be transiting rather than residing in the area for extended periods of time. Further, any impacts to North Atlantic right whales are expected to be in the form of lower-level behavioral disturbance.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by Level B harassment only) anticipated and proposed for authorization would have a negligible impact on the North Atlantic right whale.

Fin Whale

The fin whale is listed as Endangered under the ESA, and the western North Atlantic stock is considered both Depleted and Strategic under the MMPA. No UME has been designated for this species or stock. No serious injury or mortality is anticipated or proposed for authorization for this species.

The proposed rule would allow for the authorization of up to 41 takes, by Level A harassment and Level B harassment, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 2 and 18, respectively (combined, this annual take (n=20) equates to approximately 0.29 percent of the stock abundance if each take were considered to be of a different individual). The Project Area does not overlap with any known areas of specific biological importance to fin whales. It is possible that some subset of the individual whales exposed could be taken several times annually.

Level B harassment is expected to be in the form of behavioral disturbance, primarily resulting in avoidance of the Project Area where foundation installation is occurring, and some low-level TTS and masking that may limit the detection of acoustic cues for relatively brief periods of time. Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at one-half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of fin whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels relatively shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above. Level B harassment would be temporary, with primary impacts being temporary displacement of the Project Area but not abandonment of any migratory or foraging behavior. There is no known foraging habitat for fin whales within the Project Area. Any fin whales in the Project Area would be expected to be migrating through the area and would have sufficient space to move away from Project activities.

Fin whales are frequently observed in the waters off of Maryland and are one of the most commonly detected large baleen whales in continental shelf waters, principally from Cape Hatteras in the Mid-Atlantic northward to Nova Scotia, Canada (CETAP, 1982; Hain *et al.,* 1992; BOEM 2012; Barco *et al.,* 2015; Edwards *et al.,* 2015; Bailey *et al.,* 2018; Hayes *et al.,* 2023). Fin whales have high relative abundance in the Mid-Atlantic and Project Area, and most observations occur in the winter and early spring months (Williams *et al.,* 2015d; Barco *et al.,* 2015), with larger group sizes occurring during the winter months (Barco *et al.,* 2015). However, fin whales typically feed in waters off of New England and within the Gulf of Maine, areas north of the Project Area, as New England and Gulf of St. Lawrence waters represent major feeding ground for fin whales (Hayes *et al.,* 2023). Hain *et al.* (1992) based on an analysis of neonate stranding data, suggested that calving takes place during October to January in latitudes of the U.S. mid-Atlantic region; however, it is unknown where calving, mating, and wintering occur for most of the population (Hayes *et al.,* 2023).

Given the documented habitat use within the area, some of the individuals taken may be exposed on multiple days. However, as described, the project area does not include areas where fin whales are known to concentrate for feeding or reproductive behaviors and the predicted takes are expected to be in the form of lower-level impacts. Given the magnitude and severity of the impacts discussed above (including no more than 18 takes, by Level A harassment and Level B harassment, over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 2 and 18 respectively), and in consideration of the proposed mitigation and other information presented, US Wind's proposed activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take (by Level A harassment and Level B harassment) anticipated and proposed to be authorized would have a negligible impact on the western North Atlantic stock of fin whales.

Humpback Whale

The West Indies DPS of humpback whales is not listed as threatened or endangered under the ESA, but the Gulf of Maine stock, which includes individuals from the West Indies DPS, is considered Strategic under the MMPA. However, as described in the Description of Marine Mammals in the Geographic Area of Specified Activities, humpback whales along the Atlantic Coast have been experiencing an active UME as elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately 40 percent had evidence of human interaction (vessel strike or entanglement). The

UME does not yet provide cause for concern regarding population-level impacts and take from vessel strike and entanglement is not proposed to be authorized. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS, of which the Gulf of Maine stock is a part) remains stable at approximately 12,000 individuals.

The proposed rule would allow for the authorization of up to 36 takes, by Level A harassment and Level B harassment, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment would be 2 and 16, respectively (combined, this maximum annual take (n=18) equates to approximately 1.29 percent of the stock abundance if each take were considered to be of a different individual). Given that humpback whales are known to forage in areas just south of Maryland during the winter and could potentially be foraging off Maryland during this time as well, it is likely that some subset of the individual whales exposed could be taken several times annually.

Among the activities analyzed, impact pile driving is likely to result in the highest amount of Level A harassment annual take of (n=2) humpback whales. The maximum amount of annual take proposed to be authorized (n=14), by Level B harassment, is highest for impact pile driving.

As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, humpback whales are known to occur regularly throughout the Mid-Atlantic Bight, including Maryland waters, with strong seasonality of peak occurrences during winter and spring (Barco *et al.,* 2015; Bailey *et al.,* 2018; Hayes *et al.,* 2023).

In the western North Atlantic, humpback whales feed during spring, summer, and fall over a geographic range encompassing the eastern coast of the United States. Feeding is generally considered to be focused in areas north of the Project Area, including a feeding BIA in the Gulf of Maine/Stellwagen Bank/Great South Channel, but has been documented farther south and off the coast of Virginia. When foraging, humpback whales tend to remain in the area for extended durations to capitalize on the food sources.

Assuming humpback whales who are feeding in waters within or surrounding the Project Area behave similarly, we expect that the predicted instances of disturbance could be comprised of some individuals that may be exposed on multiple days if they are utilizing the area as foraging habitat. Also similar to other baleen whales, if migrating, individuals would likely be exposed to noise levels from the project above the harassment thresholds only once during migration through the Project Area.

For all the reasons described in the *Mysticetes* section above, we anticipate any potential PTS and TTS would be concentrated at one-half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which is lower than the full predicted hearing range of humpback whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels relatively shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above. Limited foraging habitat exists for humpback whales within the Project Area as their main foraging habitat is located further north. Any humpback whales in the Project Area would more likely be migrating through the area.

Given the magnitude and severity of the impacts discussed above (including no more than 36 humpback whale takes over the course of the 5-year rule, a maximum annual allowable take by Level A harassment and Level B harassment, of 2 and 16, respectively), and in consideration of the proposed mitigation measures and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed to be authorized would have a negligible impact on the Gulf of Maine stock of humpback whales.

Minke Whale

Minke whales are not listed under the ESA, and the Canadian east coast stock is neither considered Depleted nor Strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area. As described in the Description of Marine Mammals in the Geographic Area of Specified Activities, a UME has been designated for this species but is pending closure. No serious injury or mortality is anticipated or proposed for authorization for this species.

The proposed rule would allow for the authorization of up to 67 minke whale takes, by Level A harassment and Level B harassment, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 6 and 41, respectively (combined, this annual take (n=47) equates to approximately 0.21 percent of the stock abundance if each take were considered to be of a different individual). As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, minke whales are common offshore the U.S. eastern seaboard with a strong seasonal component in the continental shelf and in deeper, off-shelf waters (CETAP, 1982; Hayes *et al.,* 2023). In the Project Area, minke whales are predominantly migratory and their known feeding areas are north, including a feeding BIA in the southwestern Gulf of Maine and George's Bank. Therefore, they would be more likely to be moving through (with each take representing a separate individual), though it is possible that some subset of the individual whales exposed could be taken up to a few times annually.

As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, there is a UME for minke whales along the Atlantic Coast from Maine through South Carolina, with the highest number of deaths in Massachusetts, Maine, and New York, and preliminary findings in several of the whales have shown evidence of human interactions or infectious diseases. However, we note that the population abundance is greater than 21,000 and the take proposed for authorization through this action is not expected to exacerbate the UME in any way.

We anticipate the impacts of this harassment to follow those described in the general *Mysticetes* section above. Any potential PTS would be minor (limited to a few dB) and any TTS would be of short duration and concentrated at one-half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which does not include the full predicted hearing range of minke whales. If TTS is incurred, hearing sensitivity would likely return to pre-exposure levels relatively shortly after exposure ends. Any masking or physiological responses would also be of low magnitude and severity for reasons described above. Level B harassment would be temporary, with primary impacts being temporary displacement of the Project Area but not abandonment of any migratory or foraging behavior. Limited foraging habitat for minke whales exists in the Project Area as major foraging habitats are located further north near New England. Any minke whales in the Project Area would be expected to migrate through the area and would

have sufficient space to move away from Project activities.

Given the magnitude and severity of the impacts discussed above (including no more than 67 takes over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of 6 and 41, respectively), and in consideration of the proposed mitigation measures and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed to be authorized would have a negligible impact on the Canadian eastern coastal stock of minke whales.

Sei Whale

Sei whales are listed as Endangered under the ESA, and the Nova Scotia stock is considered both Depleted and Strategic under the MMPA. There are no known areas of specific biological importance in or adjacent to the Project Area and no UME has been designated for this species or stock. No serious injury or mortality is anticipated or proposed for authorization for this species.

The proposed rule would allow for the authorization of up to six takes, by Level A harassment and Level B harassment, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be one and one, respectively (combined, this annual take (n=2) equates to approximately 0.03 percent of the stock abundance, if each take were considered to be of a different individual). As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, most of the sei whale distribution is concentrated in Canadian waters and seasonally in northerly United States waters, though they are uncommonly observed in the waters off of Maryland. Because sei whales are migratory and their known feeding areas are east and north of the Project Area (*e.g.,* there is a feeding BIA in the Gulf of Maine), they would be more likely to be moving through and, considering this and the very low number of total takes, it is unlikely that any individual would be exposed more than once within a given year.

With respect to the severity of those individual takes by behavioral Level B harassment, we would anticipate impacts to be limited to low-level, temporary behavioral responses with avoidance and potential masking impacts in the vicinity of the turbine installation to be the most likely type of response. Any potential PTS and TTS would likely be concentrated at one-half or one octave above the frequency band of pile driving noise (most sound is below 2 kHz) which is below the full predicted hearing range of sei whales. Moreover, any TTS would be of a small degree. Any avoidance of the Project Area due to the Project's activities would be expected to be temporary. There is no known foraging habitat that exists in the Project Area for sei whales. Any sei whales in the Project Area would be expected to be migrating through the area.

Given the magnitude and severity of the impacts discussed above (including no more than six takes over the course of the 5-year rule, and a maximum annual allowable take by Level A harassment and Level B harassment, of one and one, respectively), and in consideration of the proposed mitigation measures and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed to be authorized would have a negligible impact on the Nova Scotia stock of sei whales.

Odontocetes

In this section, we include information here that applies to all of the odontocete species and stocks addressed below. Odontocetes include dolphins, porpoises, and all other whales possessing teeth, and we further divide them into the following subsections: sperm whales, small whales and dolphins, and harbor porpoise. These sub-sections include more specific information, as well as conclusions for each stock represented.

All of the takes of odontocetes proposed for authorization incidental to US Wind's specified activities are by pile driving and HRG surveys. No serious injury or mortality is anticipated or proposed. We anticipate that, given ranges of individuals (*i.e.,* that some individuals remain within a small area for some period of time), and non-migratory nature of some odontocetes in general (especially as compared to mysticetes), these takes are more likely to represent multiple exposures of a smaller number of individuals than is the case for mysticetes, though some takes may also represent one-time exposures to an individual. Foundation installation is likely to disturb odontocetes to the greatest extent, compared to HRG surveys. While we expect animals to avoid the area during foundation installation, their habitat range is extensive compared to the area ensonified during these activities.

As described earlier, Level B harassment may include direct disruptions in behavioral patterns (*e.g.,* avoidance, changes in vocalizations (from masking) or foraging), as well as those associated with stress responses or TTS. Odontocetes are highly mobile species and, similar to mysticetes, NMFS expects any avoidance behavior to be limited to the area near the sound source. While masking could occur during foundation installation, it would only occur in the vicinity of and during the duration of the activity and would not generally occur in a frequency range that overlaps most odontocete communication or any echolocation signals. The mitigation measures (*e.g.,* use of sound attenuation systems, implementation of clearance and shutdown zones) would also minimize received levels such that the severity of any behavioral response would be expected to be less than exposure to unmitigated noise exposure.

Any masking or TTS effects are anticipated to be of low severity. First, the frequency range of pile driving, the most impactful activity proposed to be conducted in terms of response severity, falls within a portion of the frequency range of most odontocete vocalizations. However, odontocete vocalizations span a much wider range than the low-frequency construction activities proposed for the project. As described above, recent studies suggest odontocetes have a mechanism to self-mitigate (*i.e.,* reduce hearing sensitivity) the impacts of noise exposure, which could potentially reduce TTS impacts. Any masking or TTS is anticipated to be limited and would typically only interfere with communication within a portion of an odontocete's range and as discussed earlier, the effects would only be expected to be of a short duration and, for TTS, a relatively small degree.

Furthermore, odontocete echolocation occurs predominantly at frequencies significantly higher than low-frequency construction activities. Therefore, there is little likelihood that threshold shift would interfere with feeding behaviors. For HRG surveys, the sources operate at higher frequencies than foundation installation activities. However, sounds from these sources attenuate very quickly in the water column, as described above. Therefore, any potential for PTS and TTS and masking is very limited. Further, odontocetes

(*e.g.,* common dolphins, spotted dolphins, bottlenose dolphins) have demonstrated an affinity to bow-ride actively surveying HRG surveys. Therefore, the severity of any harassment during HRG surveys, if it does occur, is anticipated to be very low in severity based on the lack of avoidance previously demonstrated by these species.

The waters off the coast of Maryland are used by several odontocete species. None of these species are listed under the ESA, and there are no known habitats of particular importance. In general, odontocete habitat ranges are far-reaching along the Atlantic coast of the United States, and the waters off of Maryland, including the Project Area, do not contain any unique odontocete habitat features.

Dolphins and Small Whales (Including Delphinids)

The 10 species and 11 stocks included in this group for which NMFS is proposing to authorize take are not listed under the ESA; however, short-finned pilot whales are listed as Strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area for any of these species and no UMEs have been designated for any of these species. No serious injury, mortality, or take by Level A harassment is anticipated or proposed for authorization for these species.

The 10 delphinid species for which NMFS proposes to authorize take are: Atlantic spotted dolphin, Pantropical spotted dolphin, common bottlenose dolphin (coastal and northern migratory stocks), common dolphin, long-finned pilot whale, short-finned pilot whale, killer whale, rough-toothed dolphin, striped dolphin, and Risso's dolphin. The proposed rule would allow for the authorization of up to between 3 and 3,013 takes (depending on species), by Level B harassment only, over the 5-year period. The maximum annual allowable take for these species by Level B harassment, would range from 3 to 1,762, respectively (this annual take equates to approximately 0.07 to 24.0 percent of the stock abundance, depending on each species, if each take were considered to be of a different individual).

For both stocks of bottlenose dolphins, given the comparatively higher number of total annual takes (1,591 for coastal and 1,768 for offshore) and the relative number of takes as compared to the stock abundance (24.0 and 2.81, respectively), primarily due to the progression of the location of impact pile driving each year, while some of the takes likely represent exposures of different individuals on 1 day a year, it is likely that some subset of the individuals exposed could be taken several times annually. For Atlantic spotted dolphins, Pantropical spotted dolphins, common dolphins, long- and short-finned pilot whales, killer whales, rough-toothed dolphins, striped dolphins, and Risso's dolphins, given the number of takes, while many of the takes likely represent exposures of different individuals on 1 day a year, some subset of the individuals exposed could be taken up to a few times annually.

Dolphins and small delphinids engage in social, reproductive, and foraging behavior in the waters offshore of Maryland. However, the number of takes, likely movement patterns of the affected species, and the intensity of any Level B harassment, combined with the availability of alternate nearby habitat that supports the aforementioned behaviors suggests that the likely impacts would not impact the reproduction or survival of any individuals. While delphinids may be taken on several occasions, none of these species are known to have small home ranges within the Project Area or known to be particularly sensitive to anthropogenic noise. No Level A harassment (PTS) is anticipated or proposed to be authorized. Some TTS could occur, but it would be limited to the frequency ranges of the activity and any loss of hearing sensitivity is anticipated to return to pre-exposure conditions shortly after the animals move away from the source or the source ceases.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed for authorization would have a negligible impact on all of the species and stocks addressed in this section.

Harbor Porpoise

Harbor porpoises are not listed as Threatened or Endangered under the ESA, and the Gulf of Maine/Bay of Fundy stock is neither considered Depleted or Strategic under the MMPA. The stock is found predominantly in northern U.S. coastal waters (less than 150 m depth) and up into Canada's Bay of Fundy (between New Brunswick and Nova Scotia). Although the population trend is not known, there are no UMEs or other factors that cause particular concern for this stock. No mortality or non-auditory injury are anticipated or proposed for authorization for this stock.

The proposed rule would allow for the authorization of up to 74 takes, by Level A harassment and Level B harassment, over the 5-year period. The maximum annual allowable take by Level A harassment and Level B harassment, would be 3 and 39, respectively (combined, this annual take (n=42) equates to approximately 0.04 percent of the stock abundance if each take were considered to be of a different individual). Given the number of takes, many of the takes likely represent exposures of different individuals on 1 day a year.

Regarding the severity of takes by Level B harassment, because harbor porpoises are particularly sensitive to noise, it is likely that a fair number of the responses could be of a moderate nature, particularly to pile driving. In response to pile driving, harbor porpoises are likely to avoid the area during construction, as previously demonstrated in Tougaard *et al.* (2009) in Denmark, in Dahne *et al.* (2013) in Germany, and in Vallejo *et al.* (2017) in the United Kingdom, although a study by Graham *et al.* (2019) may indicate that the avoidance distance could decrease over time. Given that foundation installation is scheduled to occur off the coast of Maryland and, given alternative foraging areas nearby, any avoidance of the area by individuals is not likely to impact the reproduction or survival of any individuals.

With respect to PTS and TTS, the effects on an individual are likely relatively low given the frequency bands of pile driving (most energy below 2 kHz) compared to harbor porpoise hearing (150 Hz to 160 kHz peaking around 40 kHz). Specifically, TTS is unlikely to impact hearing ability in their more sensitive hearing ranges, or the frequencies in which they communicate and echolocate. We expect any PTS that may occur to be within the very low end of their hearing range where harbor porpoises are not particularly sensitive, and any PTS would affect a relatively small portion of the individual's hearing range. As such, any PTS would not interfere with key foraging or reproductive strategies necessary for reproduction or survival.

Harbor porpoises are seasonally distributed (Hayes *et al.,* 2023). During fall (October through December) and spring (April through June), harbor porpoises are widely dispersed from

New Jersey to Maine, with lower densities farther north and south. During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada. In non-summer months they have been seen from the coastline to deep waters (>1,800 m; Westgate *et al.,* 1998), although the majority are found over the continental shelf. While harbor porpoises are likely to avoid the area during any of the project's construction activities, as demonstrated during European wind farm construction, the time of year in which work would occur is when harbor porpoises are not in highest abundance, and any work that does occur would not result in the species' abandonment of the waters off of Maryland.

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed for authorization would have a negligible impact on the Gulf of Maine/Bay of Fundy stock of harbor porpoises.

Phocids (Harbor Seals, Gray Seals, and Harp Seals)

The harbor seal, gray seal, and harp seal are not listed under the ESA, and these stocks are not considered Depleted or Strategic under the MMPA. There are no known areas of specific biological importance in or around the Project Area. As described in the Description of Marine Mammals in the Geographic Area of Specified Activities section, a UME has been designated for harbor seals and gray seals and is described further below. No serious injury or mortality is anticipated or proposed for authorization for any seal species.

As limited occurrence data for seals are available for the Project Area, take estimates for harbor seals, gray seals, and harp seals are presented as one estimate. For the three seal species, the proposed rule would allow for the total authorization of up to 496 seals by Level B harassment, over the 5-year period. The maximum annual allowable take for these species, by Level B harassment, would be 341 seals. If all of the allocated take was attributed to gray seals, this take would equate to 1.25 percent of the gray seal stock abundance, if each take were considered to be of a different individual. If all of the allocated take was attributed to harbor seals, this take would equate to 0.56 percent of the harbor seal stock abundance, if each take were considered to be of a different individual. If all of the allocated take was attributed to harp seals, this take would equate to 0.004 percent of the harp seal stock abundance. Gray seals, harbor seals, and harp seals are considered migratory and none of these species have specific feeding areas that have been designated in the area, therefore, it is likely that takes of seals would represent exposures of different individuals throughout the project duration.

Harp seals are considered extralimital in the Project Area, however, harp seal strandings have been documented in Maryland during the winter and spring (Hayes *et al.,* 2023; NAB, 2023a; NAB, 2023b). Harbor and gray seals occur in Maryland waters most often from late winter to early spring, with harbor seal occurrences being more common than gray seals (Hayes *et al.,* 2023). Seals are more likely to be close to shore (*e.g.,* closer to the edge of the area ensonified above NMFS' harassment threshold), such that exposure to foundation installation and HRG surveys would be expected to be at comparatively lower levels. Although a gray seal rookery may occur off the coast of Cape Henlopen, north of the Project Area, based on the distance of this area from the Project Area it is not expected that in-air sounds produced would cause the take of hauled out pinnipeds. As this is the closest documented pinniped haul-out to the Project Area, NMFS does not expect any harassment to occur, nor have we proposed to authorize any take from in-air impacts on hauled out seals.

As described in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, construction of wind farms in Europe resulted in pinnipeds temporarily avoiding construction areas but returning within short time frames after construction was complete (Carroll *et al.,* 2010; Hamre *et al.,* 2011; Hastie *et al.,* 2015; Russell *et al.,* 2016; Brasseur *et al.,* 2010). Effects on pinnipeds that are taken by Level B harassment in the Project Area would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring). Most likely, individuals would simply move away from the sound source and be temporarily displaced from those areas (Lucke *et al.,* 2006; Edren *et al.,* 2010; Skeate *et al.,* 2012; Russell *et al.,* 2016). Given the low anticipated magnitude of impacts from any given exposure (*e.g.,* temporary avoidance), even potential repeated Level B harassment across a few days of some small subset of individuals, which could occur, is unlikely to result in impacts on the reproduction or survival of any individuals. Moreover, pinnipeds would benefit from the mitigation measures described in 50 CFR part 217—Regulations Governing the Taking and Importing of Marine Mammals Incidental to Specified Activities.

As described above, noise from pile driving is mainly low-frequency and, while any TTS that does occur would fall within the lower end of pinniped hearing ranges (50 Hz to 86 kHz), TTS would not occur at frequencies around 5 kHz, where pinniped hearing is most susceptible to noise-induced hearing loss (Kastelein *et al.,* 2018). No Level A harassment (PTS) is anticipated or proposed to be authorized. In summary, any TTS would be of small degree and not occur across the entire, or even most sensitive, hearing range. Hence, any impacts from TTS are likely to be of low severity and not interfere with behaviors critical to reproduction or survival.

Elevated numbers of harbor seal and gray seal mortalities were first observed in July 2018 and occurred across Maine, New Hampshire, and Massachusetts until 2020. Based on tests conducted so far, the main pathogen found in the seals belonging to that UME was phocine distemper virus, although additional testing to identify other factors that may be involved in this UME are underway. Currently, the only active UME is occurring in Maine with some harbor and gray seals testing positive for highly pathogenic avian influenza (HPAI) H5N1. Although elevated strandings continue, neither UME (alone or in combination) provides cause for concern regarding population-level impacts to any of these stocks. For harbor seals, the population abundance is over 61,000 and annual mortality/serious injury (M/SI) (n=339) is well below PBR (1,729) (Hayes *et al.,* 2023). The population abundance for gray seals in the United States is over 27,000, with an estimated overall abundance, including seals in Canada, of approximately 450,000. In addition, the abundance of gray seals is likely increasing in the U.S. Atlantic, as well as in Canada (Hayes *et al.,* 2023).

Given the magnitude and severity of the impacts discussed above, and in consideration of the proposed mitigation and other information presented, US Wind's activities are not expected to result in impacts on the reproduction or survival of any individuals, much less affect annual

rates of recruitment or survival. For these reasons, we have preliminarily determined that the take by harassment anticipated and proposed for authorization would have a negligible impact on harbor, gray, and harp seals.

Preliminary Negligible Impact Determination

No mortality or serious injury is anticipated to occur or proposed to be authorized. As described in the preliminary analysis above, the impacts resulting from the project's activities cannot be reasonably expected to, and are not reasonably likely to, adversely affect any of the species or stocks for which take is proposed for authorization through effects on annual rates of recruitment or survival. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and taking into consideration the implementation of the proposed mitigation and monitoring measures, NMFS preliminarily finds that the marine mammal take from all of US Wind's specified activities combined will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals estimated to be taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is less than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS proposes to authorize incidental take (by Level A harassment and/or Level B harassment) of 19 species of marine mammal (with 20 managed stocks). The maximum number of instances of takes by combined Level A harassment and Level B harassment possible within any one year and proposed for authorization relative to the best available population abundance is less than one-third for all species and stocks potentially impacted.

For 13 of these species (13 stocks), less than 1 percent of the stock abundance is proposed to be authorized for take by Level A and/or Level B harassment. For five stocks, less than 5 percent is proposed, and for one stock less than 25 percent is proposed (coastal stock of bottlenose dolphins), assuming that each instance of take represents a different individual. Specific to the North Atlantic right whale, the maximum amount of take in any given year, which is by Level B harassment only, is four, or 1.18 percent of the stock abundance, assuming that each instance of take represents a different individual. Please see table 25 for information relating to this small numbers analysis.

Based on the analysis contained herein of the proposed activities (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Classification

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure 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 promulgation of rulemakings, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the NOAA GARFO.

The NMFS Office of Protected Resources is proposing to authorize the take of three marine mammal species which are listed under the ESA: North Atlantic right, fin, and sei whales. The Permit and Conservation Division requested initiation of section 7 consultation on December 5, 2023, with GARFO for the promulgation of the rulemaking. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization. The proposed regulations and any subsequent LOA(s) would be conditioned such that, in addition to measures included in those documents, US Wind would also be required to abide by the reasonable and prudent measures and terms and conditions of the Biological Opinion and Incidental Take Statement, as issued by NMFS, pursuant to section 7 of the ESA.

Executive Order 12866

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act (RFA)

Pursuant to the RFA (5 U.S.C. 601 *et seq.*), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. US Wind is the sole entity that would be subject to the requirements in these proposed regulations, and US Wind is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Paperwork Reduction Act (PRA)

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOA, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS.

Coastal Zone Management Act (CZMA)

The CZMA requires Federal actions within and outside the coastal zone that have reasonably foreseeable effects on any coastal use or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program (16 U.S.C. 1456(c)). NMFS has determined that US Wind's application for incidental take regulations is not an

activity listed by the MD DNR pursuant to 15 CFR 930.53 and, thus, is not subject to Federal consistency requirements in the absence of the receipt and prior approval of an unlisted activity review request from the State by the Director of NOAA's Office for Coastal Management. Consistent with 15 CFR 930.54, NMFS published Notice of Receipt of US Wind's application for this incidental take regulation in the **Federal Register** on May 2, 2023 (88 FR 27453) and is now publishing the proposed rule. The State of Maryland did not request approval from the Director of NOAA's Office for Coastal Management to review US Wind's application as an unlisted activity, and the time period for making such request has expired. Therefore, NMFS has determined the incidental take authorization is not subject to Federal consistency review.

Proposed Promulgation

As a result of these preliminary determinations, NMFS proposes to promulgate an LOA to US Wind authorizing take, by Level A harassment and Level B harassment, incidental to construction activities associated with the Maryland Offshore Wind Project offshore of Maryland for a 5-year period from January 1, 2025, through December 31, 2029, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Request for Additional Information and Public Comments

NMFS requests interested persons to submit comments, information, and suggestions concerning US Wind's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare the final rule and make final determinations on whether to issue the requested authorization. This proposed rule and referenced documents provide all environmental information relating to our proposed action for public review.

Recognizing, as a general matter, that this action is one of many current and future wind energy actions, we invite comment on the relative merits of the IHA, single-action rule/LOA, and programmatic multi-action rule/LOA approaches, including potential marine mammal take impacts resulting from this and other related wind energy actions and possible benefits resulting from regulatory certainty and efficiency.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened species, Fish, Fisheries, Marine mammals, Penalties, Reporting and recordkeeping requirements, Wildlife.

Dated: December 6, 2023.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, NMFS proposes to amend 50 CFR part 217 to read as follows:

PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart II, consisting of §§ 217.340 through 217.349, to read as follows:

Subpart II—Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland

Sec.

Subpart II—Taking Marine Mammals Incidental to the Maryland Offshore Wind Project Offshore of Maryland

§ 217.340 Specified activity and specified geographical region.

(a) Regulations in this subpart apply to activities associated with the Maryland Offshore Wind Project (hereafter referred to as the ''Project'') by US Wind, Inc. (hereafter referred to as ''LOA Holder''), and those persons it authorizes or funds to conduct activities on its behalf in the area outlined in paragraph (b) of this section. Requirements imposed on LOA Holder must be implemented by those persons it authorizes or funds to conduct activities on its behalf.

(b) The specified geographical region is the Mid-Atlantic Bight, which includes, but is not limited to, the Bureau of Ocean Energy Management (BOEM) Lease Area Outer Continental Shelf (OCS)-A 0490 Commercial Lease of Submerged Lands for Renewable Energy Development, along the relevant Export Cable Corridors (ECCs), and at the sea-to-shore transition points located within Delaware Seashore State Park.

(c) The specified activities are impact pile driving of wind turbine generator (WTG), offshore substation (OSS), and a meteorological tower (Met tower) foundations; high-resolution geophysical (HRG) site characterization surveys; vessel transit within the specified geographical region to transport crew, supplies, and materials; WTG and OSS operation; fishery and ecological monitoring surveys; placement of scour protection; and trenching, laying, and cable burial activities.

§ 217.341 Effective dates.

The regulations in this subpart are effective from January 1, 2025, through December 31, 2029.

§ 217.342 Permissible methods of taking.

Under the LOA, issued pursuant to §§ 216.106 of this chapter and 217.346, the LOA Holder, and those persons it authorizes or funds to conduct activities on its behalf, may incidentally, but not intentionally, take marine mammals within the vicinity of BOEM Lease Area OCS–A 0490 Commercial Lease of Submerged Lands for Renewable Energy Development, provided the LOA Holder is in complete compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA:

(a) By Level B harassment associated with the acoustic disturbance of marine mammals by impact pile driving (WTG, OSS, and Met tower foundation installation) and HRG site characterization surveys;

(b) By Level A harassment associated with the acoustic disturbance of marine mammals by impact pile driving of WTG foundations;

(c) Take by mortality or serious injury of any marine mammal species is not authorized; and

(d) The incidental take of marine mammals by the activities listed in paragraphs (a) and (b) of this section is limited to the following species:

TABLE 1 TO PARAGRAPH (d)

Marine mammal species	Scientific name	Stock
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic.
Fin whale	*Balaenoptera physalus*	Western North Atlantic.
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine.
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal.
Sei whale	*Balaenoptera borealis*	Nova Scotia.
Killer whale	*Orcinus orca*	Western North Atlantic.
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic.
Pantropical spotted dolphin	*Stenella attenuata*	Western North Atlantic.
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic—Offshore. Northern Migratory Coastal.
Common dolphin	*Delphinus delphis*	Western North Atlantic.
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic.
Short-finned pilot whale	*Globicephala macrorhynchus*	Western North Atlantic.
Risso's dolphin	*Grampus griseus*	Western North Atlantic.
Rough-toothed dolphin	*Steno bredanensis*	Western North Atlantic.
Striped dolphin	*Stenella coeruleoalba*	Western North Atlantic.
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy.
Gray seal	*Halichoerus grypus*	Western North Atlantic.
Harbor seal	*Phoca vitulina*	Western North Atlantic.
Harp seal	*Pagophilus groenlandicus*	Western North Atlantic.

§ 217.343 Prohibitions.

Except for the takings described in § 217.342 and authorized by the LOA issued under this subpart, it is unlawful for any person to do any of the following in connection with the activities described in this subpart:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or the LOA issued under this subpart;

(b) Take any marine mammal not specified in § 217.342(d);

(c) Take any marine mammal specified in the LOA in any manner other than as specified in the LOA; or

(d) Take any marine mammal specified in § 217.342(d), after NMFS Office of Protected Resources determines such taking results in more than a negligible impact on the species or stocks of such marine mammals.

§ 217.344 Mitigation requirements.

When conducting the activities identified in § 217.340(c) within the area described in § 217.340(b), LOA Holder must implement the mitigation measures contained in this section and any LOA issued under §§ 217.346 and 217.347. These mitigation measures include, but are not limited to:

(a) *General conditions.* LOA Holder must comply with the following general measures:

(1) A copy of any issued LOA must be in the possession of LOA Holder and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM) operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) LOA Holder must conduct training for construction, survey, and vessel personnel and the marine mammal monitoring team (PSO and PAM operators) prior to the start of all in-water construction activities in order to explain responsibilities, communication procedures, marine mammal detection and identification, mitigation, monitoring, and reporting requirements, safety and operational procedures, and authorities of the marine mammal monitoring team(s). This training must be repeated for new personnel who join the work during the project. A description of the training program must be provided to NMFS at least 60 days prior to the initial training before in-water activities begin. Confirmation of all required training must be documented on a training course log sheet and reported to NMFS Office of Protected Resources prior to initiating project activities;

(3) Prior to and when conducting any in-water activities and vessel operations, LOA Holder personnel and contractors (*e.g.,* vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the Project Area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of U.S. Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings and/or information associated with any Slow Zones (*i.e.,* Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators, PSO(s), and PAM operator(s); The marine mammal monitoring team must monitor these systems no less than every 4 hours;

(4) Any marine mammal observed by project personnel must be immediately communicated to any on-duty PSOs, PAM operator(s), and all vessel captains. Any large whale observation or acoustic detection by PSOs or PAM operators must be conveyed to all vessel captains;

(5) For North Atlantic right whales, any visual detection or acoustic detection within the PAM monitoring zone must trigger a delay to the commencement of pile driving. Any visual detection within 500 m must trigger a delay to the commencement of HRG surveys;

(6) In the event that a large whale is sighted or acoustically detected that cannot be confirmed as a non-North Atlantic right whale, it must be treated as if it were a North Atlantic right whale for purposes of mitigation;

(7) If a delay to commencing an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action. If a delay or shutdown of an activity is called for by the Lead PSO or PAM operator, LOA Holder must take the required mitigative action unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. Any disagreements between the Lead PSO, PAM operator, and the activity operator regarding delays or shutdowns would only be discussed after the mitigative action has occurred;

(8) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone prior to

beginning a specified activity, the activity must be delayed. If the activity is ongoing, it must be shut down immediately, unless shutdown would result in imminent risk of injury or loss of life to an individual, pile refusal, or pile instability. The activity must not commence or resume until the animal(s) has been confirmed to have left and is on a path away from the Level B harassment zone or after 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species with no further sightings;

(9) For in-water construction heavy machinery activities listed in § 217.340(c), if a marine mammal is on a path towards or comes within 10 meters (m) (32.8 feet (ft)) of equipment, LOA Holder must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment;

(10) All vessels must be equipped with a properly installed, operational Automatic Identification System (AIS) device and LOA Holder must report all Maritime Mobile Service Identity (MMSI) numbers to NMFS Office of Protected Resources;

(11) By accepting the issued LOA, LOA Holder consents to on-site observation and inspections by Federal agency personnel (including NOAA personnel) during activities described in this subpart, for the purposes of evaluating the implementation and effectiveness of measures contained within the LOA and this subpart;

(12) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with a PSO, PAM Operator, or vessel crew member acting as an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment. Personnel may report any violations to the NMFS Office of Law Enforcement; and

(13) The LOA Holder must also abide by the reasonable and prudent measures and terms and conditions of the Biological Opinion and Incidental Take Statement, as issued by NMFS, pursuant to section 7 of the Endangered Species Act.

(b) *Vessel strike avoidance measures.* LOA Holder must comply with the following vessel strike avoidance measures, unless a situation presents a threat to the health, safety, or life of a person or when a vessel, actively engaged in emergency rescue or response duties, including vessel-in-distress or environmental crisis response, requires speeds in excess of 10 kn to fulfill those responsibilities, while in the specified geographical region:

(1) Prior to the start of the Project's activities involving vessels, all vessel personnel must receive a protected species training that covers, at a minimum, identification of marine mammals that have the potential to occur where vessels would be operating; detection observation methods in both good weather conditions (*i.e.,* clear visibility, low winds, low sea states) and bad weather conditions (*i.e.,* fog, high winds, high sea states, with glare); sighting communication protocols; all vessel speed and approach limit mitigation requirements (*e.g.,* vessel strike avoidance measures); and information and resources available to the project personnel regarding the applicability of Federal laws and regulations for protected species. This training must be repeated for any new vessel personnel who join the Project. Confirmation of the observers' training and understanding of the Incidental Take Authorization (ITA) requirements must be documented on a training course log sheet and reported to NMFS;

(2) LOA Holder, regardless of their vessel's size, must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course to avoid striking any marine mammal;

(3) LOA Holder's underway vessels (*e.g.,* transiting, surveying) operating at any speed must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard) located at an appropriate vantage point for ensuring vessels are maintaining appropriate separation distances. Visual observers must be equipped with alternative monitoring technology (*e.g.,* night vision devices, infrared cameras) for periods of low visibility (*e.g.,* darkness, rain, fog, *etc.*). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements in this subpart. Visual observers may be third-party observers (*i.e.,* NMFS-approved PSOs) or trained crew members, as defined in paragraph (b)(1) of this section;

(4) LOA Holder must continuously monitor the U.S. Coast Guard VHF Channel 16 at the onset of transiting through the duration of transiting, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting and at least once every 4 hours, vessel operators and/or trained crew member(s) must also monitor the project's Situational Awareness System, WhaleAlert, and relevant NOAA information systems such as the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales;

(5) All LOA Holder's vessels must transit at 10 kn or less within any active North Atlantic right whale Slow Zone (*i.e.,* Dynamic Management Areas (DMAs) or acoustically-triggered slow zone);

(6) LOA Holder's vessels, regardless of size, must immediately reduce speed to 10 kn or less for at least 24 hours when a North Atlantic right whale is sighted at any distance by any project-related personnel or acoustically detected by any project-related PAM system. Each subsequent observation or acoustic detection in the Project area shall trigger an additional 24-hour period. If a North Atlantic right whale is reported via any of the monitoring systems (refer back to (b)(4) of this section) within 10 kilometers (km; 6.2 miles (mi)) of a transiting vessel(s), that vessel must operate at 10 knots (kn; 11.5 miles per hour (mph)) or less for 24 hours following the reported detection;

(7) LOA Holder's vessels, regardless of size, must immediately reduce speed to 10 kn or less when any large whale (other than a North Atlantic right whale) is observed within 500 m (1,640 ft) of an underway vessel;

(8) If LOA Holder's vessel(s) are traveling at speeds greater than 10 kn (*i.e.,* no speed restrictions are enacted) in a transit corridor from a port to the Lease Area, in addition to the required dedicated visual observer, LOA Holder must monitor the transit corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 kn or less for 24 hours following the detection. Each subsequent detection shall trigger a 24-hour reset. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection in the transit corridor in the past 24 hours;

(9) LOA Holder's vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 kn or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must reduce speed

and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale and take the vessel strike avoidance measures described in this paragraph (b)(9);

(10) LOA Holder's vessels must maintain a minimum separation distance of 100 m (328 ft) from sperm whales and non-North Atlantic right whale baleen whales. If one of these species is sighted within 100 m of a transiting vessel, LOA Holder's vessel must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(11) LOA Holder's vessels must maintain a minimum separation distance of 50 m (164 ft) from all delphinoid cetaceans and pinnipeds with an exception made for those that approach the vessel (*i.e.,* bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of a transiting vessel, LOA Holder's vessel must shift the engine to neutral, with an exception made for those that approach the vessel (*e.g.,* bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(12) When a marine mammal(s) is sighted while LOA Holder's vessel(s) is transiting, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.,* attempt to remain parallel to the animal's course, slow down, and avoid abrupt changes in direction until the animal has left the area). This measure does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (*i.e.,* any situation where the vessel is navigationally constrained);

(13) LOA Holder's vessels underway must not divert or alter course to approach any marine mammal;

(14) LOA Holder is required to abide by other speed and approach regulations. Nothing in this subpart exempts vessels from any other applicable marine mammal speed and approach regulations;

(15) LOA Holder must check, daily, for information regarding the establishment of mandatory or voluntary vessel strike avoidance areas (*i.e.,* DMAs, SMAs, Slow Zones) and any information regarding North Atlantic right whale sighting locations;

(16) LOA Holder must submit a North Atlantic Right Whale Vessel Strike Avoidance Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of vessel activity. The plan must provide details on the vessel-based observer and PAM protocols for transiting vessels. If a plan is not submitted or approved by NMFS prior to vessel operations, all project vessels transiting, year-round, must travel at speeds of 10 kn or less. LOA Holder must comply with any approved North Atlantic Right Whale Vessel Strike Avoidance Plan; and

(17) Speed over ground will be used to measure all vessel speed restrictions.

(c) *WTG, OSS, Met tower foundation installation.* The following requirements apply to impact pile driving activities associated with the installation of WTG, OSS, and Met tower foundations:

(1) Impact pile driving must not occur December 1 through April 30.

(2) Monopiles must be no larger than 11 m in diameter. Hammer energies must not exceed 4,400 kilojoules (kJ) for monopile installation. No more than one monopile may be installed per day, unless otherwise approved by NMFS. Pin piles for the OSSs must be no larger than 3 m in diameter. Hammer energies must not exceed 1,500 kJ for 3-m pin pile installation. No more than four 3-m pin piles may be installed per day. Met tower pin piles must be no larger than 1.8 m in diameter, and hammer energies must not exceed 500 kJ for Met tower pin pile installation. No more than two 1.8-m pin piles may be installed per day.

(3) LOA Holder must not initiate pile driving earlier than 1 hour prior to civil sunrise or later than 1.5 hours prior to civil sunset, unless the LOA Holder submits, and NMFS approves, an Alternative Monitoring Plan as part of the Pile Driving and Marine Mammal Monitoring Plan that reliably demonstrates the efficacy of their night vision devices.

(4) Soft-start must occur at the beginning of impact driving and at any time following a cessation of impact pile driving of 30 minutes or longer. Soft-start would involve initiating hammer operation at a reduced energy level (relative to full operating capacity) followed by a waiting period. For impact pile driving of monopiles and pin piles, the LOA Holder must utilize a soft-start protocol by performing four to six strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes.

(5) LOA Holder must establish clearance and shutdown zones, which must be measured using the radial distance around the pile being driven. If a marine mammal is detected within or about to enter the applicable clearance zones, prior to the beginning of soft-start procedures, impact pile driving must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species.

(6) For North Atlantic right whales, any visual observation or acoustic detection within the PAM monitoring zone must trigger a delay to the commencement of pile driving. The clearance zone may only be declared clear if no North Atlantic right whale acoustic or visual detections have occurred within the clearance zone during the 60-minute monitoring period.

(7) LOA Holder must deploy at least two functional noise abatement systems that reduce noise levels to the modeled harassment isopleths, assuming 10-dB attenuation, during all impact pile driving and comply with the following measures:

(i) A single bubble curtain must not be used;

(ii) Any bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 m^3/(minute*m). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must adjust the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iii) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(iv) No parts of the ring or other objects may prevent full seafloor contact with a bubble curtain ring;

(v) Construction contractors must train personnel in the proper balancing of airflow to the bubble curtain ring. LOA Holder must provide NMFS Office of Protected Resources with a bubble curtain performance test and maintenance report to review within 72 hours after each pile using a bubble curtain is installed. Additionally, a full maintenance check (*e.g.,* manually clearing holes) must occur prior to each pile being installed; and

(vi) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (c)(8) must occur prior to impact pile driving of monopiles, 3-m pin piles, and 1.8-m pin piles. If LOA

Holder uses a noise mitigation device in addition to the bubble curtain, LOA Holder must maintain similar quality control measures as described in this paragraph (c)(7).

(8) LOA Holder must utilize NMFS-approved PAM systems, as described in paragraph(c)(16) of this section. The PAM system components (*i.e.,* acoustic buoys) must not be placed closer than 1 km to the pile being driven so that the activities do not mask the PAM system. LOA Holder must provide a demonstration of and justification for the detection range of the system they plan to deploy while considering potential masking from concurrent pile driving and vessel noise. The PAM system must be able to detect a vocalization of North Atlantic right whales up to 10 km (6.2 mi).

(9) LOA Holder must utilize PSO(s) and PAM operator(s), as described in § 217.345(c), to monitor the clearance and shutdown zones. At least three on-duty PSOs must be on the pile driving platform and any additional platforms used.

(10) If a marine mammal is detected (visually or acoustically) entering or within the respective shutdown zone after pile driving has begun, the PSO or PAM operator must call for a shutdown of pile driving and LOA Holder must stop pile driving immediately, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals, or the lead engineer determines there is pile refusal or pile instability. If pile driving is not shut down in one of these situations, LOA Holder must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS Office of Protected Resources within the applicable monitoring reports (*e.g.,* weekly, monthly).

(11) A visual observation by PSOs at any distance or acoustic detection within the PAM monitoring zone of a North Atlantic right whale triggers shutdown requirements as per paragraph 10 of this section. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale has neither been visually or acoustically detected for 30 minutes.

(12) If pile driving has been shut down due to the presence of a marine mammal other than a North Atlantic right whale, pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time LOA Holder must use the lowest hammer energy practicable to maintain stability.

(13) Pile driving sound levels must not exceed modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds assuming 10-dB attenuation.

(14) LOA Holder must conduct sound field verification (SFV) measurements during pile driving activities associated with the installation of, at minimum, the first three monopile foundations and the first three full jacket foundations (inclusive of all pin piles for a specific jacket foundation) for each of the three construction campaigns. SFV measurements must continue until at least three consecutive monopiles and three entire jacket foundations demonstrate noise levels are at or below those modeled, assuming 10-decibels (dB) of attenuation. Subsequent SFV measurements are also required should larger piles be installed or if additional piles are driven that may produce louder sound fields than those previously measured (*e.g.,* higher hammer energy, greater number of strikes, *etc.*). SFV measurements must be conducted as follows:

(i) Measurements must be made at a minimum of four distances from the pile(s) being driven, along a single transect, in the direction of lowest transmission loss (*i.e.,* projected lowest transmission loss coefficient), including, but not limited to, 750 m (2,460 ft) and three additional ranges selected such that measurement of Level A harassment and Level B harassment isopleths are accurate, feasible, and avoids extrapolation. At least one additional measurement at an azimuth 90 degrees from the array at 750 m must be made. At each location, there must be a near bottom and mid-water column hydrophone (measurement systems);

(ii) The recordings must be continuous throughout the duration of all pile driving of each foundation;

(iii) The SFV measurement systems must have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile. The frequency range of SFV measurement systems must cover the range of at least 20 hertz (Hz) to 20 kilohertz (kHz). The SFV measurement systems must be designed to have omnidirectional sensitivity so that the broadband received level of all pile driving exceeds the system noise floor by at least 10 dB. The dynamic range of the SFV measurement system must be sufficient such that at each location, the signals prevent poor signal-to-noise ratios for low amplitude signals and avoid clipping, nonlinearity, and saturation for high amplitude signals;

(iv) All hydrophones used in SFV measurements systems are required to have undergone a full system, traceable laboratory calibration conforming to International Electrotechnical Commission (IEC) 60565, or an equivalent standard procedure, from a factory or accredited source to ensure the hydrophone receives accurate sound levels, at a date not to exceed 2 years before deployment. Additional in-situ calibration checks using a pistonphone are required to be performed before and after each hydrophone deployment. If the measurement system employs filters via hardware or software (*e.g.,* high-pass, low-pass, *etc.*), which is not already accounted for by the calibration, the filter performance (*i.e.,* the filter's frequency response) must be known, reported, and the data corrected before analysis;

(v) LOA Holder must be prepared with additional equipment (hydrophones, recording devices, hydrophone calibrators, cables, batteries, *etc.*), which exceeds the amount of equipment necessary to perform the measurements, such that technical issues can be mitigated before measurement;

(vi) LOA Holder must submit interim SFV reports within 48 hours after each foundation is measured (see § 217.345(g) for interim and final reporting requirements);

(vii) If any of the interim SFV measurement reports submitted for the first three monopiles exceed the modeled distances to NMFS marine mammal Level A harassment and Level B harassment thresholds assuming 10-dB attenuation, then LOA Holder must implement additional sound attenuation measures on all subsequent foundations. LOA Holder must also increase clearance and shutdown zone sizes to those identified by NMFS until SFV measurements on at least three additional foundations demonstrate acoustic distances to harassment thresholds meet or are less than those modeled assuming 10 dB of attenuation. LOA Holder must optimize the sound attenuation systems (*e.g.,* ensure hose maintenance, pressure testing, *etc.*) to meet noise levels modeled, assuming

10-dB attenuation, within three piles or else foundation installation activities must cease until NMFS and LOA Holder can evaluate the situation and ensure future piles do not exceed noise levels modeled assuming 10-dB attenuation;

(viii) If, after additional measurements conducted pursuant to requirements of paragraph (14)(vii) of this section, acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling (assuming 10-dB attenuation), LOA Holder may request a modification of the clearance and shutdown zones from the NMFS Office of Protected Resources. For NMFS Office of Protected Resources to consider a modification request for reduced zone sizes, LOA Holder must have conducted SFV measurements on an additional three foundations (for either/or monopile and jackets) and ensure that subsequent foundations would be installed under conditions that are predicted to produce smaller harassment zones than those modeled assuming 10 dB of attenuation;

(ix) LOA Holder must conduct SFV measurements as described in c(14) upon commencement of turbine operations to estimate turbine operational source levels, in accordance with a NMFS-approved Foundation Installation Pile Driving SFV Plan. SFV must be conducted in the same manner as previously described in § 217.304(c)(14), with appropriate adjustments to measurement distances, number of hydrophones, and hydrophone sensitivities being made, as necessary; and

(x) LOA Holder must submit a SFV Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of foundation installation activities and abide by the Plan if approved. At minimum, the SFV Plan must describe how LOA Holder would ensure that the first three monopile foundation/entire jacket foundation (inclusive of all pin piles for a jacket foundation) installation sites selected for SFV measurements are representative of the rest of the monopile and/or jacket foundation installation sites such that future pile installation events are anticipated to produce similar sound levels to those piles measured. In the case that these sites/scenarios are not determined to be representative of all other pile installation sites, LOA Holder must include information in the SFV Plan on how additional sites/scenarios would be selected for SFV measurements. The SFV Plan must also include methodology for collecting, analyzing, and preparing SFV measurement data for submission to NMFS Office of Protected Resources and describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. SFV for pile driving may not occur until NMFS approves the SFV Plan for this activity.

(15) LOA Holder must submit a Foundation Installation Pile Driving Marine Mammal Monitoring Plan to NMFS Office of Protected Resources for review and approval at least 180 days prior to planned start of pile driving and abide by the Plan if approved. LOA Holder must obtain both NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division's concurrence with this Plan prior to the start of any pile driving. The Plan must include a description of all monitoring equipment and PAM and PSO protocols (including number and location of PSOs) for all pile driving. No foundation pile installation can occur without NMFS' approval of the Plan.

(16) LOA Holder must submit a Passive Acoustic Monitoring Plan (PAM Plan) to NMFS Office of Protected Resources for review and approval at least 180 days prior to the planned start of foundation installation activities (impact pile driving) and abide by the Plan if approved. The PAM Plan must include a description of all proposed PAM equipment, address how the proposed passive acoustic monitoring must follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind as described in ''NOAA and BOEM Minimum Recommendations for Use of Passive Acoustic Listening Systems in Offshore Wind Energy Development Monitoring and Mitigation Programs'' (2021). The Plan must describe all proposed PAM equipment, procedures, and protocols including proof that vocalizing North Atlantic right whales will be detected within the clearance and shutdown zones. No pile installation can occur if LOA Holder's PAM Plan does not receive approval from NMFS Office of Protected Resources and NMFS Greater Atlantic Regional Fisheries Office Protected Resources Division.

(d) *HRG surveys.* The following requirements apply to HRG surveys operating sub-bottom profilers (SBPs) (*i.e.,* boomers, sparkers, and Compressed High Intensity Radiated Pulse (CHIRPS)):

(1) LOA Holder must establish and implement clearance and shutdown zones for HRG surveys using visual monitoring, as described in paragraph (d) of this section;

(2) LOA Holder must utilize PSO(s), as described in § 217.345(f);

(3) SBPs (hereinafter referred to as ''acoustic sources'') must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Acoustic sources must be used at the lowest practicable source level to meet the survey objective, when in use, and must be turned off when they are not necessary for the survey;

(4) LOA Holder is required to ramp-up acoustic sources prior to commencing full power, unless the equipment operates on a binary on/off switch, and ensure visual clearance zones are observable (*e.g.,* not obscured from observation by darkness, rain, fog, *etc.*) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to the initiation of survey activities using acoustic sources specified in the LOA. Ramp-up and activation must be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up and activation may only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species, has elapsed with no further sightings;

(5) Prior to a ramp-up procedure starting or activating acoustic sources, the acoustic source operator (operator) must notify a designated PSO of the planned start of ramp-up as agreed upon with the Lead PSO. The notification time should not be less than 60 minutes prior to the planned ramp-up or activation in order to allow the PSOs time to monitor the clearance zone(s) for 30 minutes prior to the initiation of ramp-up or activation (pre-start clearance). During this 30-minute pre-start clearance period, the entire applicable clearance zones must be visible, except as indicated in paragraph (d)(11) of this section;

(6) Ramp-ups must be scheduled so as to minimize the time spent with the source activated;

(7) A PSO conducting pre-start clearance observations must be notified again immediately prior to reinitiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed;

(8) LOA Holder must implement a 30-minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30-minute break in survey activities or PSO monitoring. A clearance period is a period when no marine mammals are detected in the relevant zone;

(9) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up or acoustic surveys may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species;

(10) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (infrared (IR)/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.,* no delay is required) despite periods of inclement weather and/or loss of daylight. Ramp-up may occur at times of poor visibility, including nighttime, if appropriate visual monitoring has occurred with no detections of marine mammals in the 30 minutes prior to beginning ramp-up;

(11) Once the survey has commenced, LOA Holder must shut down acoustic sources if a marine mammal enters a respective shutdown zone, except in cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.,* no shutdown is required) so long as no marine mammals have been detected. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus, Stenella, Lagenorhynchus,* and *Tursiops.* If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in this paragraph (d)(11) is detected in the shutdown zone;

(12) If an acoustic source has been shut down due to the presence of a marine mammal, the use of an acoustic source may not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting;

(13) LOA Holder must immediately shut down any acoustic source if a marine mammal is sighted entering or within its respective shutdown zones. If there is uncertainty regarding the identification of a marine mammal species (*i.e.,* whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified in paragraph (d)(11) of this section is detected in the shutdown zone; and

(14) If an acoustic source is shut down for a period longer than 30 minutes, all clearance and ramp-up procedures must be initiated. If an acoustic source is shut down for reasons other than mitigation (*e.g.,* mechanical difficulty) for less than 30 minutes, acoustic sources may be activated again without ramp-up only if PSOs have maintained constant observation and no additional detections of any marine mammal occurred within the respective shutdown zones.

(e) *Fisheries monitoring surveys.* The following measures apply to fishery monitoring surveys:

(1) Survey gear must be deployed as soon as possible once the vessel arrives on station. Gear must not be deployed if there is a risk of interaction with marine mammals. Gear may be deployed after 15 minutes of no marine mammal sightings within 1 nautical mile (nmi; 1,852 m) of the sampling station;

(2) LOA Holder and its cooperating institutions, contracted vessels, or commercially hired captains must implement the following ''move-on'' rule: If marine mammals are sighted within 1 nmi of the planned location and 15 minutes before gear deployment, then LOA Holder and its cooperating institutions, contracted vessels, or commercially hired captains, as appropriate, must move the vessel away from the marine mammal to a different section of the sampling area. If, after moving on, marine mammals are still visible from the vessel, LOA Holder and its cooperating institutions, contracted vessels, or commercially hired captains must move again or skip the station;

(3) If a marine mammal is at risk of interacting with or becoming entangled in the gear after the gear is deployed or set, all gear must be immediately removed from the water. If marine mammals are sighted before the gear is fully removed from the water, the vessel must slow its speed and maneuver the vessel away from the animals to minimize potential interactions with the observed animal;

(4) LOA Holder must maintain visual marine mammal monitoring effort during the entire period of time that gear is in the water (*i.e.,* throughout gear deployment, fishing, and retrieval);

(5) All fisheries monitoring gear must be fully cleaned and repaired (if damaged) before each use/deployment;

(6) LOA Holder's fixed gear must comply with the Atlantic Large Whale Take Reduction Plan regulations at 50 CFR 229.32 during fisheries monitoring surveys;

(7) All gear must be emptied as close to the deck/sorting area and as quickly as possible after retrieval;

(8) During any survey that uses vertical lines, buoy lines must be weighted and must not float at the surface of the water and all groundlines must consist of sinking lines. All groundlines must be composed entirely of sinking lines. Buoy lines must utilize weak links. Weak links must break cleanly leaving behind the bitter end of the line. The bitter end of the line must be free of any knots when the weak link breaks. Splices are not considered to be knots. The attachment of buoys, toggles, or other floatation devices to groundlines is prohibited;

(9) All in-water survey gear, including buoys, must be properly labeled with the scientific permit number or identification as LOA Holder's research gear. All labels and markings on the gear, buoys, and buoy lines must also be compliant with the Atlantic Large Whale Take Reduction Plan regulations at 50 CFR 229.32, and all buoy markings must comply with instructions received by the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division;

(10) All survey gear must be removed from the water whenever not in active survey use (*i.e.,* no wet storage); and

(11) All reasonable efforts, that do not compromise human safety, must be undertaken to recover gear.

§ 217.345 Monitoring and reporting requirements.

(a) *Protected species observer (PSO) and passive acoustic monitoring (PAM) operator qualifications.* LOA Holder must implement the following measures applicable to PSOs and PAM operators:

(1) LOA Holder must use independent, NMFS-approved PSOs and PAM operators, meaning that the PSOs and PAM operators must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant crew with regard to the presence of protected species and mitigation requirements;

(2) All PSOs and PAM operators must have successfully attained a bachelor's degree from an accredited college or

university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO or PAM operator has acquired the relevant skills through a suitable amount of alternate experience. Requests for such a waiver must be submitted to NMFS Office of Protected Resources and must include written justification containing alternative experience. Alternate experience that may be considered includes, but is not limited to previous work experience conducting academic, commercial, or government-sponsored marine mammal visual and/or acoustic surveys, or previous work experience as a PSO/PAM operator;

(3) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable); ability to conduct field observations and collect data according to the assigned protocols; sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations; writing skills sufficient to document observations, including but not limited to, the number and species of marine mammals observed, the dates and times when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental take of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior; and the ability to communicate orally, by radio, or in-person, with project personnel to provide real-time information on marine mammals observed in the area;

(4) All PSOs must be trained in northwestern Atlantic Ocean marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations (as described in paragraphs (b)(6) and (7) of this section;

(5) All PSOs and PAM operators must successfully complete a relevant training course within the last 5 years, including obtaining a certificate of course completion;

(6) PSOs and PAM operators are responsible for obtaining NMFS' approval. NMFS may approve PSOs and PAM operators as conditional or unconditional. A conditionally approved PSO or PAM operator may be one who has completed training in the last 5 years but has not yet attained the requisite field experience. An unconditionally approved PSO or PAM operator is one who has completed training within the last 5 years and attained the necessary experience (*i.e.,* demonstrate experience with monitoring for marine mammals at clearance and shutdown zone sizes similar to those produced during the respective activity). Lead PSO or PAM operators must be unconditionally approved and have a minimum of 90 days in a northwestern Atlantic Ocean offshore environment performing the role (either visual or acoustic), with the conclusion of the most recent relevant experience not more than 18 months previous. A conditionally approved PSO or PAM operator must be paired with an unconditionally approved PSO or PAM operator;

(7) PSOs for HRG surveys may be unconditionally or conditionally approved. PSOs and PAM operators for foundation installation activities must be unconditionally approved;

(8) At least one on-duty PSO and PAM operator, where applicable, for each activity (*e.g.,* impact pile driving, vibratory pile driving, and HRG surveys) must be designated as the Lead PSO or Lead PAM operator;

(9) LOA Holder must submit NMFS previously approved PSOs and PAM operators to NMFS Office of Protected Resources for review and confirmation of their approval for specific roles at least 30 days prior to commencement of the activities requiring PSOs/PAM operators or 15 days prior to when new PSOs/PAM operators are required after activities have commenced;

(10) For prospective PSOs and PAM operators not previously approved, or for PSOs and PAM operators whose approval is not current, LOA Holder must submit resumes for approval at least 60 days prior to PSO and PAM operator use. Resumes must include information related to relevant education, experience, and training, including dates, duration, location, and description of prior PSO or PAM operator experience. Resumes must be accompanied by relevant documentation of successful completion of necessary training;

(11) PAM operators are responsible for obtaining NMFS approval. To be approved as a PAM operator, the person must meet the following qualifications: The PAM operator must demonstrate that they have prior experience with real-time acoustic detection systems and/or have completed specialized training for operating PAM systems and detecting and identifying Atlantic Ocean marine mammals sounds, in particular: North Atlantic right whale sounds, humpback whale sounds, and how to deconflict them from similar North Atlantic right whale sounds, and other co-occurring species' sounds in the area including sperm whales; must be able to distinguish between whether a marine mammal or other species sound is detected, possibly detected, or not detected, and similar terminology must be used across companies/projects; Where localization of sounds or deriving bearings and distance are possible, the PAM operators need to have demonstrated experience in using this technique; PAM operators must be independent observers (*i.e.,* not construction personnel); PAM operators must demonstrate experience with relevant acoustic software and equipment; PAM operators must have the qualifications and relevant experience/training to safely deploy and retrieve equipment and program the software, as necessary; PAM operators must be able to test software and hardware functionality prior to operation; and PAM operators must have evaluated their acoustic detection software using the PAM Atlantic baleen whale annotated data set available at National Centers for Environmental Information (NCEI) and provide evaluation/performance metric;

(12) PAM operators must be able to review and classify acoustic detections in real-time (prioritizing North Atlantic right whales and noting detection of other cetaceans) during the real-time monitoring periods;

(13) PSOs may work as PAM operators and vice versa, pending NMFS-approval; however, they may only perform one role at any time and must not exceed work time restrictions, which must be tallied cumulatively; and

(14) All PSOs and PAM operators must complete a Permits and Environmental Compliance Plan training and a 2-day refresher session that must be held with the PSO provider and Project compliance representative(s) prior to the start of in-water project activities (*e.g.,* HRG survey, foundation installation, *etc.*).

(b) *General PSO and PAM operator requirements.* The following measures apply to PSOs and PAM operators and must be implemented by LOA Holder:

(1) PSOs must monitor for marine mammals prior to, during, and following impact pile driving and HRG surveys that use sub-bottom profilers (with specific monitoring durations and needs described in paragraphs (c) through (f) of this section, respectively).

Monitoring must be done while free from distractions and in a consistent, systematic, and diligent manner;

(2) For foundation installation, PSOs must visually clear (*i.e.,* confirm no observations of marine mammals) the entire minimum visibility zone for a full 30 minutes immediately prior to commencing activities. For HRG surveys, which do not have a minimum visibility zone, the entire clearance zone must be visually cleared and as much of the Level B harassment zone as possible;

(3) All PSOs must be located at the best vantage point(s) on any platform, as determined by the Lead PSO, in order to obtain 360-degree visual coverage of the entire clearance and shutdown zones around the activity area, and as much of the Level B harassment zone as possible. PAM operators may be located on a vessel or remotely on-shore, the PAM operator(s) must assist PSOs in ensuring full coverage of the clearance and shutdown zones. The PAM operator must monitor to and past the clearance zone for large whales;

(4) All on-duty PSOs must remain in real-time contact with the on-duty PAM operator(s), PAM operators must immediately communicate all acoustic detections of marine mammals to PSOs, including any determination regarding species identification, distance, and bearing (where relevant) relative to the pile being driven and the degree of confidence (*e.g.,* possible, probable detection) in the determination. All on-duty PSOs and PAM operator(s) must remain in contact with the on-duty construction personnel responsible for implementing mitigations (*e.g.,* delay to pile driving) to ensure communication on marine mammal observations can easily, quickly, and consistently occur between all on-duty PSOs, PAM operator(s), and on-water Project personnel;

(5) The PAM operator must inform the Lead PSO(s) on duty of animal detections approaching or within applicable ranges of interest to the activity occurring via the data collection software system (*i.e.,* Mysticetus or similar system) who must be responsible for requesting that the designated crewmember implement the necessary mitigation procedures (*i.e.,* delay);

(6) PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During foundation installation, at least two PSOs on the pile driving vessel must be equipped with functional Big Eye binoculars (*e.g.,* 25 * 150; 2.7 view angle; individual ocular focus; height control); these must be pedestal mounted on the deck at the best vantage point that provides for optimal sea surface observation and PSO safety. PAM operators must have the appropriate equipment (*i.e.,* a computer station equipped with a data collection software system available wherever they are stationed) and use a NMFS-approved PAM system to conduct monitoring. PAM systems are approved through the PAM Plan as described in § 217.344(c)(17); and

(7) PSOs and PAM operators must not exceed 4 consecutive watch hours on duty at any time, must have a 2-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period. If the schedule includes PSOs and PAM operators on-duty for 2-hour shifts, a minimum 1-hour break between watches must be allowed.

(c) *PSO and PAM operator requirements during WTG, OSS, and Met Tower foundation installation.* The following measures apply to PSOs and PAM operators during WTG, OSS, and Met tower foundation installation and must be implemented by LOA Holder:

(1) PSOs and PAM operator(s), using a NMFS-approved PAM system, must monitor for marine mammals 60 minutes prior to, during, and 30 minutes following all pile driving activities. If PSOs cannot visually monitor the minimum visibility zone prior to impact pile driving at all times using the equipment described in paragraphs (b)(6) and (7) of this section, pile driving operations must not commence or must shutdown if they are currently active;

(2) At least three on-duty PSOs must be stationed and observing from the activity platform during impact pile driving and at least three on-duty PSOs must be stationed on each dedicated PSO vessel. Concurrently, at least one PAM operator per acoustic data stream (equivalent to the number of acoustic buoys) must be actively monitoring for marine mammals 60 minutes before, during, and 30 minutes after impact pile driving in accordance with a NMFS-approved PAM Plan; and

(3) LOA Holder must conduct PAM for at least 24 hours immediately prior to pile driving activities. The PAM operator must review all detections from the previous 24-hour period immediately prior to pile driving activities.

(d) *PSO requirements during HRG surveys.* The following measures apply to PSOs during HRG surveys using acoustic sources that have the potential to result in harassment and must be implemented by LOA Holder:

(1) At least one PSO must be on active duty monitoring during HRG surveys conducted during daylight (*i.e.,* from 30 minutes prior to civil sunrise through 30 minutes following civil sunset) and two PSOs during nighttime surveying (if it occurs);

(2) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating acoustic sources, during the use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(3) Any observations of marine mammals must be communicated to PSOs on all nearby survey vessels during concurrent HRG surveys; and

(4) During daylight hours when survey equipment is not operating, LOA Holder must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources.

(e) *Monitoring requirements during fisheries monitoring surveys.* The following measures apply during fisheries monitoring surveys and must be implemented by LOA Holder:

(1) All captains and crew conducting fishery surveys must be trained in marine mammal detection and identification; and

(2) Marine mammal monitoring must be conducted within 1 nmi from the planned survey location by the trained captain and/or a member of the scientific crew for 15 minutes prior to deploying gear, throughout gear deployment and use, and for 15 minutes after haul back.

(f) *Reporting.* LOA Holder must comply with the following reporting measures:

(1) Prior to initiation of any on-water project activities, LOA Holder must demonstrate in a report submitted to NMFS Office of Protected Resources that all required training for LOA Holder personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed.

(2) LOA Holder must use a standardized reporting system during the effective period of the LOA. All data collected related to the Project must be recorded using industry-standard software that is installed on field laptops and/or tablets. Unless stated otherwise, all reports must be submitted to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*), dates must be in MM/DD/YYYY format, and location information must be provided in Decimal Degrees and with the coordinate system information (*e.g.,* NAD83, WGS84, *etc.*).

(3) For all visual monitoring efforts and marine mammal sightings, the

following information must be collected and reported to NMFS Office of Protected Resources: the date and time that monitored activity begins or ends; the construction activities occurring during each observation period; the watch status (*i.e.,* sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform); the PSO who sighted the animal; the time of sighting; the weather parameters (*e.g.,* wind speed, percent cloud cover, visibility); the water conditions (*e.g.,* Beaufort sea state, tide state, water depth); all marine mammal sightings, regardless of distance from the construction activity; species (or lowest possible taxonomic level possible); the pace of the animal(s); the estimated number of animals (minimum/maximum/high/low/best); the estimated number of animals by cohort (*e.g.,* adults, yearlings, juveniles, calves, group composition, *etc.*); the description (*i.e.,* as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics); the description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity; the animal's closest distance and bearing from the pile being driven or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zone(s); the activity at time of sighting (*e.g.,* impact pile driving, construction survey), use of any noise attenuation device(s), and specific phase of activity (*e.g.,* ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, *etc.*); the marine mammal occurrence in Level A harassment or Level B harassment zones; the description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.,* delay, shutdown, *etc.*) and time and location of the action; other human activity in the area, and; other applicable information, as required in any LOAs issued under § 217.346.

(4) LOA Holder must compile and submit weekly reports during foundation installation to NMFS Office of Protected Resources that document the daily start and stop of all pile driving associated with the Project; the start and stop of associated observation periods by PSOs; details on the deployment of PSOs; a record of all detections of marine mammals (acoustic and visual); any mitigation actions (or if mitigation actions could not be taken, provide reasons why); and details on the noise attenuation system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday to Saturday) and must include the information required under this section. The weekly report must also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is completed, weekly reports are no longer required by LOA Holder.

(5) LOA Holder must compile and submit monthly reports to NMFS Office of Protected Resources during foundation installation that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, MMIS number, and route), number of piles installed, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). Full PAM detection data and metadata must also be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic Right Whale Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates.*

(6) LOA Holder must submit a draft annual report to NMFS Office of Protected Resources no later than 90 days following the end of a given calendar year. LOA Holder must provide a final report within 30 days following resolution of NMFS' comments on the draft report. The draft and final reports must detail the following: the total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zone(s) with comparison to authorized take of marine mammals for the associated activity type; marine mammal detections and behavioral observations before, during, and after each activity; what mitigation measures were implemented (*i.e.,* number of shutdowns or clearance zone delays, *etc.*) or, if no mitigative actions was taken, why not; operational details (*i.e.,* days and duration of impact and vibratory pile driving, days, and amount of HRG survey effort, *etc.*); any PAM systems used; the results, effectiveness, and which noise attenuation systems were used during relevant activities (*i.e.,* impact pile driving); summarized information related to situational reporting; and any other important information relevant to the Project, including additional information that may be identified through the adaptive management process.

(7) LOA Holder must submit its draft 5-year report to NMFS Office of Protected Resources on all visual and acoustic monitoring conducted within 90 calendar days of the completion of activities occurring under the LOA. At a minimum, the draft and final 5-year report must include: the total number (annually and across all 5 years) of marine mammals of each species/stock detected and how many were detected within the designated Level A harassment and Level B harassment zone(s) with comparison to authorized take of marine mammals for the associated activity type; a summary table(s) indicating the amount of each activity type (*e.g.,* pile installation, HRG) completed in each of the 5 years and total; GIS shapefile(s) of the final location of all piles, cable routes, and other permanent structures including an indication of what year installed and began operating; GIS shapefile of all North Atlantic right whale sightings, including dates and group sizes; a 5-year summary and evaluation of all SFV data collected; a 5-year summary and evaluation of all PAM data collected; a 5-year summary and evaluation of marine mammal behavioral observations; a 5-year summary and evaluation of mitigation and monitoring implementation and effectiveness; a list of recommendations to inform environmental compliance assessments for future offshore wind actions. A 5-year report must be prepared and submitted within 60 calendar days following receipt of any NMFS Office of Protected Resources comments on the draft report. If no comments are received from NMFS Office of Protected Resources within 60 calendar days of NMFS Office of Protected Resources receipt of the draft report, the report shall be considered final.

(8) For those foundation piles requiring SFV measurements, LOA Holder must provide the initial results of the SFV measurements to NMFS Office of Protected Resources in an interim report after each foundation installation event as soon as they are available and prior to a subsequent foundation installation, but no later than 48 hours after each completed foundation installation event. The report must include, at minimum: hammer energies/schedule used during

pile driving, including, the total number of strikes and the maximum hammer energy; the model-estimated acoustic ranges ($R_{95\%}$) to compare with the real-world sound field measurements; peak sound pressure level (SPL_{pk}), root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), and sound exposure level (SEL, in single strike for pile driving, SEL_{ss},), for each hydrophone, including at least the maximum, arithmetic mean, minimum, median (L50) and L5 (95 percent exceedance) statistics for each metric; estimated marine mammal Level A harassment and Level B harassment isopleths, calculated using the maximum-over-depth L5 (95 percent exceedance level, maximum of both hydrophones) of the associated sound metric; comparison of modeled results assuming 10-dB attenuation against the measured marine mammal Level A harassment and Level B harassment acoustic isopleths; estimated transmission loss coefficients; pile identifier name, location of the pile and each hydrophone array in latitude/longitude; depths of each hydrophone; one-third-octave band single strike SEL spectra; if filtering is applied, full filter characteristics must be reported; and hydrophone specifications including the type, model, and sensitivity. LOA Holder must also report any immediate observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices. If any in-situ calibration checks for hydrophones reveal a calibration drift greater than 0.75 dB, pistonphone calibration checks are inconclusive, or calibration checks are otherwise not effectively performed, LOA Holder must indicate full details of the calibration procedure, results, and any associated issues in the 48-hour interim reports.

(9) The final results of SFV measurements from each foundation installation must be submitted as soon as possible, but no later than 90 days following completion of each event's SFV measurements. The final reports must include all details prescribed above for the interim report as well as, at minimum, the following: the peak sound pressure level (SPL_{pk}), the root-mean-square sound pressure level that contains 90 percent of the acoustic energy (SPL_{rms}), the single strike sound exposure level (SEL_{ss}), the integration time for SPL_{rms}, the spectrum, and the 24-hour cumulative SEL extrapolated from measurements at all hydrophones. The final report must also include at least the maximum, mean, minimum, median (L_{50}) and L_5 (95 percent exceedance) statistics for each metric; the SEL and SPL power spectral density and/or one-third octave band levels (usually calculated as decidecade band levels) at the receiver locations should be reported; the sound levels reported must be in median, arithmetic mean, and L_5 (95 percent exceedance) (*i.e.,* average in linear space), and in dB; range of transmission loss coefficients; the local environmental conditions, such as wind speed, transmission loss data collected on-site (or the sound velocity profile); baseline pre- and post-activity ambient sound levels (broadband and/or within frequencies of concern); a description of depth and sediment type, as documented in the Construction and Operation Plan (COP), at the recording and foundation installation locations; the extents of the measured Level A harassment and Level B harassment zone(s); hammer energies required for pile installation and the number of strikes per pile; the hydrophone equipment and methods (*i.e.,* recording device, bandwidth/sampling rate; distance from the pile where recordings were made; the depth of recording device(s)); a description of the SFV measurement hardware and software, including software version used, calibration data, bandwidth capability and sensitivity of hydrophone(s), any filters used in hardware or software, any limitations with the equipment, and other relevant information; the spatial configuration of the noise attenuation device(s) relative to the pile; a description of the noise abatement system and operational parameters (*e.g.,* bubble flow rate, distance deployed from the pile, *etc.*), and any action taken to adjust the noise abatement system. A discussion which includes any observations which are suspected to have a significant impact on the results including but not limited to: observed noise mitigation system issues, obstructions along the measurement transect, and technical issues with hydrophones or recording devices.

(10) If at any time during the project LOA Holder becomes aware of any issue or issues which may (to any reasonable subject-matter expert, including the persons performing the measurements and analysis) call into question the validity of any measured Level A harassment or Level B harassment isopleths to a significant degree, which were previously transmitted or communicated to NMFS Office of Protected Resources, LOA Holder must inform NMFS Office of Protected Resources within 1 business day of becoming aware of this issue or before the next pile is driven, whichever comes first.

(11) If a North Atlantic right whale is acoustic detected at any time by a project-related PAM system, LOA Holder must ensure the detection is reported as soon as possible to NMFS, but no longer than 24 hours after the detection via the ''24-hour North Atlantic right whale Detection Template'' (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*). Calling the hotline is not necessary when reporting PAM detections via the template.

(12) Full detection data, metadata, and location of recorders (or GPS tracks, if applicable) from all real-time hydrophones used for monitoring during construction must be submitted within 90 calendar days after pile driving has ended and instruments have been pulled from the water. Reporting must use the webform templates on the NMFS Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates.* Submit the completed data templates to *nmfs.nec.pacmdata@noaa.gov.* The full acoustic recordings from all real-time hydrophones must also be sent to the National Centers for Environmental Information (NCEI) for archiving within 90 calendar days following completion of activities requiring PAM for mitigation. Submission details can be found at: *https://www.ncei.noaa.gov/products/passive-acoustic-data.*

(13) LOA Holder must submit situational reports if the following circumstances occur (including all instances wherein an exemption is taken must be reported to NMFS Office of Protected Resources within 24 hours):

(i) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must ensure the sighting is immediately (if not feasible, as soon as possible, and no longer than 24 hours after the sighting) reported to NMFS and the Right Whale Sightings Advisory System (RWSAS). If in the Northeast Region (Maine to Virginia/North Carolina border) call (866–755–6622). If in the Southeast Region (North Carolina to Florida) call (877–WHALE–HELP or 877–942–5343). If calling NMFS is not possible, reports can also be made to the U.S. Coast Guard via channel 16 or through the WhaleAlert app (*https://www.whalealert.org*). The sighting report must include the time, date, and location of the sighting,

number of whales, animal description/certainty of sighting (provide photos/video if taken), Lease Area/project name, PSO/personnel name, PSO provider company (if applicable), and reporter's contact information.

(ii) If a North Atlantic right whale is observed at any time by PSOs or project personnel, LOA Holder must submit a summary report to NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov*) and NMFS Office of Protected Resources, and NMFS Northeast Fisheries Science Center (NEFSC; *ne.rw.survey@noaa.gov*) within 24 hours with the above information and the vessel/platform from which the sighting was made, activity the vessel/platform was engaged in at time of sighting, project construction and/or survey activity at the time of the sighting (*e.g.,* pile driving, cable installation, HRG survey), distance from vessel/platform to sighting at time of detection, and any mitigation actions taken in response to the sighting.

(iii) If an observation of a large whale occurs during vessel transit, LOA Holder must report the time, date, and location of the sighting; the vessel's activity, heading, and speed (knots); Beaufort sea state, water depth (meters), and visibility conditions; marine mammal species identification to the best of the observer's ability and any distinguishing characteristics; initial distance and bearing to marine mammal from vessel and closest point of approach; and any avoidance measures taken in response to the marine mammal sighting.

(iv) In the event that personnel involved in the Project discover a stranded, entangled, injured, or dead marine mammal, LOA Holder must immediately report the observation to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866–755–6622); if in the Southeast Region (North Carolina to Florida), call the NMFS Southeast Stranding Hotline (877–942–5343). Separately, LOA Holder must report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov, nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS Southeast Regional Office (SERO; *secmammalreports@noaa.gov*) as soon as feasible. The report (via phone or email) must include contact (name, phone number, *etc.*), the time, date, and location of the first discovery (and updated location information if known and applicable); species identification (if known) or description of the animal(s) involved; condition of the animal(s) (including carcass condition if the animal is dead); observed behaviors of the animal(s), if alive; if available, photographs or video footage of the animal(s); and general circumstances under which the animal was discovered.

(v) In the event of a vessel strike of a marine mammal by any vessel associated with the Project or if other project activities cause a non-auditory injury or death of a marine mammal, LOA Holder must immediately report the incident to NMFS. If in the Greater Atlantic Region (Maine to Virginia) call the NMFS Greater Atlantic Stranding Hotline (866–755–6622) and if in the Southeast Region (North Carolina to Florida) call the NMFS Southeast Stranding Hotline (877–942–5343). Separately, LOA Holder must immediately report the incident to NMFS Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov*) and, if in the Greater Atlantic region (Maine to Virginia), NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov, nmfs.gar.stranding@noaa.gov*) or, if in the Southeast region (North Carolina to Florida), NMFS SERO (*secmammalreports@noaa.gov*). The report must include the time, date, and location of the incident; species identification (if known) or description of the animal(s) involved; vessel size and motor configuration (inboard, outboard, jet propulsion); vessel's speed leading up to and during the incident; vessel's course/heading and what operations were being conducted (if applicable); status of all sound sources in use; description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike; environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike; estimated size and length of animal that was struck; description of the behavior of the marine mammal immediately preceding and following the strike; if available, description of the presence and behavior of any other marine mammals immediately preceding the strike; estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and to the extent practicable, photographs or video footage of the animal(s). LOA Holder must immediately cease all on-water activities until the NMFS Office of Protected Resources is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS Office of Protected Resources may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. LOA Holder may not resume their activities until notified by NMFS Office of Protected Resources.

(14) LOA Holder must report any lost gear associated with the fishery surveys to the NOAA GARFO Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*) as soon as possible or within 24 hours of the documented time of missing or lost gear. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.

§ 217.346 Letter of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, LOA Holder must apply for and obtain an LOA.

(b) The LOA, unless suspended or revoked, may be effective for a period of time not to exceed December 31, 2029, the expiration date of this subpart.

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by the LOA, LOA Holder must apply for and obtain a modification of the LOA as described in § 217.347.

(d) The LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(e) Issuance of the LOA must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under the regulations of this subpart.

(f) Notice of issuance or denial of the LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.347 Modifications of Letter of Authorization.

(a) The LOA issued under §§ 217.342 and 217.346 or this section for the activity identified in § 217.340 shall be modified upon request by LOA Holder, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as

those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For a LOA modification request by the applicant that includes changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), the LOA shall be modified, provided that:

(1) NMFS Office of Protected Resources determines that the changes to the activity or the mitigation, monitoring, or reporting do not change the findings made for the regulations in this subpart and do not result in more than a minor change in the total estimated number of takes (or distribution by species or years); and

(2) NMFS Office of Protected Resources may, if appropriate, publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) The LOA issued under §§ 217.342 and 217.346 or this section for the activities identified in § 217.340 may be modified by NMFS Office of Protected Resources under the following circumstances:

(1) Through adaptive management, NMFS Office of Protected Resources may modify (including delete, modify, or add to) the existing mitigation, monitoring, or reporting measures (after consulting with the LOA Holder regarding the practicability of the modifications), if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in the LOA include, but are not limited to:

(A) Results from LOA Holder's monitoring;

(B) Results from other marine mammals and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations in this subpart or subsequent LOA.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS Office of Protected Resources shall publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS Office of Protected Resources determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in the LOA issued pursuant to §§ 217.342 and 217.346 or this section, the LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.348–217.349 [Reserved]

[FR Doc. 2023–27189 Filed 1–3–24; 8:45 am]

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Part III

Federal Trade Commission

16 CFR Part 463
Combating Auto Retail Scams Trade Regulation Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 463

RIN 3084–AB72

Combating Auto Retail Scams Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing this Combating Auto Retail Scams Trade Regulation Rule (''CARS Rule,'' ''Rule,'' or ''Final Rule'') and Statement of Basis and Purpose (''SBP'') related to the sale, financing, and leasing of covered motor vehicles by covered motor vehicle dealers. The Final Rule, among other things, prohibits motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, requires accurate pricing disclosures in dealers' advertising and sales communications, requires dealers to obtain consumers' express, informed consent for charges, prohibits the sale of any add-on product or service that confers no benefit to the consumer, and requires dealers to keep records of certain advertisements and customer transactions.

DATES: This rule is effective July 30, 2024.

ADDRESSES: Copies of this document are available on the Commission's website, *www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Dwyer or Sanya Shahrasbi, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 202–326–2957 (Dwyer), 202–326–2709 (Shahrasbi), *ddwyer@ftc.gov, sshahrasbi@ftc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

A. Statutory Authority

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was signed into law in 2010.[1] Section 1029 of the Dodd-Frank Act authorizes the FTC to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers.[2] The FTC is authorized to do so under the FTC Act and in accordance with section 553 of the Administrative Procedure Act (''APA'').[3] The grant of APA rulemaking authority set forth in section 1029 of the Dodd-Frank Act became effective as of July 21, 2011—the designated ''transfer date'' established by the Treasury Department.[4]

B. Commission Actions Following the Dodd-Frank Act and the Rulemaking Process

Following enactment of the Dodd-Frank Act, the Commission published in the **Federal Register** a notice discussing its authority to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers and announcing that it would be hosting a series of public roundtables to explore consumer protection issues pertaining to motor vehicle sales and leasing, including what consumer protection issues, if any, exist that could be addressed through a possible rulemaking.[5] The Commission sought participation from regulators, consumer advocates, industry participants, and other interested parties and ultimately held three such public roundtables.[6]

The Commission subsequently focused on enforcement and business guidance in the motor vehicle dealer marketplace. As discussed in SBP II.C,[7] however, certain unfair and deceptive acts or practices have persisted, despite more than a decade of enforcement and education. Accordingly, on June 23, 2022, the Commission announced a notice of proposed rulemaking (''NPRM'') addressing unfair or deceptive acts or practices by motor vehicle dealers.[8] That notice was published in the **Federal Register** on July 13, 2022.[9] The NPRM, among other things, proposed to (i) prohibit motor vehicle dealers from making certain misrepresentations, (ii) require accurate pricing disclosures, (iii) prohibit the sale of any add-on product or service that confers no benefit to the consumer, (iv) require express, informed consent for add-ons and other charges, and (v) impose certain recordkeeping requirements. The comment period for the NPRM closed on September 12, 2022.

In response to the NPRM and proposed rule, the Commission received more than 27,000 comments from stakeholders representing a wide range of viewpoints.[10] These stakeholders included numerous individual consumers who described deceptive practices during recent car purchases and many who discussed current or former military service and deceptive and predatory practices common near military installations.[11] Commenters

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[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] 12 U.S.C. 5519(d). *See* 12 U.S.C. 5519(f)(1) and (2) for definitions of the terms ''motor vehicle'' and ''motor vehicle dealer'' under section 1029 of the Dodd-Frank Act, respectively.

[3] *See* 12 U.S.C. 5519(a) (discussing the authority over ''motor vehicle dealer[s] that [are] predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both''); 12 U.S.C. 5519(d) (''Notwithstanding section 57a of title 15, the Federal Trade Commission is authorized to prescribe rules under sections 45 and 57a(a)(1)(B) of title 15[ ] in accordance with section 553 of title 5, with respect to a person described in subsection (a).''); 5 U.S.C. 553. Because the Commission has authority to promulgate this Rule in accordance with the APA, it is not required to include a statement as to the prevalence of the acts or practices treated by the Rule under section 18(d) of the FTC Act. *Compare* 12 U.S.C. 5519(d) and (a) (providing the FTC with APA rulemaking authority for purposes of section 1029 of the Dodd-Frank Act), *with* 15 U.S.C. 57a(b)(3) (requiring a statement as to prevalence for certain rulemaking proceedings by the Commission under non-APA procedures), *and* 15 U.S.C. 57a(b)(1) (establishing that certain rulemaking proceedings by the Commission under non-APA procedures are subject to requirements in addition to those under the APA).

[4] *See* 12 U.S.C. 5411(a).

[5] 76 FR 14014, 14015 (Mar. 15, 2011).

[6] *See* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Apr. 12, 2011), *https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in Detroit, Michigan); Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Aug. 2, 2011), *https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in San Antonio, Texas); Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Nov. 17, 2011), *https://www.ftc.gov/news-events/events/2011/11/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in Washington, District of Columbia).

[7] As used herein, references to the ''Statement of Basis and Purpose'' or ''SBP'' refer to the portions of this document that precede the regulatory text of the Final Rule. References to the ''Rule,'' ''Final Rule,'' or ''CARS Rule'' refer to the text in part 463—Combating Auto Retail Scams (''CARS'') Trade Regulation Rule. Because the Final Rule is narrower than the proposed Motor Vehicle Dealers Trade Regulation Rule in the NPRM, the Commission has modified the Rule title to reflect the more limited scope.

[8] *See* Press Release, Fed. Trade Comm'n, ''FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers'' (June 23, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers.*

[9] *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 FR 42012 (released June 23, 2022; published July 13, 2022) [hereinafter NPRM], *https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14214.pdf.*

[10] The Commission received 27,349 comment submissions filed online in response to its NPRM. *See* Gen. Servs. Admin., Dkt. No. FTC–2022–0046, Proposed Rule, Motor Vehicle Dealers Trade Regulation Rule (July 13, 2022), *https://www.regulations.gov/document/FTC-2022-0046-0001* (noting comments received). To facilitate public access, over 11,000 such comments have been posted publicly on *Regulations.gov* at *https://www.regulations.gov/document/FTC-2022-0046-0001/comment* (noting posted comments). As explained at *Regulations.gov*, agencies may choose to redact or withhold certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. *See* Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, Find Dockets, Documents, and Comments FAQs, ''How are comments counted and posted to *Regulations.gov*?,'' *https://www.regulations.gov/faq?anchor=downloadingdata* (last visited Dec. 5, 2023). The Commission has considered all timely and responsive public comments it received in response to its NPRM.

[11] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–4648 (''As a young Marine stationed in

Continued

also included dealerships and their employees, industry groups, consumer and community groups, and Federal and State lawmakers and law enforcement agencies. Many commenters, such as consumers, some dealers and dealer employees, consumer groups, and lawmakers and enforcers, were supportive of the proposed rule in whole or in part. Many of these commenters also urged the FTC to include additional protections for consumers and law-abiding businesses, while others, such as industry groups, dealers, and dealer employees, asked questions or criticized the proposal.[12] These comments and responses to comments are discussed primarily in the discussion of the Final Rule in SBP III.

The Commission notes that it has undertaken careful review and consideration of each of the comments it received in response to its NPRM. The Commission has dedicated the majority of its section-by-section analysis to descriptions of, and responses to, comments or portions thereof that were critical of the Commission's proposal or that urged the Commission to adopt additional requirements. Thus, to ensure that this document also reflects the many comments in the public record from stakeholders who supported the proposal as is, the Commission has excerpted a number of such comments in portions of its SBP.

II. Motor Vehicle Financing and Leasing

A. Overview of the Motor Vehicle Marketplace

For many consumers, buying or leasing a motor vehicle is essential, expensive, and time-consuming.[13] Americans rely on their vehicles for work, school, childcare, groceries, medical visits, and many other important tasks in their daily lives.[14] These vehicles have become increasingly costly: the average price of a new vehicle sold at a new car dealership in 2022 was more than $46,000,[15] while the average price of a used vehicle sold at such dealerships was more than $30,000.[16] By the second quarter of 2023, the average monthly payment for used cars reached $533, and the average monthly payment for new cars reached $741—both record highs.[17] Vehicles are now many consumers' largest expense—on a par with housing, child care and food, and accounting for 16% of the median annual household income before taxes.[18] In 2022 alone, Americans spent more than $720 billion on motor vehicles and vehicle parts.[19]

Given these costs, many consumers who purchase a motor vehicle rely on financing to complete their purchases. According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed.[20] By the first quarter of 2023, Americans had more than 107 million outstanding auto financing accounts and owed more than $1.56 trillion thereon,[21] making auto finance the third-largest source of debt for U.S. consumers, and the second-largest for U.S. consumers ages 40 and over.[22] Servicemembers have an average of twice as much auto debt as civilians—particularly young servicemembers, who generally require vehicles for transportation while living on military bases.[23] By the age of 24, around 20

a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[ ]s and we[ ]re instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges . . . .''); Individual commenter, Doc. No. FTC–2022–0046–0542 (''As a former member of the Military, the amount of scams and horror stories I have heard regarding young service members buying cars is absurd. . . . Someone shouldn't have to do hours of research on how to buy a car so they don't get taken advantage of.''); Individual commenter, Doc. No. FTC–2022–0046–0637 (''As a small business owner and active duty military member I have played the role of both a buyer, toiling for hours to just reach fair deals on vehicles, as well as that of an advocate for my Sailors who have been preyed upon by local dealerships. Nowhere else in our society do so many average citizens have to mentally prepare for a battle over fair pricing and treatment for something that is realistically a modern necessity.''); Individual commenter, Doc. No. FTC–2022–0046–9840 (''I can't list the number of times I have either seen, or have stepped in a situation, where car dealers have either attempted to take, or have successfully taken, advantage of a young military member or their family by baiting and switching when it came to the price of a car, or stated that the price was one amount, only to be charged, and over-charged a higher amount. These dealers have even attempted to pull unethical tricks on me and my wife, even after they found out that I was a military member, a combat veteran, that was serving this great nation.''); Individual commenter, Doc. No. FTC–2022–0046–0845 (''Predatory practices like [bait-and-switch pricing] are common near military installations . . . .'').

[12] Industry commenters claimed that many of the areas covered by the proposed rule are already addressed in industry guidance. The Commission notes that, although industry guidance can provide helpful information to dealers, dealers who choose not to follow such guidance, or who engage in deceptive or unfair practices, subject their customers to significant harm. The Rule addresses such practices, thus protecting consumers and law-abiding dealers.

[13] Unless otherwise indicated, the terms ''auto,'' ''automobile,'' ''car,'' ''motor vehicle,'' and ''vehicle,'' as used in this SBP and the Commission's final regulatory analysis, refer to ''Covered Motor Vehicle'' as defined in this part.

[14] During 2017 to 2022, an average of 91% of American workers who did not work from home drove to work. *See* U.S. Census Bureau, ''American Community Survey: Means of Transportation to Work by Selected Characteristics, 2022: ACS 1-Year Estimates Subject Tables'' (2023), *https://data.census.gov/table?q=Commuting&tid=ACSST1Y2022.S0802* (reporting 110,245,368 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,881,067 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 136,196,004 workers 16 years and over who did not work from home); U.S. Census Bureau, ''American Community Survey: Means of Transportation to Work by Selected Characteristics, 2021: 2017–2021 ACS 5-Year Estimates Subject Tables'' (2022), *https://data.census.gov/table?q=Commuting&tid=ACSST5Y2021.S0802* (reporting 113,724,271 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,340,838 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 140,223,271 workers 16 years and over who did not work from home).

[15] Nat'l Auto. Dealers Ass'n, ''NADA Data 2022'' 7, *https://www.nada.org/media/4695/download?inline* (noting average retail selling price of $46,287 for new vehicles sold by dealerships in 2022).

[16] *Id.* at 10 (noting average retail selling price of $30,736 for used vehicles sold by new-vehicle dealerships in 2022).

[17] Lydia DePillis, ''How the Costs of Car Ownership Add Up,'' N.Y. Times (Oct. 6, 2023), *https://www.nytimes.com/interactive/2023/10/07/business/car-ownership-costs.html* (citing average monthly payment figures from TransUnion).

[18] *Id.* (citing data from AAA and the U.S. Census Bureau).

[19] Bureau of Econ. Analysis, ''National Data: National Income and Product Accounts, Personal Consumption Expenditures by Major Type of Product'' tbl. 2.3.5, *https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJjYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJOSVBBX1RhYmxlX0xpc3QiLCI2NSJdXX0=* (last revised July 27, 2023) (listing estimated annual expenditure rates of between $713.1 billion and $737.1 billion in 2022).

[20] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 5, *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* (on file with the Commission).

[21] Fed. Rsrv. Bank of N.Y., ''Quarterly Report on Household Debt and Credit, 2023: Q1'' 3–4 (May 2023), *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1;* Fed. Rsrv. Bank of N.Y., ''Data Underlying Report'' on ''Page 3 Data'' and ''Page 4 Data'' tabs, *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD_C_Report_2023Q1* (last visited Dec. 5, 2023) (listing number of open ''Auto Loan'' accounts and total outstanding balance in such accounts).

[22] Fed. Rsrv. Bank of N.Y., ''Quarterly Report on Household Debt and Credit, 2023: Q1'' 3, 21 (May 2023), *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1;* Fed. Rsrv. Bank of N.Y., ''Data Underlying Report'' on ''Page 3 Data'' and ''Page 21 Data'' tabs, *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD_C_Report_2023Q1* (last visited Dec. 5, 2023) (listing total ''Auto Loan'' debt balance compared to other product type categories).

[23] *See* Consumer Fin. Prot. Bureau, ''Financially Fit? Comparing the Credit Records of Young Servicemembers and Civilians'' 27 (July 2020), *https://files.consumerfinance.gov/f/documents/cfpb_financially-fit_credit-young-servicemembers-civilians_report_2020-07.pdf.*

percent of young servicemembers have at least $20,000 in auto debt, which equates to nearly two-thirds of an enlisted soldier's typical base salary at that age.[24]

In addition to the expense, the process of buying or leasing a vehicle is often time-consuming and arduous. It can take several hours or days to finalize a transaction,[25] on top of the hours it can take, particularly in rural areas, to drive to a dealership.[26] Consumers may need to take time off work or arrange childcare, and families with a single vehicle may be forced to delay other important appointments due to the length of the vehicle-buying or -leasing process.

Most consumers—approximately 70%—finance vehicle purchases through a motor vehicle dealer,[27] using what is known as dealer-provided ''indirect'' financing.[28] This financing is typically offered through dealers' financing and insurance (''F&I'') offices, which may also offer leasing and add-on products or services. In the dealer-provided financing scenario, the dealer collects financial information about the consumer and forwards that information to prospective motor vehicle financing entities. These financing entities evaluate this information and, in the process, determine whether, and on what terms, to provide credit.[29] These terms include the ''buy rate'': a risk-based finance charge that reflects the interest rate at which the entity will finance the deal.[30] Dealers often add a finance charge called a ''dealer reserve'' or ''markup'' to the buy rate.[31] Unlike the buy rate, the markup is not based on the underwriting risk or credit characteristics of the applicant, and dealers retain the markup as profit.[32] New vehicle dealers average a gross profit of about $2,444 per vehicle,[33] more than half of which comes from the dealers' F&I offices. Independent used vehicle dealers averaged a gross profit of more than $6,000 per vehicle, as of 2019.[34] While some used vehicle dealerships do not have a separate F&I office, more than half of such dealerships sell add-on products.[35]

Six to eight percent of financed vehicle purchases use what is called ''buy here, pay here'' dealers.[36] In this scenario, consumers typically borrow from, and make their payments directly to, the dealership.

The remainder of financed vehicle transactions use what is commonly referred to as ''direct'' financing, provided by a credit union, bank, or other financing entity.[37] In this scenario, consumers typically receive an interest rate quote from the financing entity prior to arriving at a dealership to purchase a vehicle, and use the financing to pay for their chosen vehicle.[38] Dealerships do not profit on the financing portion of the vehicle sale transaction when a consumer arranges financing directly.

Finally, consumers may choose to lease a vehicle from a dealership rather than purchase one. In this scenario, consumers may drive a vehicle for a set period of time—typically around three years [39]—and for a certain maximum number of miles—typically 10,000–15,000 miles per year—in exchange for an upfront payment, a monthly payment, and fees before, during, and at the end of the lease, including for excess wear and usage over the mileage limit.[40] When consumers lease a vehicle, they do not own it, and they must return the vehicle when the lease expires, though they may have the option to purchase

[24] *See* Consumer Fin. Prot. Bureau, ''Protecting Servicemembers from Costly Auto Loans and Wrongful Repossessions'' (July 18, 2022), *https://www.consumerfinance.gov/about-us/blog/protecting-servicemembers-from-costly-auto-loans-and-wrongful-repossessions/.*

[25] Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm'n, ''The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research'' 15 (July 2020) [hereinafter Auto Buyer Study], *https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf* (noting that the purchase transactions in the FTC's qualitative study often took 5 hours or more to complete, with some extending over several days); *Cf.* Cox Auto., ''2020 Cox Automotive Car Buyer Journey'' 6 (2020) [hereinafter 2020 Cox Automotive Car Buyer Journey], *https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf* (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes); Cox Auto., ''2022 Car Buyer Journey: Top Trends Edition'' 6 (2023) [hereinafter 2022 Car Buyer Journey], *https://www.coxautoinc.com/wp-content/uploads/2023/01/2022-Car-Buyer-Journey-Top-Trends.pdf* (reporting average consumer time spent shopping for a vehicle at 14 hours, 39 minutes).

[26] For example, consumers have complained about going to a dealership based on an offer that the dealer refuses to honor only after they have spent hours driving there and additional time on the lot. *See, e.g.,* Complaint ¶¶ 23–26, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships based on the advertised prices; that test-driving and selecting a vehicle, and negotiating the price and financing terms, is an often hours-long process; and that, after this time, dealers falsely told consumers that add-on products or packages were required to purchase or finance the vehicle, even though they were not included in the low prices advertised or disclosed to consumers who called to confirm prices).

[27] Unless otherwise indicated, the terms ''dealer,'' ''dealership,'' and ''motor vehicle dealer'' as used in this SBP and the Commission's final regulatory analysis refer to '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' as defined in this part.

[28] *See* Nat'l Auto. Dealers Ass'n, ''Dealer-Assisted Financing Benefits Consumers,'' *https://www.nada.org/autofinance/[https://web.archive.org/web/20220416131718/https://www.nada.org/autofinance/]* (Apr. 16, 2022) (noting that 7 out of 10 consumers finance through their dealership). This is also known as ''dealer financing,'' because consumers obtain financing through the dealer that partners with other entities in the financing process.

[29] Dealers often originate the contract governing the extension of retail credit or retail leases and then sell, or otherwise assign, these contracts to unaffiliated third-party finance or leasing sources, including such third parties the dealer may have contacted in the course of arranging dealer-provided ''indirect'' financing. *See* Consumer Fin. Prot. Bureau, ''Automobile Finance Examination Procedures'' 3 (Aug. 2019), *https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.*

[30] *See* Nat'l Auto. Dealers Ass'n, Nat'l Ass'n of Minority Auto. Dealers & Am. Int'l Auto. Dealers Ass'n, ''Fair Credit Compliance Policy & Program'' 2 (2015), *https://www.nada.org/media/4558/download?inline.* (defining ''buy rate'' as ''the rate at which the finance source will purchase the credit contract from the dealer'').

[31] *See, e.g., id.* at 1 n.4 & accompanying text.

[32] *Id.* (describing this as the amount dealers earn for arranging financing, measured as the difference between the consumer's annual percentage rate (''APR'') and the wholesale ''buy rate'' at which a finance source buys the finance contract from the dealer, and noting that finance sources typically permit dealers to retain the dealer participation).

[33] Nat'l Auto. Dealers Ass'n, ''Average Dealership Profile'' 1 (2020), *https://www.nada.org/media/4136/download?attachment[http://web.archive.org/web/20220623204158/https://www.nada.org/media/4136/download?attachment]* (June 23, 2022).

[34] Nat'l Indep. Auto. Dealers Ass'n, ''NIADA Used Car Industry Report 2020'' 21 (2020).

[35] *Id.* at 8, 10.

[36] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q2 2020'' 8 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf* [*http://web.archive.org/web/20201106002015/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf*] (Mar. 6, 2023).

[37] Consumer Fin. Prot. Bureau, ''Automobile Finance Examination Procedures'' 4 (Aug. 2019), *https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.*

[38] Consumer Fin. Prot. Bureau, ''Consumer Voices on Automobile Financing'' 5 (June 2016), *https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf.*

[39] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 26 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* [*http://web.archive.org/web/20210311174922/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf*] (Mar. 6, 2023).

[40] *See* Fed. Trade Comm'n, ''Financing or Leasing a Car,'' *https://www.consumer.ftc.gov/articles/0056-financing-or-leasing-car* (last visited Dec. 5, 2023) (''The annual mileage limit in most standard leases is 15,000 or less.''); Consumer Fin. Prot. Bureau, ''What should I know about the differences between leasing and buying a vehicle?,'' *https://www.consumerfinance.gov/ask-cfpb/what-should-i-know-about-the-differences-between-leasing-and-buying-a-vehicle-en-815/* (last visited Aug. 24, 2023) (''Most leases restrict your mileage to 10,000–15,000 miles per year.'').

the vehicle at the end of the lease period. Nearly 27% of new vehicles are leased, as are just over 8% of used vehicles.[41]

B. Deceptive and Unfair Practices in the Motor Vehicle Marketplace

Section 5 of the Federal Trade Commission Act (''FTC Act''), as amended (15 U.S.C. 45), authorizes the FTC to address deceptive or unfair acts or practices in or affecting commerce, including in the motor vehicle marketplace.

An act or practice is deceptive if there is a representation, omission, or other practice that is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it is likely to affect consumers' conduct or decisions with regard to a product or service.[42] Deceptive conduct can involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.[43]

An act or practice is considered unfair under section 5 of the FTC Act if: (1) it causes, or is likely to cause, substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.[44]

In each of the past four years, the FTC received more than 100,000 complaints regarding motor vehicle sales, financing, service and warranties, and rentals and leasing.[45] This industry is also consistently at or near the top of private sources of consumer complaints.[46] Many of these complaints concerned deceptive or unfair acts or practices affecting U.S. consumers. Complaints about motor vehicle transactions are regularly in the top ten complaint categories tracked by the FTC.[47] For military consumers as well, auto-related complaints are among the top 10 complaint categories outside of identity theft.[48]

Moreover, law enforcement experience shows that complaints are just the tip of the iceberg.[49] The Commission's recent enforcement action against a large, multistate dealership group is illustrative of this point in the motor vehicle marketplace: in that matter, the Commission received 391 complaints—about add-ons and other issues—over a several-month period prior to filing a complaint against the thirteenth largest dealership group in the country by revenue as of 2020.[50] However, in a survey of the dealer's customers over the same time period, 83% of respondents—or at least 16,848 customers—indicated they were subject to the dealer's unlawful practices related to add-ons alone.[51]

Similarly, in other contexts where companies were charged with making misrepresentations or engaging in misconduct regarding add-on products, information obtained after filing has shown widespread harm far beyond the initial consumer complaint volumes reported prior to filing.[52]

As examined in greater detail in the paragraphs that follow, consumers in the motor vehicle marketplace are confronted with chronic deceptive or unfair practices, including bait-and-switch tactics and hidden charges.[53]

1. Bait-and-Switch Tactics

Advertisements for motor vehicles are often consumers' first contact in the vehicle-buying or -leasing process. Dealers utilize a variety of means to

[41] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 5 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* [*https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf*] (Mar. 6, 2023).

[42] *See* Fed. Trade Comm'n, ''FTC Policy Statement on Deception'' 2, 5, 103 F.T.C. 174 (1984) [hereinafter FTC Policy Statement on Deception] (*appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 183 (1984)), *https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

[43] *Id.*

[44] 15 U.S.C. 45(n).

[45] *See, e.g.,* Fed. Trade Comm'n, ''Consumer Sentinel Network Data Book 2022'' app. B3 at 85 (Feb. 2023) [hereinafter Consumer Sentinel Network Data Book 2022], *https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf* (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2020, 2021, and 2022); Fed. Trade Comm'n, ''Consumer Sentinel Network Data Book 2021'' app. B3 at 85 (Feb. 2022) [hereinafter Consumer Sentinel Network Data Book 2021], *https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf* (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2019, 2020, and 2021).

[46] According to commenters, complaints to the Better Business Bureau about new and used auto dealers, when combined, have been either the first or second highest regarding any industry in the U.S. for the past twenty years. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at ii; *see also* Better Bus. Bureau, ''BBB Complaint and Inquiry Statistics,'' *https://www.bbb.org/all/bbb-complaint-statistics* (last visited Dec. 5, 2023) (listing complaint statistics from 2010 through 2022, sorted by industry). In addition, for the past seven years annual surveys of State and local consumer protection agencies have reported that auto-related complaints were the top complaint received from consumers. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 13; Consumer Fed'n of Am., ''2022 Consumer Complaint Survey Report'' 4–5 (May 2023), *https://consumerfed.org/wp-content/uploads/2023/05/2022-Consumer-Complaint-Survey-Report.pdf* (''For the seventh year in a row, auto sales, leases and repairs are the #1 complaint category. Consumers filed complaints about add-on products and services, bait and switch pricing, and mechanical condition issues.'').

[47] *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 8 (listing vehicle-related complaints as the seventh most common report category, outside of identity theft, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 8 (listing motor vehicle-related complaints as the fifth most common report category, outside of identity theft, in 2022).

[48] *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 18 (listing vehicle-related complaints as the eighth most common complaint category for military consumers, outside of identity theft categories, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 18 (listing vehicle-related complaints as the ninth most common complaint category for military consumers, outside of identity theft categories, in 2022).

[49] *See, e.g., United States* v. *Brien,* 617 F.2d 299, 308 (1st Cir. 1980); *United States* v. *Offs. Known as 50 State Distrib. Co.,* 708 F.2d 1371, 1374–75 (9th Cir. 1983); Keith B. Anderson, Fed. Trade Comm'n, ''Consumer Fraud in the United States: An FTC Survey'' 80 (2004), *https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf* (staff report noting consumers who reported they were victims of fraud complained to an official source only 8.4 percent of the time, filing complaints with the BBB in 3.5 percent of incidents and to a Federal agency, including the FTC, in only 1.4 percent of cases).

[50] *See* Complaint, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022); *see also* WardsAuto, ''WardsAuto 2020 Megadealer 100,'' *https://www.wardsauto.com/dealers/wardsauto-2020-megadealer-100-industry-force* (last visited Dec. 5, 2023) (listing Napleton Automotive Group as the 13th-ranked dealership group by total revenue).

[51] Complaint ¶ 27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making them difficult to detect); *see* Press Release, Fed. Trade Comm'n, ''FTC Returns Additional $857,000 To Consumers Harmed by Napleton Auto's Junk Fees and Discriminatory Practices'' (Nov. 20, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-returns-additional-857000-consumers-harmed-napleton-autos-junk-fees-discriminatory-practices.*

[52] For example, in a recent action involving deceptive pre-approval claims, the FTC had received roughly 30 complaints about the company's pre-approval conduct in the five-year period prior to announcing its action. But in the five months following announcement of the action, more than 900 additional consumers came forward with complaints about the conduct. *See* Press Release, Fed. Trade Comm'n, ''FTC Announces Claims Process for Consumers Harmed by Credit Karma 'Pre-Approved' Offers for Which They Were Denied'' (Dec. 5, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-announces-claims-process-consumers-harmed-credit-karma-pre-approved-offers-which-they-were* (''[W]ithin five months of that announcement, the agency received nearly 900 more such complaints'').

[53] While other issues exist in the motor vehicle sales, financing, and leasing space, including issues involving discrimination, financing application falsification, data privacy and security, and yo-yo financing, this Rule's core focus is on misrepresentations and add-on and pricing practices.

reach consumers, including social media and online advertisements, television and radio commercials, and direct mail marketing. New vehicle dealers spend an average of more than $700 on advertising per vehicle sold [54]—more than two-thirds of which goes toward online advertising.[55]

The FTC has brought many law enforcement actions involving motor vehicle dealers' deceptive advertising and other unlawful tactics. Such actions have charged dealers with, *inter alia,* making misrepresentations regarding the price of a vehicle, the availability of discounts and rebates, the monthly payment amount for a financed purchase or lease, the amount due at signing, and whether an offer pertains to a purchase or a lease.[56] Other such actions have charged dealers with misrepresentations regarding whether the dealer or consumer is responsible for paying off ''negative equity,'' *i.e.,* the outstanding debt on a vehicle that is being ''traded in'' as part of another vehicle purchase.[57] And in other FTC actions, some dealers have lured potential buyers through financial incentives incidental to the purchase, such as deceptive promises of a valuable prize that is redeemable only by visiting the dealership.[58]

Deceptive tactics can cause significant consumer harm and impede competition, competitively disadvantaging law-abiding dealers. When dealerships advertise prices, discounts, or other terms that are not actually available to typical consumers, consumers who select that dealership instead of others spend time visiting the dealership or otherwise interacting with the dealership under false pretenses.

2. Unlawful Practices Relating to Add-On Products or Services and Hidden Charges

Another key consumer protection concern is the sale of add-on products or services in a deceptive or unfair manner. Add-ons in connection with the sale or financing of motor vehicles include extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection (''GAP'') agreements, emergency road service, VIN etching and other theft protection devices, and undercoating. Individual add-ons can cost consumers thousands of dollars and can significantly increase the overall cost to the consumer in the transaction.[59] Moreover, in the past two years, dealers have substantially increased prices for these add-ons, notwithstanding that such products or services largely are not constrained by supply.[60]

A significant consumer protection concern is consumers paying for add-ons without knowing about, or expressly agreeing to, these products or services.[61] This type of payment packing has been a particular concern in the military community.[62] The protracted and paperwork-heavy vehicle-buying or -leasing process can make it difficult for consumers to spot add-on charges, particularly when advertised prices or payment terms do not mention add-ons.[63] If consumers are financing or leasing the vehicle, they undergo a separate financing process after selecting a vehicle, which can include wading through a thick stack of dense paperwork filled with fine print.[64] For example, according to an FTC law enforcement action, consumers visiting one large dealership group were required to complete a stack of paperwork that ran more than sixty pages and required more than a dozen signatures.[65] This paperwork can include hidden charges for add-on products or services, causing consumers

[54] Nat'l Auto. Dealers Ass'n, ''NADA Data 2022'' 15, *https://www.nada.org/media/4695/download?inline* (listing average dealership advertising per new vehicle sold of $718 in 2022, and $602 in 2021).

[55] *Id.* at 16 (listing 68.2% of estimated advertising expenditures by medium as internet expenditures).

[56] *See, e.g.,* Complaint, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts that were only available through rebates not applicable to the typical consumer); Complaint, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose that discounts were only available on the most expensive models); Complaint, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016) (alleging deceptive failure to disclose material conditions of obtaining the lease monthly payment in their online and print advertising); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging that company issued advertisements for attractive terms but concealed that the terms were only applicable to lease offers); Complaint ¶¶ 36–38, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 85–87, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging that dealerships claimed consumers could finance the purchase of vehicles with attractive terms and buried disclosures indicating that such terms were applicable to leases only).

[57] Complaint ¶¶ 82–84, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentation that dealer would pay off a consumer's trade-in when in fact consumers were still responsible for outstanding debt on trade-in vehicles); Complaint ¶¶ 17–19, *TXVT Ltd. P'ship,* No. C–4508 (F.T.C. Feb. 12, 2015) (alleging misrepresentation in leasing advertising that the dealership would pay off the negative equity of a consumer's trade in vehicle, when in fact, it was merely rolled into the financed amount for the consumer's newly financed vehicle).

[58] *See, e.g.,* Complaint ¶¶ 12, 17–19, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020); Complaint ¶¶ 4, 7–9, *Fowlerville Ford, Inc.,* No. C–4433 (F.T.C. Feb. 20, 2014).

[59] *See, e.g.,* Complaint ¶¶ 25, 27–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022).

[60] *See* Ben Eisen, ''Car Dealer Markups Helped Drive Inflation, Study Finds,'' Wall St. J., Apr. 23, 2023, *https://www.wsj.com/articles/car-dealer-markups-helped-drive-inflation-study-finds-7c1d5a2d;* U.S. Bureau of Labor Statistics, ''Automotive Dealerships 2019–2022: Dealer Markup Increases Drive New-Vehicle Consumer Inflation'' (Apr. 2023), *https://www.bls.gov/opub/mlr/2023/article/automotive-dealerships-markups.htm.*

[61] *See* Nat'l Consumer L. Ctr., ''Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing'' (Oct. 1, 2017), *https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf;* Adam J. Levitin, ''The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses,'' 108 Geo. L.J. 1257, 1265–66 (2020), *https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf* (discussing ''loan packing'' as the sale of add-on products that are falsely represented as being required in order to obtain financing); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14 (''Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers' experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.'').

[62] Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2–3 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (citing a U.S. Department of Defense data call summary that found that the vast majority of military counselors have clients with auto financing problems and cited ''loan packing'' and yo-yo financing as the most frequent auto lending abuses affecting servicemembers).

[63] Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint ¶ 60, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016); Carole L. Reynolds & Stephanie E. Cox, Fed. Trade Comm'n, ''Buckle Up: Navigating Auto Sales and Financing'' (2020) [hereinafter Buckle Up], *https://www.ftc.gov/reports/*buckle-navigating-auto-sales-financing.

[64] *See, e.g.,* Buckle Up, *supra* note 63, at 10–11 (noting the long, complex transaction process); Complaint ¶¶ 23–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (same).

[65] Complaint ¶ 24, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); *see also* Buckle Up, *supra* note 63, at 10–11.

to purchase those add-ons without knowing about or agreeing to them, or without knowing or agreeing to their costs or other key terms.[66] Unscrupulous dealers are able to slip the often considerable additional costs for these items past consumers unnoticed and into purchase contracts through a variety of means, including by not mentioning them at all,[67] or by focusing consumers' attention on other aspects of the complex transaction, such as monthly payments, which might increase only marginally with the addition of prorated add-on costs, or may even be made to decrease if the financing term is extended.[68] This type of conduct can target immigrants, communities of color, and servicemembers.[69] In other instances, dealers might wait until late in the transaction to mention add-ons, and then do so in a misleading manner. For example, participants in an FTC qualitative study on consumers' car-buying experiences cited situations where dealers waited until the financing stage to mention add-ons, after consumers believed they had agreed on terms, and even though many add-ons have nothing to do with financing and were not mentioned at all during the sales process or when prices were initially negotiated.[70] According to FTC enforcement actions, dealers also have represented that add-ons are required when in fact they are not,[71] have misrepresented the purported benefits of add-ons, and have failed to disclose material limitations.[72]

[66] Complaint ¶¶ 25, 27, 29–32, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); *see also* Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Dale Irwin, Slough Connealy Irwin & Madden LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00060 (Dec. 29, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0051* (consumer protection lawyer noting ''payment packing'' among problems ''that cry out for scrutiny and regulation''); Michael Archer, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00041 at 3 (Aug. 6, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0014* (workshop panelist stating, ''I have seen cases wherein the dealer uses financing to pack in extra costs or to wipe out trade-in value.''); Dawn Smith, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00027 (July 27, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0043* (''Confusing or misleading sales terms[.] Extra fees was [sic] added at the time of purchase and to this day I still do not understand what the fee was for; it made the payment higher.''); Carrie Ferraro, Legal Servs. of N.J., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00061 (Dec. 29, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0059* (citing ''[d]ealers engage[d] in packing'' as an example of the common consumer complaints of car-sales-related fraud received by LSNJ's legal advice hotline); Rosemary Shahan, Consumers for Auto Reliability and Safety, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00069 at 3 (Jan. 31, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0069* (noting that ''[m]any common auto scams do not generate complaints in proportion to how pervasive or costly the practices are, simply because the consumers generally remain unaware they have been scammed,'' including as a result of ''[l]oan packing''); Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm'n, ''The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research,'' Supplemental Appendix: Redacted Interview Transcripts at 525 (2020) [hereinafter Auto Buyer Study: Appendix], *https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautobuyerstudysuppappendix.pdf* (Study participant 169810: consumer had ''additional items'' charges on contract that consumer could not identify); *id.* at 730, 740–42 (Study participant 188329: dealer did not tell consumer about GAP or service contract but consumer was charged $599 and $1,950 for those add-ons, respectively); Press Release, N.Y. State Att'y Gen., ''A.G. Schneiderman Announces Nearly $14 Million Settlement with NYC and Westchester Auto Dealerships for Deceptive Practices that Resulted in Inflated Car Prices'' (June 17, 2015), *https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-nearly-14-million-settlement-nyc-and-westchester-auto* (''This settlement is part of the [New York] attorney general's wider initiative to end the practice of 'jamming,' unlawfully charging consumers for hidden purchases by car dealerships.'').

[67] Under the Truth in Lending Act (''TILA'') and its implementing Regulation Z, required add-on products or services must be factored into the APR and the finance charge disclosed during the transaction. *See* 15 U.S.C. 1605, 1606, 1638; 12 CFR 226.4, 226.18(b), (d), (e), and 226.22. It is legally impermissible for dealers to include charges for such products in a consumer's contract without disclosing them. *See, e.g.,* Complaint ¶¶ 57–60, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

[68] *See, e.g.,* Buckle Up, *supra* note 63, at 6; Fed. Trade Comm'n, Military Consumer Financial Workshop, Panel 1, Tr. 19:25–41 (July 19, 2017), *https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles,'' Public Roundtable, Session 2, Tr. at 40–41 (Aug. 2 2011), *https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles* (noting that optional products and services are often already included in the monthly payment prices advertised or quoted); Christopher Kukla, Ctr. for Responsible Lending, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00071 at 10 (Feb. 1, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0068* (discussing how dealers conceal packing by expressing an increase in price in terms of monthly payment); Att'ys General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 5 (Apr. 13, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0124* (discussing the ''age-old auto salesperson's trick'' of quoting monthly payment prices without disclosing that the quote includes the cost of optional items that the customer has not yet agreed to purchase).

[69] *See, e.g.,* Complaint ¶¶ 9, 26, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (charging defendants with discriminating on the basis of race, color, and national origin by charging higher interest rates and inflated fees); Press Release, N.Y. State Att'y Gen., ''Attorney General James Delivers Restitution to New Yorkers Cheated by Auto Dealership'' (Nov. 17, 2020), *https://ag.ny.gov/press-release/2020/attorney-general-james-delivers-restitution-new-yorkers-cheated-auto-dealership* (dealership targeted Chinese speakers for unlawful payment packing or ''jamming''); Military Consumer Financial Workshop, Tr. 19:21 (July 19, 2017), *https://www.ftc.gov/news-events/events/2017/07/military-consumer-workshop* (panelist discussing servicemembers experiencing payment packing); *see also* Fed. Trade Comm'n, ''Staff Perspective: A Closer Look at the Military Consumer Financial Workshop'' 2–3 (Feb. 2018), *https://www.ftc.gov/system/files/documents/reports/closer-look-military-consumer-financial-workshop-federal-trade-commission-staff-perspective/military_consumer_workshop_-_staff_perspective_2-2-18.pdf* (explaining the unique situation of servicemembers whose steady paychecks make them attractive customers for dealers, while having no or minimal credit history, meaning they qualify for less advantageous credit terms and higher interest rate financing).

[70] *See, e.g.,* Buckle Up, *supra* note 63, at 6 (observing that the introduction of ''add-ons during financing discussions caused several participants' total sale price to balloon from the cash price''); *id.* at 9 (observing that, for most consumers in the study, ''add-ons did not come up until the financing process, if at all, after a long car-buying process and at a time when the consumer often felt pressure to close the deal''); *id.* (noting that most study participants' contracts included add-ons charges, but that many ''were unclear what those add-ons included, and sometimes did not realize they had purchased any add-ons at all''); *id.* at 7 (explaining situations where the consumer reached the financing office after negotiating with the sales staff and were then told that the agreed upon price was not compatible with key financing terms—for example, a promised rebate or discount could not be combined with an advertised interest rate).

[71] Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14.

[72] Complaint ¶¶ 4–14, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4–13, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims); Buckle Up, *supra* note 63, at 10 (noting that some Auto Buyer Study participants did not fully understand material aspects of extended warranties or service plans they purchased and ''were surprised to discover during the interview that their plans had unexpected limitations'' or that ''they had to pay out-of-pocket for repairs or services that were not covered''; for example, one ''consumer purchased a 'Lifetime' maintenance plan, only to discover later that he received a one-year plan that covered periodic oil changes''). *Cf.* Consent Order ¶¶ 10–16, *Santander*

Indeed, as previously noted, in a recent FTC enforcement action, the Commission cited a survey finding that 83% of consumers from the named dealers were charged for add-on products or services that they did not authorize or as a result of deceptive claims.[73]

One participant in an FTC qualitative study of consumers' car-buying experiences summed up these issues during an interview after having purchased a vehicle.[74] The consumer purchased a $2,000 service contract that the dealer falsely said was free, and a $900 GAP agreement that the dealer falsely said was mandatory. The consumer only learned about these purchases during the study interview. This consumer remarked:

> I feel I've been taken advantage of, to be honest with you. Even though I thought that I was getting a great deal with the interest rate, but I know [sic] see that they're also very sneaky about putting stuff on your paperwork. They only let you skim through the paperwork that you have to sign and they just kind of tell you what it is. This is this, this is that, this is this, and then you just sign it away. You're so tired, you're so worn down, you don't want to be there no more. You just want to get it done and over with. They take advantage of that. Yes, they still play this friendly card, you know, thank you for your business card kind of thing. Like I said, they never lose. They never lose.[75]

Similarly, in response to the Commission's notice of proposed rulemaking, thousands of commenters described issues they faced when purchasing, financing, or leasing a vehicle. Many comments the Commission received in support of the NPRM were from self-identified military consumers and dealership employees. Examples of supportive comments include the following:

- As a young Marine stationed in a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[]s and we[]re instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges . . . . Please make it more difficult for dishonest dealers like these to financially burden young Americans and Americans of any age for that matter.[76]
- Imagine going to a restaurant franchise and order[ing] a burger and fries for $10 and the franchise employees say[,] 'Sorry that will be $25 dollars, there is a $10 restaurant adjustment price due to market conditions and $5 for us to place and document your order.' You would walk away without hesitation because that would [be] absolutely ridiculous. Yet, dealerships are allowed to do exactly that. . . . IT IS TIME TO CHANGE AND PROTECT CONSUMERS[.][77]
- As in many other areas, it is the vulnerable in our society who are probably most affected by such deceptive practices. . . . Sadly, it is often these very people who desperately need a dependable, affordable car for transportation to work, school, shopping, or medical care. To entice, pressure, or trick people into buying a car that is more than they can afford sets them up for financial failure, not only in possibly having a needed car repossessed, but in long-term damage to their credit. . . . In closing, I would be extremely happy to see rules such as those described above enacted, and don't think these could come a day too soon. It's a step in the right direction for the protection of the consumer.[78]
- None of us working here at the dealership in sales benefit from [unfair and deceptive practices]. We cringe as much as every customer and have to show up to work every[ ]day and hope we are not forced to screw someone with these BS products. . . . I would hope when [t]he regulators are making their decisions, they understand the positive implications this would have for dealership employees both financially and mentally.[79]
- Generally, I'm not a person in favor of government regulation. However, as a potential customer and cash buyer, I feel there is certainly a need to bring car dealers back into check. I'm just looking for a more honest and transparent process. I don't want to be taken advantage of. I certainly don't want my family members or [s]oldiers to be taken advantage of. Therefore, I feel it is in the best interest of future customers to support this regulation.[80]
- I cannot stress enough my support for these new rules. Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products.[81]
- I can tell you after many years of car buying I have NEVER walked out of a dealership feeling good. Even worse, I've never purchased a car feeling like I fully understood what I was getting. . . . Looking forward to seeing the change happen SOON![82]
- When I buy a gallon of milk from the store, the price is written next to the milk. When I go pay, I pay the price advertised next to the milk. Would it be OK if I go up to pay and that gallon of milk had anywhere between 1% and 1,200% markup depending on the day, what you look like, what you drove to the store in, if you're a man or a woman?[83]
- We ended up having to drive 3 hours to the [vehicle we] wanted. Upon arriving to pick[ ]up the car we were told there was a [$]4,300 increase over MSRP. We were told if we didn't take it they had someone else waiting to purchase it. We needed the car and didn't have time to hunt down another one so ended up purchasing it. Very disappointed in the long and awful process.[84]
- The worst is dealing with car dealers. You never know what the real price is on a vehicle until you spend a few hours with them. Mandatory add[-] on[ ]s, market availability surcharges, doc fees that vary from dealer to dealer. . . . Then dealing with the finance manager who tr[ie]s to sell you everything you don't[ ]need. They high pressure the consumer on purchasing extend[ed] warranties. There

Consumer USA, Inc., CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding that defendant sold GAP product allegedly providing ''full coverage'' to consumers with loan-to-value ratios (''LTVs'') above 125%, when in fact coverage was limited to 125% of LTV).

[73] Complaint ¶ 27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[74] The study is described in the Commission's reports: Auto Buyer Study, *supra* note 25, and Buckle Up, *supra* note 63. Some industry commenters critiqued the FTC's reliance on this qualitative study. The Commission notes that the study provides helpful qualitative insight from consumer interviews regarding their recent motor vehicle purchases and is one of the many sources the Commission has considered, including consumer complaints, enforcement actions, outreach and dialogue with stakeholders and consumer groups, among others, as described in this SBP and in the NPRM.

[75] Auto Buyer Study: Appendix, *supra* note 66, at 130 (Study participant 152288); *see also id.* at 202–03 (Study participant 180267: dealership included a charge for GAP in the final paperwork but not in retail sales contract); *id.* at 296 (Study participant 146748: consumer learned during interview with FTC that consumer purchased GAP: ''maybe they're just throwing that in there without telling you'').

[76] Individual commenter, Doc. No. FTC–2022–0046–4648.

[77] Individual commenter, Doc. No. FTC–2022–0046–0016.

[78] Individual commenter, Doc. No. FTC–2022–0046–1216.

[79] Individual commenter, Doc. No. FTC–2022–0046–3615.

[80] Individual commenter, Doc. No. FTC–2022–0046–7366.

[81] Individual commenter, Doc. No. FTC–2022–0046–3693.

[82] Individual commenter, Doc. No. FTC–2022–0046–3678.

[83] Individual commenter, Doc. No. FTC–2022–0046–1479.

[84] Individual commenter, Doc. No. FTC–2022–0046–1878.

needs [to be] some sort of policing [of] these unscrupulous car dealers to protect the buyers.[85]

• This is a good start to making car purchasing a better experience. . . . I remember looking at a Lexus and being told by the dealership, the only one in the state, that [S]cotchguard and undercoating were mandatory and they refused to sell any vehicles without them. There were two Acura dealerships in town and one of them included 'free' lifetime oil changes that I didn't learn about until negotiating the price and had already spent two hours in negotiations. All of these services/price adjustments were not disclosed at the start of the negotiation and were only revealed either in the manager's office or when the purchase agreement was presented to me by the salesperson. After spending time on the test drive and negotiating the price, it felt that these last minute price adjustments were being revealed that late in the process so that I wouldn't leave.[86]

• Please enact and enforce these regulations to protect vulnerable consumers from predatory business practices enjoyed by dealers. Our family experienced such practices when trying to purchase a vehicle in early 2022. It was only after five hours at the dealership that we discovered the dealer had added on a $3,000 market adjustment and $3,100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP. This raised the price by about $6,000 and caused us to use extra PTO over that week to find a new vehicle at a price within our budget. Greater transparency in the car-buying process is desperately needed to protect vulnerable consumers—who usually lack any bargaining power—against power dealer networks and their special interest groups. . . .[87]

C. Law Enforcement and Other Responses

The Commission has taken action to protect consumers from deceptive and unfair acts or practices in the motor vehicle marketplace. As noted in the NPRM, the Commission has brought more than 50 auto law enforcement actions; [88] led two law enforcement sweeps, including one that involved 181 State enforcement actions; [89] published two reports on a qualitative study of consumer experiences while purchasing motor vehicles; and held workshops with various stakeholders to discuss the motor vehicle marketplace.[90]

[85] Individual commenter, Doc. No. FTC–2022–0046–0825.

[86] Individual commenter, Doc. No. FTC–2022–0046–4833.

[87] Individual commenter, Doc. No. FTC–2022–0046–1690.

[88] Complaint, *Fed. Trade Comm'n* v. *Rhinelander Auto Ctr., Inc.,* No. 3:23–cv–00737 (W.D. Wis. Oct. 24, 2023); Complaint, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–02670–GLS (D. Md. Oct. 18, 2022); Complaint, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); Complaint, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020); Complaint, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint, *Federal-Mogul Motorparts LLC,* No. C–4717 (F.T.C. May 12, 2020); Complaint, *LightYear Dealer Techs., LLC,* No. C–4687 (F.T.C. Sept. 3, 2019); Complaint, *Fed. Trade Comm'n* v. *Passport Imports, Inc.,* No. 8:18–cv–03118 (D. Md. Oct. 10, 2018); Complaint, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018); Complaint, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018); Complaint, *Fed. Trade Comm'n* v. *Norm Reeves, Inc.,* No. 8:17–cv–01942 (C.D. Cal. Nov. 3, 2017); Complaint, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017); Complaint, *CarMax, Inc.,* No. C–4605 (F.T.C. Mar. 22, 2017); Complaint, *West-Herr Auto. Grp., Inc.,* No. C–4607 (F.T.C. Mar. 22, 2017); Complaint, *Fed. Trade Comm'n* v. *Volkswagen Grp. of Am., Inc.,* No. 3:16–cv–01534 (N.D. Cal. Jan. 31, 2017); Complaint, *Fed. Trade Comm'n* v. *Uber Techs., Inc.,* No. 3:17–cv–00261 (N.D. Cal. Jan. 19, 2017); Complaint, *Gen. Motors LLC,* No. C–4596 (F.T.C. Dec. 8, 2016); Complaint, *Jim Koons Mgmt. Co.,* No. C–4598 (F.T.C. Dec. 8, 2016); Complaint, *Lithia Motors, Inc.,* No. C–4597 (F.T.C. Dec. 8, 2016); Complaint, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sep. 29, 2016); Complaint, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016); Complaint, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016); Complaint, *BMW of N. Am., LLC,* No. C–4555 (F.T.C. Oct. 21, 2015); Complaint, *United States* v. *Tricolor Auto Acceptance, LLC,* No. 3:15–cv–3002 (N.D. Tex. Sept. 15, 2015); Complaint, *JS Autoworld, Inc.,* No. C–4535 (F.T.C. Aug. 13, 2015); Complaint, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015); Complaint, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015); Complaint, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015); Complaint, *Fin. Select, Inc.,* No. C–4528 (F.T.C. June 2, 2015); Complaint, *First Am. Title Lending of Ga., LLC,* No. C–4529 (F.T.C. June 2, 2015); Complaint, *City Nissan Inc.,* No. C–4524 (F.T.C. May 4, 2015); Complaint, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015); Complaint, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015); Complaint, *TXVT Ltd. P'ship,* No. C–4508 (F.T.C. Feb. 12, 2015); Complaint, *Fed. Trade Comm'n* v. *Regency Fin. Servs., LLC,* No. 1:15–cv–20270–DPG (S.D. Fla. Jan. 26, 2015); Complaint, *United States* v. *Billion Auto, Inc.,* No. 5:14–cv–04118–MWB (N.D. Iowa Dec. 11, 2014); Complaint, *Fed. Trade Comm'n* v. Ramey Motors, Inc., No. 1:14–cv–29603 (S.D. W. Va. Dec. 11, 2014); Complaint, *Fed. Trade Comm'n* v. *Consumer Portfolio Servs., Inc.,* No. 14–cv–00819 (C.D. Cal. May 28, 2014); Complaint, *Nissan N. Am., Inc.,* No. C–4454 (F.T.C. May 1, 2014); Complaint, *TBWA Worldwide, Inc.,* No. C–4455 (F.T.C. May 1, 2014); Complaint, *Bill Robertson & Sons, Inc.,* No. C–4451 (F.T.C. Apr. 11, 2014); Complaint, *Paramount Kia of Hickory, LLC,* No. C–4450 (F.T.C. Apr. 11, 2014); Complaint, *Fed. Trade Comm'n* v. *Abernathy Motor Co.,* No. 3:14–cv–00063–BRW (E.D. Ark. Mar. 12, 2014); Complaint, *Fowlerville Ford, Inc.,* No. C–4433 (F.T.C. Feb. 20, 2014); Complaint, *Infiniti of Clarendon Hills, Inc.,* No. C–4438 (F.T.C. Feb. 20, 2014); Complaint, *Luis Alfonso Sierra,* No. C–4434 (F.T.C. Feb. 20, 2014); Complaint, *Mohammad Sabha,* No. C–4435 (F.T.C. Feb. 20, 2014); Complaint, *Norm Reeves, Inc.,* No. C–4436 (F.T.C. Feb. 20, 2014); Complaint, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014); Complaint, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014); Complaint, *Courtesy Auto Grp., Inc.,* No. 9359 (F.T.C. Jan. 7, 2014); Complaint, *Franklin's Budget Car Sales, Inc.,* No. C–4371 (F.T.C. Oct. 3, 2012); Complaint, *Fed. Trade Comm'n* v. *Matthew J. Loewen,* No. 2:12–cv–01207–MJP (W.D. Wash. July 13, 2012); Complaint, *Key Hyundai of Manchester, LLC,* No. C–4358 (F.T.C. May 4, 2012); Complaint, *Billion Auto, Inc.,* No. C–4356 (F.T.C. May 1, 2012); Complaint, *Frank Myers AutoMaxx, LLC,* No. C–4353 (F.T.C. Apr. 19, 2012); Complaint, *Ramey Motors, Inc.,* No. C–4354 (F.T.C. Apr. 19, 2012); Complaint, *Fed. Trade Comm'n* v. *Hope for Car Owners, LLC,* No. 2:12–cv–00778–GEB–EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n* v. *NAFSO VLM, Inc.,* No. 2:12–cv–00781–KJM–EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003); Complaint, *Pacifico Ardmore, Inc.,* No. C–3920 (F.T.C. Feb. 7, 2000).

[89] Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. *See* Press Release, Fed. Trade Comm'n, ''Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing'' (Mar. 26, 2015), *https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown.*

[90] For example, the FTC has held public workshops: (1) in conjunction with the National Highway Traffic Safety Administration to examine the consumer privacy and security issues posed by automated and connected motor vehicles, *see* Fed. Trade Comm'n, ''Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles'' (June 28, 2017), *https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected;* (2) to explore competition and related issues in the U.S. motor vehicle distribution system including how consumers and businesses may be affected by State regulations and emerging trends in the industry, *see* Fed. Trade Comm'n, ''Auto Distribution: Current Issues & Future Trends'' (Jan. 19, 2016), *https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends;* (3) on military consumer financial issues, including automobile purchases, financing, and leasing, *see* Fed. Trade Comm'n, ''Military Consumer Workshop'' (July 19, 2017), *https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop;* and (4) through a series of three roundtables on numerous issues in selling, financing, and leasing automobiles, *see* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Apr. 12, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/04/road-ahead-selling-financing-leasing-motor-vehicles;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Aug. 2, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Nov. 17, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/11/road-ahead-selling-financing-leasing-motor-vehicles; see also* Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811, at 6 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (stating that the Director of the Navy-Marine Corps Relief Society in San Diego indicated before the California Assembly Committee on Banking and Finance that ''the number one issue they are confronted with is used car dealers who are taking advantage of military personnel''). These events, and others, have included speakers representing consumers, dealers, regulators, and other industry stakeholders.

As discussed in the NPRM, the Commission's law enforcement partners have also brought actions addressing unfair, abusive, and deceptive practices in the motor vehicle industry. For example, the Consumer Financial Protection Bureau (''CFPB'') has taken action against third-party motor vehicle financing entities in matters that raise similar, and sometimes identical, claims of deceptive and unfair acts or practices as have been at issue in FTC enforcement actions.[91]

In addition, States have engaged in enforcement actions alleging similar dealer misconduct in the motor vehicle dealer marketplace, and have implemented legislative and regulatory measures to address corresponding consumer protection issues. With regard to law enforcement, State regulators and Attorneys General have participated in law enforcement sweeps with the FTC, and have filed hundreds of actions alleging unlawful conduct by motor vehicle dealerships across the country.[92] Furthermore, with regard to legislative and regulatory efforts, at least four States have enacted consumer protection measures relating to pricing or add-ons by motor vehicle dealers.[93] For example, to ''ensure that dealers do not add in hidden or undisclosed costs after the price for a vehicle has been advertised,'' Oregon promulgated a rule that requires dealerships to state an ''offering price'' that is the actual offer and amount the consumer can pay to own the vehicle, excluding only taxes and other specific items.[94] California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory tax, title, and registration fees.[95] Other States, such as Indiana, have enacted codes that prohibit the sale of add-ons in certain circumstances.[96]

The Commission and its law enforcement partners also regularly provide business guidance and consumer education regarding the motor vehicle marketplace. The Commission has compiled its motor vehicle business guidance into a portal on its website, with links to guidance documents, frequently asked questions, and legal resources.[97] Likewise, the Commission provides a web page for consumers to learn more about buying, financing, and leasing motor vehicles.[98] Several States have published similar such guidance manuals for motor vehicle dealers,[99]

[91] The CFPB has brought at least 23 enforcement actions involving motor vehicles, financing, or add-on products or services. *See* Consent Order ¶¶ 3, 13–57, *Toyota Motor Credit Corp.,* CFPB No. 2023–CFPB–0015 (Nov. 20, 2023) (finding auto lender engaged in unfair or abusive acts or practices by making it unreasonably difficult for consumers to cancel unwanted add-ons; failing to ensure consumers received refunds of payments they had made for certain add-ons that had become void and worthless; and failing to provide refunds owed to consumers who canceled their vehicle service agreements);

Complaint ¶¶ 75–104, *CFPB* v. *USASF Servicing, LLC,* No. 1:23–cv–03433–VMC (N.D. Ga. Aug. 2, 2023) (alleging auto loan servicer illegally disabled and repossessed consumers' vehicles, wrongfully double-billed consumers, misapplied payments, and failed to ensure refunds of unearned GAP premiums to which consumers were entitled); Consent Order ¶¶ 7–33, *TMX Finance LLC,* CFPB No. 2023–CFPB–0001 (Feb. 23, 2023) (finding auto lender understated and inaccurately disclosed the finance charge and annual percentage rate on loans and unfairly charged borrowers for a product that provided no benefit); Complaint ¶¶ 33–135, 171–226, *CFPB* v. *Credit Acceptance Corp.,* No. 1:23–cv–00038 (S.D.N.Y. Jan. 4, 2023) (alleging indirect auto lender misrepresented key terms of loans provided to subprime and deep-subprime consumers and substantially assisted dealers in the deceptive sale of add-on products); Consent Order ¶¶ 7–22, *Wells Fargo Bank, N.A.,* CFPB No. 2022–CFPB–0011 (Dec. 20, 2022) (finding bank incorrectly applied borrowers' auto loan payments, erroneously assessed fees and interest, wrongly repossessed borrowers' vehicles, and failed to ensure borrowers received refunds of unearned GAP fees at early payoff); Consent Order ¶¶ 4–55, *Hyundai Capital America,* CFPB No. 2022–CFPB–0005 (July 26, 2022) (finding auto finance company furnished inaccurate information about consumers to credit reporting agencies); Consent Order ¶¶ 4–14, *3rd Generation, Inc.,* CFPB No. 2021–CFPB–0003 (May 21, 2021) (finding subprime auto loan servicer charged interest on late payments of fees without the knowledge or consent of consumers); Consent Order ¶¶ 8–50, *Santander Consumer USA Inc.,* CFPB No. 2020–BCFP–0027 (Dec. 22, 2020) (finding auto finance company provided inaccurate records to credit reporting agencies); Consent Order ¶¶ 11–52, *Nissan Motor Acceptance Corp.,* CFPB No. 2020–BCFP–0017 (Oct. 13, 2020) (finding auto finance company misrepresented financing extension agreements, repossessions, and limitations to consumer bankruptcy protections); Consent Order ¶¶ 8–22, *Lobel Fin. Corp.,* CFPB No. 2020–BCFP–0016 (Sept. 21, 2020) (finding auto-loan servicer unfairly charged delinquent consumers add-on charges in the form of Loss Damage Waiver premiums); Consent Order ¶¶ 6–30, *Santander Consumer USA Inc.,* CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding auto finance company sold GAP to consumers with LTV over 125%, misrepresenting that such consumers would be fully covered with total loss);

Consent Order ¶¶ 27–39, *Wells Fargo Bank, N.A.,* CFPB No. 2018–BCFP–0001 (Apr. 20, 2018) (finding bank imposed duplicative or unnecessary forced-placed auto loan insurance on consumers); Consent Order ¶¶ 12–23, *Toyota Motor Credit Corp.,* CFPB No. 2016–CFPB–0002 (Feb. 2, 2016) (finding auto finance company engaged in discriminatory pricing markup for motor vehicle financing, without regard to creditworthiness); Consent Order ¶¶ 73–75, *Y King S Corp.,* CFPB No. 2016–CFPB–0001 (Jan. 21, 2016) (finding used car dealer failed to disclose mandatory add-ons as financing charges); Consent Order ¶¶ 12–51, *Interstate Auto Grp., Inc.,* CFPB No. 2015–CFPB–0032 (Dec. 17, 2015) (finding dealership and financing company reported information they knew or had reasonable cause to believe was inaccurate to credit reporting entities, harming consumer credit); Consent Order ¶¶ 7–90, *Westlake Servs., LLC,* CFPB No. 2015–CFPB–0026 (Sept. 30, 2015) (finding indirect auto financing entity used illegal debt collection tactics); Consent Order ¶¶ 8–23, *Fifth Third Bank,* CFPB No. 2015–CFPB–0024 (Sept. 28, 2015) (finding discrimination against loan applicants in credit applications based on characteristics such as race and national origin); Consent Order ¶¶ 9–24, *Am. Honda Fin. Corp.,* CFPB No. 2015–CFPB–0014 (July 14, 2015) (same);

Consent Order ¶¶ 4–60, *DriveTime Auto. Grp., Inc.,* CFPB No. 2014–CFPB–0017 (Nov. 19, 2014) (finding buy-here-pay-here dealership made harassing debt collection calls and provided inaccurate credit information to credit reporting agencies); Consent Order ¶¶ 4–37, *First Investors Fin. Servs. Grp., Inc.,* CFPB No. 2014–CFPB–0012 (Aug. 20, 2014) (finding auto financing company provided inaccurate records to credit reporting agencies); Consent Order ¶¶ 7–27, *Ally Fin. Inc.,* CFPB No. 2013–CFPB–0010 (Dec. 20, 2013) (finding auto lender engaged in discriminatory pricing); Consent Order ¶¶ 14–29, *U.S. Bank Nat'l Ass'n,* CFPB No. 2013–CFPB–0004 (June 26, 2013) (finding bank failed to properly disclose all the fees charged to participants in the companies' Military Installment Loans and Educational Services auto loans program, and misrepresented the true cost and coverage of add-on products financed along with the auto loans); Consent Order ¶¶ 10–22, *Dealers' Fin. Servs., LLC,* CFPB No. 2013–CFPB–0004 (June 26, 2013) (finding financing company made deceptive statements regarding the cost of add-on products and the scope of coverage of the vehicle service contract).

[92] Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. *See* Press Release, Fed. Trade Comm'n, ''Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing'' (Mar. 26, 2015), *https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown.* Separately, the California Attorney General's office sued a dealership chain under State consumer protection laws for deceiving consumers about add-on product charges and misrepresenting consumers' income on credit applications; the alleged practices specifically targeted low-income consumers with subprime credit. Complaint ¶¶ 37–86, *People* v. *Paul Blanco's Good Car Co. Auto Grp.,* No. RG–19036081 (Cal. Super. Ct. Sept. 23, 2019).

[93] *See, e.g.,* Cal. Veh. Code 11713.1(b), (c); Or. Admin. R. 137–020–0020(3)(c); Wis. Admin. Code Trans. 139.03(3); Ind. Code 24–4.5–3–202.

[94] Or. Admin. R. 137–020–0020(3)(c); Official Commentary, Or. Admin. R. 137–020–0020(3)(c).

[95] Cal. Veh. Code 11713.1(b), (c); Wis. Admin. Code Trans. 139.03(3).

[96] Ind. Code 24–4.5–3–202(3)(e)(ix) (prohibiting the sale of any GAP coverage when the LTV is less than 80%); Cal. Civ. Code 2982.12(a)(5)(B) (prohibiting the sale of any GAP waiver in three scenarios, including when the amount financed for the vehicle exceeds the amount covered by the GAP waiver).

[97] *See* Fed. Trade Comm'n, Business Guidance, ''Automobiles,'' *https://www.ftc.gov/business-guidance/industry/automobiles* (last visited Dec. 5, 2023).

[98] *See* Fed. Trade Comm'n, ''Buying and Owning a Car,'' *https://consumer.ftc.gov/shopping-and-donating/buying-and-owning-car* (last visited Dec. 5, 2023).

[99] *See, e.g.,* Ill. Sec'y of State Police, Dealer Handbook (Apr. 2022), *https://www.ilsos.gov/publications/pdf_publications/sos_dop66.pdf;* Wis. DOT—Div. of Motor Vehicles, Motor Vehicle Salesperson Manual—2020, *https://wisconsindot.gov/Documents/dmv/shared/salesmanual-20.pdf;* Enf't Div. of the Tex. Dep't of Motor Vehicles, Motor Vehicle Dealer Manual (2017), *https://www.txdmv.gov/sites/default/files/body-files/Motor_Vehicle_Dealer_Manual.pdf.*

while others have provided online consumer education resources.[100]

While some commenters stated that existing Federal and State efforts are sufficient, recent Commission and partner actions indicate that misconduct has persisted despite prior law enforcement and other efforts, and despite the NPRM's detailed description of chronic problems relating to bait-and-switch tactics and hidden add-on and other charges. For example, in a recent enforcement action, filed after publication of the NPRM, the Commission charged several auto dealer locations in an auto dealership group with misrepresenting the price of vehicles. According to the complaint, the dealers advertised one price to lure consumers to their dealerships, then charged them hundreds to thousands of dollars more than the advertised price by tacking on bogus extra fees for inspection, reconditioning, preparation, and certification.[101] The action also addressed the practice of dealers charging Black and Latino consumers these fees more often and in higher amounts.[102]

Multiple actions by partners since publication of the Commission's NPRM have involved auto add-ons. The Commission and the State of Wisconsin alleged that a dealership group, its current and former owners, and its general manager deceived consumers by tacking on hundreds or even thousands of dollars for add-ons without those consumers' authorization or by leading the consumers to believe the add-ons were mandatory, and doing so disproportionately more frequently with American Indian customers.[103] The CFPB and the New York State Office of the Attorney General alleged that a subprime auto lender knew or recklessly disregarded that dealers were tricking borrowers into purchasing add-on products without their knowledge or consent and had incentivized such behavior.[104] In addition, the Commonwealth of Massachusetts has brought two recent cases involving unfair add-on pricing practices.[105] In one such case, Massachusetts emphasized the dynamics of auto transactions that frequently lead to deceptive and unfair practices, particularly with respect to add-ons, noting that add-on products ''are often sprung on consumers in the final steps of completing a transaction'' after ''multiple rounds of negotiation on the price of a car and/or car financing.'' [106]

Efforts to combat deceptive and unfair practices in the motor vehicle industry since the NPRM have gone beyond enforcement actions. The CFPB announced that it uncovered several unlawful practices through supervisory examinations, including auto loan servicers charging for add-ons that provide no benefit to the consumer [107] and failing to ensure consumers received refunds for add-on products that no longer offered any benefits.[108] In addition, the State of California enacted new legislation that regulates a particular type of add-on product—GAP agreements.[109] A press release introducing the legislation cited concerns about unfair practices in the sale of GAP agreements, stating that this add-on has little value and is often targeted at consumers with lower incomes and subprime credit.[110] California's law requires several disclosures related to GAP agreements, including disclosures pertaining to their financed cost and informing consumers that such products are optional.[111] The law also prohibits the sale of GAP agreements that will not actually cover consumers' debt.[112]

Despite the array of actions by the Commission and its partners, unfairness and deception continue in the motor vehicle marketplace, including (1) deceptive or unfair sales and advertising tactics and (2) hidden charges, particularly with respect to add-on products or services. To address the harm these issues inflict on consumers and on law-abiding dealers, the Final Rule, in general:

- Prohibits dealers from making misrepresentations regarding material information, including about the cost of the vehicle, the financing terms, and the availability of rebates or discounts;
- Requires dealers to disclose the offering price of the vehicle—its full cash price, provided that dealers may exclude required government charges; that optional add-ons are not required; the total of payments for the vehicle when making a representation about monthly payment; and that a discussed lower monthly payment will increase

[100] *See, e.g.,* Cal. Dept. of Just., ''Buying and Maintaining a Car,'' *https://oag.ca.gov/consumers/general/cars* (last visited Dec. 5, 2023); Fla. Highway Safety & Motor Vehicles, ''Buying from a Licensed Dealer,'' *https://www.flhsmv.gov/safety-center/consumer-education/buying-vehicle-florida/buying-licensed-dealer* (last visited Dec. 5, 2023); Or. Dep't of Just., ''Buying a Vehicle,'' *https://www.doj.state.or.us/consumer-protection/motor-vehicles/buying-a-vehicle/* (last visited Dec. 5, 2023).

[101] Complaint ¶ 17, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–2670 (D. Md. Oct. 18, 2022).

[102] *Id.* ¶ 18. Recent actions outside the auto marketplace, even in transactions that may not be as complex and time consuming as motor vehicle transactions, further illustrate unfair and deceptive practices related to advertising, add-ons, and hidden charges. In one such action, the court noted ''the realities of the disparate bargaining power'' between the corporate defendant and its customers, adding that customers ''might have believed the [add-on] fees were mandatory,'' and ''might not have had the time'' to negotiate or complain about them. *Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 1:19–cv–5727, 2022 WL 3350066, at *13 (N.D. Ga. Aug. 9, 2022) (granting the Commission's motion to exclude the defendant's expert testimony); *see also Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1337 (N.D. Ga. 2022) (finding on summary judgment that (1) defendants did not tell consumers about fees at sign-up; (2) disclosures about fees in contractual documents were inadequate; and (3) defendants failed to get consent to add-on charges); *id.* at 1334 (concluding that defendants had ''charged a slew of fees that: were never discoverable to customers [and] were obscured by undecipherable language''); Complaint ¶¶ 41–43, *Fed. Trade Comm'n* v. *Harris Originals of NY, Inc.,* No. 2:22–cv–4260 (E.D.N.Y. July 20, 2022) (alleging that a jewelry company charged military consumers for add-on products without their consent or under false pretenses); Complaint ¶¶ 61–73, *Fed. Trade Comm'n* v. *Benefytt Techs., Inc.,* No. 8:22–cv–1794 (M.D. Fla. Aug. 8, 2022) (alleging illegal add-on charges by healthcare companies); Complaint ¶¶ 1–4, *Fed. Trade Comm'n* v. *First Am. Payment Sys., LP,* No. 4:22–cv–654 (E.D. Tex. July 29, 2022) (alleging that a payment processing company misrepresented the terms and costs of its services, resulting in unexpected and unauthorized fees); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420, 77435–37 (released Oct. 11, 2023; published Nov. 9, 2023), *https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf.*

[103] Complaint ¶¶ 3–5, 11–18, 33–43, 48–51, *Fed. Trade Comm'n* v. *Rhinelander Auto Ctr., Inc.,* No. 3:23–cv–00737 (W.D. Wis. Oct. 24, 2023).

[104] Complaint ¶¶ 128–30, *CFPB* v. *Credit Acceptance Corp.,* No. 1:23–cv–38 (S.D.N.Y. Jan. 4, 2023).

[105] Complaint ¶ 3, *Massachusetts* v. *Jaffarian's Serv., Inc.,* No. 2277–cv–881 (Mass. Super. Ct. Sept. 15, 2022); Assurance of Discontinuance ¶¶ 7–9, *In re Hometown Auto Framingham, Inc.,* No. 2384–cv–116 (Mass. Super. Ct. Jan. 17, 2023).

[106] Complaint ¶ 5, *Massachusetts* v. *Jaffarian's Serv., Inc.,* No. 2277–cv–881 (Mass. Super. Ct. Jan. 17, 2023).

[107] Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 24, Summer 2021'' 3–4 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf* (finding servicers added and maintained unnecessary collateral protection insurance (CPI) when consumers had adequate insurance and thus the CPI provided no benefit to the consumers, and also when consumers' vehicles had been repossessed even though no actual insurance protection was provided after repossession).

[108] Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 28, Fall 2022'' 4–5 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (finding consumers paid off their vehicle financing early but servicers failed to ensure consumers received refunds for unearned fees related to add-on products which no longer offered any possible benefit to consumers after payoff).

[109] Cal. Civ. Code 2982.12.

[110] Press Release, Off. of the Att'y Gen. of Cal., ''Attorney General Bonta and Assemblymember Maienschein Announce Legislation to Strengthen Protections for Car Buyers'' (Feb. 16, 2022), *https://oag.ca.gov/news/press-releases/attorney-general-bonta-and-assemblymember-maienschein-announce-legislation.*

[111] Cal. Civ. Code 2982.12.

[112] *Id.*

the total amount the consumer will pay, if true;

- Prohibits dealers from charging for add-on products or services that provide no benefit to the consumer; and
- Requires dealers to obtain express, informed consent from the consumer for any charge.

As discussed in the section-by section analysis in SBP III and in response to comments, the Commission is declining to finalize certain provisions proposed in the NPRM, including the provision that dealers must disclose a list of prices for all optional add-on products or services, and the provision that dealers must obtain certain signed declinations from consumers prior to charging for optional add-on products or services. The Commission also is finalizing the defined terms ''Covered Motor Vehicle'' and ''Covered Motor Vehicle Dealer'' to reflect edits to narrow the scope of these definitions compared to the scope of the terms ''Motor Vehicle'' and ''Motor Vehicle Dealer'' in the NPRM.

III. Section-by-Section Analysis

The following discussion provides a section-by-section analysis that states the provisions proposed in the NPRM, and discusses the comments received, the Commission's responses to comments, and the provisions adopted in the Final Rule.[113]

A. § 463.1: Authority

Section 463.1 states that the Final Rule is promulgated pursuant to section 1029 of the Dodd-Frank Act, and that it is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the FTC Act to violate, directly or indirectly, any provision of the Final Rule, including the recordkeeping requirements, which are necessary to prevent such unfair or deceptive acts or practices and to enforce this Rule.[114] The prohibition against violating any applicable provision ''directly or indirectly'' applies to each section of part 463. As discussed in SBP I.A, section 1029 authorizes the FTC to prescribe rules under Sections 5 and 18(a)(1)(B) of the FTC Act with respect to motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[115]

[113] Regarding the thousands of comments received, the Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the Final Rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

[114] The proposed authority provision in the NPRM omitted the second reference to ''unfair'' acts or practices with regard to the proposed recordkeeping requirements; the Final Rule consistently refers to both ''unfair'' and ''deceptive'' acts or practices together.

[115] One industry group argued that the proposed rule violated the APA because it did not comply with the FTC's rule requiring publication of an Advance Notice of Proposed Rulemaking (''ANPR''), 16 CFR 1.10. Section 1.10, however, like the rest of subpart B of part 1 of the Commission's Rules of Practice, applies only to ''proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act.'' 16 CFR 1.7. The ANPR requirement in section 1.10 implements section 18(b)(2) of the FTC Act, which requires an ANPR when the Commission promulgates rules under the procedures set forth in that section. In this case, the FTC is acting under statutory authority under section 1029(d) of the Dodd-Frank Act, *see* NPRM at 42031, which authorizes the Commission to promulgate rules using the APA's informal notice-and-comment procedure, *see* 5 U.S.C. 553, notwithstanding the additional procedural requirements set forth in section 18. Accordingly, this rulemaking is governed by subpart C of part 1 of the Commission's Rules of Practice, which ''sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act.'' 16 CFR 1.21. Neither subpart C nor the APA requires publication of an ANPR.

This is consistent with Commission practice in prior notices to issue or amend regulations, including with the Made in USA Labeling Rule, the Children's Online Privacy Protection Act Rule, and the Telemarketing Sales Rule. *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Made in USA Labeling Rule, 85 FR 43162 (July 16, 2020), *https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-13902.pdf* (issuing original notice of proposed rulemaking that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 64 FR 22750 (Apr. 27, 1999), *https://www.govinfo.gov/content/pkg/FR-1999-04-27/pdf/99-10250.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 60 FR 8313 (Feb. 14, 1995), *https://www.govinfo.gov/content/pkg/FR-1995-02-14/pdf/95-3537.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 78 FR 41200 (July 19, 2013), *https://www.govinfo.gov/content/pkg/FR-2013-07-09/pdf/2013-12886.pdf* (issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Proposed Rule, Children's Online Privacy Protection Rule, 76 FR 59804 (Sept. 27, 2011), *https://www.govinfo.gov/content/pkg/FR-2011-09-27/pdf/2011-24314.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 74 FR 41988 (Aug. 19, 2009), *https://www.govinfo.gov/content/pkg/FR-2009-08-19/pdf/E9-19749.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 70 FR 2580 (Jan. 14, 2005), *https://www.govinfo.gov/content/pkg/FR-2005-01-14/pdf/05-877.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 67287 (Nov. 17, 2004), *https://www.govinfo.gov/content/pkg/FR-2004-11-17/pdf/04-25470.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 7330 (Feb. 13, 2004), *https://www.govinfo.gov/content/pkg/FR-2004-02-13/pdf/04-3287.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 67 FR 4492 (Jan. 30, 2002), *https://www.govinfo.gov/content/pkg/FR-2002-01-30/pdf/02-1998.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 66 FR 54963 (Oct. 31, 2001), *https://www.govinfo.gov/content/pkg/FR-2001-10-31/pdf/01-27390.pdf* (same). This is also true of regulation amendments pursuant to the authority under which this Final Rule is promulgated—that which Congress granted to the Commission under section 1029 of the Dodd-Frank Act, 15 U.S.C. 5519, pertaining to motor vehicle dealers. *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Used Motor Vehicle Trade Regulation Rule, 77 FR 74746, 74748 (Dec. 17, 2012), *https://www.govinfo.gov/content/pkg/FR-2012-12-17/pdf/2012-29920.pdf* (''Because the Dodd-Frank Act authorized the Commission to use APA procedures for notice and public comment in issuing or amending rules with respect to motor vehicle dealers, the FTC will not use the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a, with respect to these proposed revisions to the Used Car Rule and the Used Car Buyers Guide. Accordingly, the Commission is publishing this Notice of Proposed Rulemaking pursuant to Section 553 of the APA.''); *see also* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act (''Privacy Rule''), 84 FR 13150 (Apr. 4, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-04-04/pdf/2019-06039.pdf* (issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking).

This same commenter argued the FTC had not complied with the ''Principles of Regulation'' enumerated in section 1(b) of Executive Order 12866. *See* Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 34–36 & n.123; E.O. 12866 3(b) (defining ''Agency'' to mean an authority of the United States ''other than those considered to be independent regulatory agencies''). This provision of the Executive Order does not apply to independent agencies such as the FTC. Regardless, the Commission did take into account the principles set forth in section 1(b), as is evident throughout the NPRM. *See, e.g.,* NPRM at 42015–17 (identifying problems in the marketplace); *id.* at 42028–42031 (soliciting comments on alternative approaches); *id.* at 42036–42044 (assessing costs and benefits).

The same commenter also argued that the Commission's denial of its request to extend the comment period prejudiced the commenter's ability to collect and provide data pertaining to the proposed rule and was inconsistent with the Commission's grant of extensions in other rulemakings. As described in its letter, the Commission also received requests opposing an extension of the comment period. *See* Letter, Fed. Trade Comm'n, ''Duration of the Public Comment Period in Matter No. P204800'' (Aug. 23, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20204800%20-%20Letter%20re%20Extension%20for%20publication.pdf.* In the letter, the Commission noted its ongoing engagement with stakeholders on issues relating to the sale, financing, and lease of motor vehicles, since before its 2011 **Federal Register** notice inviting stakeholder feedback on these issues and continuing since that time. *See* Fed. Trade Comm'n, Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 FR 14,014 (Mar. 15, 2011), *https://www.federalregister.gov/documents/2011/03/15/2011-5873/public-roundtables-protecting-consumers-in-the-sale-and-leasing-of-motor-vehicles.* The Commission determined that a sixty-day comment period, along with an additional twenty days following the public announcement and release of the NPRM and prior to its publication in the **Federal Register**, provided meaningful opportunity to comment. *See also* Steven J. Balla, ''Public Commenting on Federal Agency Regulations: Research on Current Practices

Continued

The Final Rule defines with specificity certain unfair or deceptive acts or practices; the Final Rule provisions are also ''prescribed for the purpose of preventing such acts or practices.'' [116]

B. § 463.2: Definitions

1. Overview

The proposed rule included definitions for the following terms: ''Add-on'' or ''Add-on Product(s) or Service(s)''; ''Add-on List''; ''Cash Price without Optional Add-ons''; ''Clearly and Conspicuously''; ''Dealer'' or ''Motor Vehicle Dealer''; ''Express, Informed Consent''; ''GAP Agreement''; ''Government Charges''; ''Material'' or ''Materially''; ''Motor Vehicle''; and ''Offering Price.'' In the definition-by-definition analysis in SBP III.B.2, the Commission discusses each definition proposed in the NPRM, relevant comments that are not otherwise addressed in the discussion of the corresponding substantive provisions of the Final Rule, and the definition the Commission is finalizing.

2. Definition-by-Definition Analysis

(a) Add-On or Add-On Product(s) or Service(s)

The proposed rule defined ''Add-on'' or ''Add-on Product(s) or Service(s)'' as ''any product(s) or service(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction.'' This term appeared in the following definitions and substantive provisions of the rule proposal: the definitions of ''Add-on List'' and ''Cash Price without Optional Add-ons''; the Prohibited Misrepresentations provision at proposed § 463.3(b); the add-on list disclosure provision at proposed § 463.4(b); the requirement to disclose that add-ons are not required at proposed § 463.4(c); the prohibition against charging for add-ons that provide the consumer no benefit at proposed § 463.5(a); and the proposed provision relating to undisclosed or unselected add-ons at § 463.5(b). As discussed in the following paragraphs, in response to stakeholder comments, the Commission declines to finalize certain of these provisions; in the Final Rule, this term appears in paragraph (a) of the Prohibited Misrepresentations section (§ 463.3); the Disclosure Requirements provision in paragraph (c) of § 463.4; and the provision in § 463.5(a) titled ''Dealer Charges for Add-ons and Other Items'' and subtitled ''Add-ons that provide no benefit.''

For the following reasons, the Commission adopts the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' largely as proposed, with conforming modifications to reflect changes to the defined terms '''Covered Motor Vehicle' or 'Vehicle''' and '''Covered Motor Vehicle Dealer' or ''Dealer''' as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

The Commission received several comments relating to the scope of its proposed definition for ''Add-on'' or ''Add-on Product(s) or Service(s).'' Industry association and other commenters recommended that the Commission broaden the definition to include manufacturer-provided products or services, expressing concern that exclusion of such products or services would put other companies that provide such items at a competitive disadvantage. Products or services provided by manufacturers, however, are already covered by several provisions of the Final Rule. Under the substantive provisions the Commission is finalizing, dealers are prohibited from making misrepresentations regarding material information, including about the ''costs or terms of purchasing, financing, or leasing a Vehicle'' (§ 463.3(a)); must disclose the vehicle's true ''Offering Price,'' which includes any amounts dealers charge for items already installed or provided by the manufacturer (§§ 463.4(a) and 463.2(k)); and are required to obtain ''Express, Informed Consent'' for charges for any item (§§ 463.5(c) and 463.2(g)). The additional substantive add-on-specific provisions [117] address harms associated with products or services not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer. Commenters did not provide evidence that the proposed provisions covering manufacturer-provided products or services would be insufficient to address consumer harm. Accordingly, the Commission has determined not to include manufacturer-provided products or services within this defined term. The Commission will continue to monitor this issue to determine whether additional action is warranted.

One individual commenter expressed concern that, under the Commission's proposed definition, dealers could raise the price of a vehicle by advertising additional products or services, such as ''free lifetime benefits'' with the vehicle, and that dealers could mislead consumers by charging more for the vehicle based on a supposedly ''free'' add-on.[118] The Commission notes that the Rule the Commission is finalizing contains several provisions relating to this concern. For example, dealers are prohibited from making misrepresentations under § 463.3, including misrepresentations regarding ''*costs,* limitation, benefit, or any other aspect'' of add-ons.[119] Furthermore, dealers are required to disclose a vehicle's offering price, which must include charges for required add-ons; this disclosure will allow consumers to know the true price of the vehicle and comparison shop before selecting and visiting a particular dealership.[120]

Several dealership association commenters expressed concern that the proposed definition was too broad, contending that it might apply to hundreds of items and include fees, such as a processing or document fee, that a dealer charges a consumer. As discussed in SBP III.B.2(b), III.D.2(b), and III.E.2(b), upon careful review of comments, including comments regarding the breadth of this requirement, the Commission has determined not to finalize the provision that would have required listing all optional add-ons—the ''Add-on List'' definition and the associated requirement that dealers disclose such a list—as well as proposed § 463.5(b) relating to undisclosed or unselected add-ons.[121] The remaining substantive provisions that use the term ''Add-ons'' prohibit misrepresentations (§ 463.3(b)); require dealers to disclose, if true, that add-ons are not required (§ 463.4(c)); and prohibit charges for add-ons that provide the consumer no benefit (§ 463.5(a)). The law already prohibits misrepresentations, regardless of the product or service at issue; dealers that offer consumers additional products or services are already required to ask

and Recommendations to the Administrative Conference of the United States'' App. A (2011), *https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf* (reporting data from a pool of 703 comment periods associated with actions by dozens of Federal agencies, and finding that the average duration of comment periods for proposed agency actions was 38.7 days, and 45.1 days for actions that are economically significant).

[116] 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[117] §§ 463.3(b), 463.4(c), 463.5(a).

[118] Individual commenter, Doc. No. FTC–2022–0046–7445 at 10–11.

[119] § 463.3(b) (emphasis added).

[120] *See* §§ 463.2(k) (defining Offering Price), 463.4(a) (requiring disclosure of Offering Price); *see also* § 463.3(p) (prohibiting misrepresentations regarding the disclosures required by the Final Rule).

[121] *See* NPRM at 42044, 42046 (proposed §§ 463.2(b), 463.4(b), 463.5(b)).

consumers if they want such products, rather than suggesting that such products or services are mandatory, when they are not; and any hardship associated with refraining from charging for products or services that provide consumers no benefits are outweighed by the harms to consumers and competition from permitting this practice, as explained in the analysis of § 463.5(a).

Commenters including an industry association suggested limiting the definition to products or services sold at the ''point of vehicle purchase'' to clarify that indirect charges, such as the inclusion of a one-year subscription to a satellite radio service, need not be separately itemized.[122] The industry association commenter suggested that, as proposed, the definition would include charges for which dealers and consumers ''would otherwise not account.'' [123] The Commission has determined not to finalize the add-on list and form requirements in proposed §§ 463.4(b) and 463.5(b). For the provisions being finalized, excluding subscription charges, or including only items added to the vehicle at the ''point of vehicle purchase,'' would narrow the definition of ''Add-on'' and the corresponding requirements in a manner that would allow for deceptive or unfair practices, including by allowing dealers to represent a price that is not the offering price, or to deceptively state that add-ons are required. In the example provided by the commenter, if the satellite radio subscription service is mandatory, it needs to be included in the offering price of the vehicle, as required by § 463.4(a) of the Final Rule; if it is not mandatory, the dealer needs to disclose, when making any representations about the service, that it is not required under § 463.4(c). Further, regardless of whether such a product or service is mandatory or optional, dealers must follow other aspects of the Final Rule, including by not making any misrepresentations about the subscription under § 463.3 and by obtaining the express, informed consent of the consumer for the associated charges under § 463.5(c).

Another industry association commenter contended that add-ons sold in the marine industry are typically different than those offered in the context of automobile sales and described in the NPRM. While all motor vehicle dealers must refrain from engaging in deceptive or unfair conduct relating to add-ons, the Commission is excluding recreational boats and marine equipment from the Final Rule's definition of '' 'Covered Motor Vehicle' or 'Vehicle,' '' as discussed in additional detail in the definition-by-definition analysis of § 463.2(e) in SBP III.B.2(e).

An industry association commenter and comments from a number of dealership associations noted that certain State laws already regulate the sale of add-ons, including, for example, laws in many States that regulate vehicle sales contracts or deceptive sales practices generally or that regulate insurance products. To the extent that the Final Rule's add-on provisions may duplicate State law, commenters have provided no evidence that any such duplication in the provisions that incorporate this defined term—which prohibit misrepresentations, require disclosures in the event add-ons are not required, and prohibit charges for add-ons from which the consumer would not benefit—will harm consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under the Final Rule, State laws may provide more or less specific requirements as long as such requirements are not inconsistent with part 463, as set forth at § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.[124]

A few dealership association commenters expressed concern that the proposed definition of ''Add-on Products or Services'' would include insurance-related products, such as credit life and credit disability insurance, and as such, could implicate the McCarran-Ferguson Act's reverse-preemption of certain Federal laws that ''invalidate, impair, or supersede'' State laws enacted ''for the purpose of regulating the business of insurance.'' [125] Commenters have provided no evidence that the Rule will invalidate, impair, or supersede State laws enacted for the purpose of regulating the business of insurance.[126] To the contrary, the Final Rule addresses deceptive or unfair conduct—it prohibits dealers, *inter alia,* from making misrepresentations regarding material information about add-ons, from failing to disclose when add-ons are not required, and from charging for add-ons from which the consumer would not benefit. Nor has the Commission been presented with evidence that the Rule's other substantive provisions (prohibiting misrepresentations; requiring disclosures of a vehicle's offering price and about total of payments; and requiring consumers' express, informed consent before charging them) invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance.[127]

A number of industry and dealership association commenters contended that, as proposed, this definition may extend to products or services that are provided by the manufacturer but that are installed by a distributor of motor vehicles, or alternatively, by the dealer, at the instruction of the manufacturer. Relatedly, a State governmental association commenter expressed concern that the proposed definition could create confusion with regard to the sale of used vehicles, where a prior owner of a vehicle may have added a product to the vehicle. The commenter contended that a motor vehicle dealer selling the used vehicle may be unaware of the added product, and further, that listing any such items may confuse buyers.

To the extent the commenters' concerns stem from the proposed provisions related to add-on lists and proposed § 463.5(b)'s provisions related to separate disclosures, the Commission is not finalizing those provisions. Under the provisions being finalized, if a product is provided to the dealer by the manufacturer or another entity, and a consumer chooses to have the product

[122] Comment of Serv. Cont. Indus. Council, Guaranteed Asset Prot. All., & Motor Vehicle Prot. Prods. Ass'n, Doc. No. FTC–2022–0046–8113 at 13–14.

[123] *Id.* at 13.

[124] *See, e.g., English* v. *Gen. Elec. Co.,* 496 U.S. 72, 79 (1990).

[125] *See* 15 U.S.C. 1012(b).

[126] *See Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 129 (1982) (setting forth test for whether an activity constitutes the ''business of insurance''); *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 307–08 (1999) (establishing criteria for whether a Federal law operates to ''invalidate, impair, or supersede'' State law).

[127] The Supreme Court has refused to interpret the McCarran Ferguson Act to invalidate Federal law when applied to remedy a misrepresentation and undo the harm caused by alleged deception. *See SEC* v. *Nat'l Sec., Inc.,* 393 U.S. 453, 462 (1969). Moreover, lower courts have rejected precisely the concern raised by the commenter about credit life insurance. *See Fed. Trade Comm'n.* v. *Dixie Fin. Co.,* 695 F.2d 926, 930 (5th Cir. 1983) (McCarran Ferguson Act does not preclude FTC investigation of ''whether the sale of insurance is a precondition to the arrangement of credit''); *Fed. Trade Comm'n* v. *Mfrs. Hanover Consumer Servs., Inc.,* 567 F. Supp. 992, 94 (E.D. Pa. 1983) (same).

installed and pay for it, the dealer may install it and charge for it, as long as the dealer complies with the provisions of the Final Rule, including by disclosing that the product is not required and by obtaining the consumer's express, informed consent for the charge. If the manufacturer requires the dealer to install the product or if the dealer chooses to install the product, and the dealer requires any consumer to pay charges for it, the amount of the charge must be included in the vehicle's offering price, and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement. Relatedly, regarding used vehicles, if a prior owner of such a vehicle installed an add-on, and the dealer that subsequently sells such a vehicle requires any consumer to pay charges for the add-on, the amount of those charges must be included in the vehicle's offering price and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement at § 463.5(c). If, alternatively, the dealer does not require any consumers to pay for the pre-installed add-on, then the dealer does not have to add that amount to the vehicle's offering price, and there is no charge for that add-on for which the dealer must obtain express, informed consent. Thus, the definition of ''Add-on'' and the Rule requirements being finalized address deceptive or unfair price and add-on disclosures and hidden charges without requiring dealers to list or itemize charges that they do not impose on consumers. For the reasons explained in this section, the Commission is finalizing the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' largely as proposed, with conforming modifications to reflect changes to the defined terms '''Covered Motor Vehicle' or 'Vehicle''' and '''Covered Motor Vehicle Dealer' or 'Dealer''' as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

(b) Add-On List

The NPRM proposed defining the term ''Add-on List,'' which appeared in the associated Add-on List disclosure provision at proposed § 463.4(b), as well as in the recordkeeping provision at proposed § 463.6(a)(2). Based on the following, the Commission has determined not to include this definition in its Final Rule.

Several commenters supported the substantive add-on list proposal and its associated definition, and commenters including consumer advocacy organizations urged the Commission to finalize additional related restrictions or disclosures, such as requiring add-on prices to be fixed and non-negotiable, or requiring a distinct add-on list for each vehicle sold. Other commenters, including dealership associations, raised concerns that, as proposed, the add-on list definition could impose significant economic burdens on dealerships for a disclosure that, in some circumstances, might be too voluminous to be optimally meaningful to consumers, or permit price ranges that could be too broad to prevent abuses and effectively inform consumers.

After careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include the add-on list disclosure provision at proposed § 463.4(b) or the recordkeeping provision at proposed § 463.6(a)(2) in its Final Rule, and therefore will not include a definition of the term ''Add-on List'' in its Final Rule. Here, as elsewhere, the Commission remains committed to promoting fair, non-deceptive, and competitive markets for consumer products and services; it will continue to monitor the marketplace for add-on-related acts or practices that are unfair or deceptive, and will evaluate whether to propose additional measures pertaining to such products and services.

(c) Cash Price Without Optional Add-Ons

The NPRM proposed defining the term ''Cash Price without Optional Add-ons,'' which appeared in the proposed provision addressing undisclosed or unselected add-ons at § 463.5(b). Based on the following, the Commission is declining to finalize this definition.

A number of commenters favored the proposed provision and definition, and several, including consumer advocacy organizations, urged the Commission to include additional requirements, such as requiring the proposed disclosure documents associated with this proposed definition to be available in different languages, while others, including a dealership association, raised concerns that the definition and relevant provision were burdensome or confusing for dealers.

As explained in additional detail in SBP III.E.2(b) with respect to § 463.5(b), in light of commenter concerns that the proposed provision using this term would increase costs for legitimate dealers and add to the time and paperwork for consumers in an already lengthy, paperwork-heavy transaction, the Commission has elected not to include a Cash Price without Optional Add-ons disclosure requirement in its Final Rule. Thus, after careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include a definition of ''Cash Price without Optional Add-ons'' in its Final Rule.

(d) Clearly and Conspicuously

The proposed rule defined the term ''Clearly and Conspicuously'' as ''in a manner that is difficult to miss (*i.e.,* easily noticeable) and easily understandable,'' including in all of seven enumerated ways, listing proposed requirements for ''any communication that is solely visual or solely audible,'' ''[a] visual disclosure,'' ''[a]n audible disclosure,'' and ''any communication using an interactive electronic medium,'' and providing, *inter alia,* that such disclosures ''must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears'' and ''must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.'' Based on the following, the Commission is finalizing this definition largely as proposed, with a modification to clarify that the definition applies whether the term appears as an adjective or an adverb, by adding the parentheses in the following manner to the defined term: ''Clear(ly) and Conspicuous(ly).''

Some consumer advocacy organization commenters favored the Commission's proposed definition while also suggesting that the Commission include a provision requiring translation of any deal consummating documents, including buyer's orders and retail installment sales contracts, into the language in which the negotiations were conducted. This issue, however, is addressed by § 463.5(c) of the Rule, which requires express, informed consent for each item charged.[128] As explained in additional detail in the paragraph-by-paragraph analysis of § 463.5(c) in SBP III.E.2(c), if a deal-consummating document is provided in a language that the consumer does not understand, and the document's contents are not otherwise clearly understood by the consumer, then the consumer is in no position to give unambiguous assent to the charges described therein. The Commission therefore has determined not to add

[128] The language requirements, as they relate to obtaining express, informed consent, are further explained in the discussion of § 463.5(c) in SBP III.E.2(c).

such a provision to its ''Clear(ly) and Conspicuous(ly)'' definition. However, the Commission will continue to monitor the marketplace and determine whether further language requirements or additional measures are warranted to address deceptive or unfair practices—particularly those that target or otherwise disproportionately impact language-minority communities.

Commenters, including consumer advocacy organizations, expressed concern that proposed § 463.2(d)(5) may be read to apply only to certain disclosures with triggering representations and only to disclosures that are in writing. These commenters also requested that the Commission incorporate into its Final Rule the FTC's policy statement regarding foreign language advertising and sales materials, which is separately codified at 16 CFR 14.9.[129] In response, the Commission notes that to be clear and conspicuous, the disclosure must be ''easily understandable,'' as stated in the definition. If a disclosure is being made in a language the consumer does not understand, it does not meet this requirement. Further, the disclosures highlighted by the commenters are indeed subject to the language requirements of § 463.2(d)(5), which requires that disclosures ''appear in each language in which the representation that requires the disclosure appears.'' With regard to the offering price disclosure in § 463.4(a)(1), the applicable ''representation that requires the disclosure'' is the ''advertisement that references . . . a specific Vehicle''; thus, for example, if an advertisement that references a specific vehicle is in Spanish, the offering price disclosure must also be in Spanish. Similarly, in § 463.4(a)(2), the applicable representation that requires the disclosure is an ''advertisement that represents . . . any monetary amount or financing term for any Vehicle.'' In § 463.4(a)(3), the applicable representation is ''any communication . . . that includes a reference . . . regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle.'' In § 463.4(c) and (d), ''any representation'' regarding an add-on product or service or a monthly payment for any vehicle, respectively, triggers the language requirement of § 463.2(d)(5). The monthly payments comparison disclosure in § 463.4(e) is required when there is a ''comparison between payment options . . . that includes discussion of a lower monthly payment.'' Thus, the language requirements in § 463.2(d)(5) apply.

In response to this concern regarding the applicability of § 463.2(d)(5) to disclosures that are not in writing, the Commission notes that its use of the word ''appear'' in § 463.2(d)(5) incorporates common meanings, such as ''to show up,'' ''to come into existence,'' or ''to become evident or manifest,'' which cause this provision to apply whether the representation requiring the disclosure appears visually, orally, or otherwise.[130] Where the Commission instead intended a provision to be limited to a visual disclosure, as in § 463.2(d)(2), the Rule states so explicitly.

In response to the request that the Commission incorporate into this Rule its policy statement regarding foreign language advertising and sales materials, separately codified at 16 CFR 14.9, the Commission emphasizes that the enforcement statement sets out what is already impermissible under current law and is consistent with the requirements the Commission is finalizing. To the extent dealers take actions that are inconsistent with Commission statements about such law, they are risking enforcement proceedings by the Commission or others. Accordingly, the Commission has determined not to add to the Rule further requirements regarding foreign language advertising. The Commission will continue to monitor the market to determine whether further action is warranted.

Industry association commenters raised concerns about how the Commission's proposed definition interacts with other Federal laws, such as Regulations Z and M, which implement the Truth in Lending Act and the Consumer Leasing Act, respectively, and contended that it conflicts with a clear and conspicuous definition in Commodity Futures Trading Commission regulations.[131] Industry and dealership association commenters contended that State advertising standards already address what constitutes ''clear and conspicuous'' advertising and provide guidance on disclosures, such that the FTC's proposal will cause confusion or possible conflict with State law.

The Commission's definition of ''Clear(ly) and Conspicuous(ly)'' is not inconsistent with the existing Federal legal requirements raised by these commenters. Dealers can comply with these laws to the extent they apply as well as with the requirements that follow from the Commission's definition. Regarding State law, commenters did not provide examples of actual conflicts. Further, to the extent there is truly an inconsistency between the operation of the Commission's definition and any State law, the Commission notes that the definition is based on decades of Commission experience policing deceptive and unfair conduct; addresses harmful practices including those related to hidden disclosures and charges; and that § 463.9 of the Final Rule sets out the Rule's relation to State laws.

Other industry association commenters also contended that the proposed definition of ''Clearly and Conspicuously'' would be overly broad and challenging for compliance, but did not explain why or suggest alternative language. In addition, some dealership association commenters requested more guidance to understand the definition. The Commission's definition spells out, in seven subparts, what clear and conspicuous means, using simple terms that provide additional information about how dealers can make a disclosure in a manner that is easily understandable and easily noticeable to the consumer. The definition elaborates basic, common-sense principles, including that visual disclosures be in a size that consumers will easily notice and that audible disclosures be in a volume, speed, and cadence such that consumers will easily hear it. Thus, for example, disclosures in an illegible font, or that consumers cannot hear, are not clear and conspicuous. The Commission also notes that it did not mandate specific fonts, volumes, or other prescriptive measures. Thus, dealers have the flexibility to determine the best way to meet the definition's requirements for their consumers under the circumstances.

A dealership association commenter contended that the proposed definition does not include a reasonableness standard and may be interpreted as prohibiting any limitations and exclusions, given the requirement in proposed § 462.3(d)(7) that a disclosure must not be contradicted or mitigated by or inconsistent with anything else in the communication. The commenter further asked whether a statement such as ''with approved credit'' would

[129] 16 CFR 14.9 is an enforcement policy statement that provides information to advertisers about clear and conspicuous disclosures in foreign language advertisings and sales materials, including ensuring the language of the disclosure matches the language in the publication. *See* 16 CFR 14.9.

[130] *See Appear* (defs. 1b, 4, 6), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/appear* (last visited Dec. 5, 2023); *see also* Order ¶¶ 2–3, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017) (identical usage in definition provision); Order ¶ 2, *Lithia Motors, Inc.,* No. C–4597 (F.T.C. Dec. 8, 2016) (same); Order ¶¶ 2–3, *Jim Koons Mgmt. Co.,* No. C–4598 (F.T.C. Dec. 8, 2016) (same).

[131] 17 CFR 162.2.

impermissibly mitigate an offer of low financing under this proposed definition.[132] The Commission responds as follows. The standard is an objective one, evaluated from the perspective of a reasonable consumer.[133] The definition does not prohibit all advertising that contains limitations and exclusions, but it does provide that if dealers are advertising offers that are limited in some way, they may not misrepresent such offers. Thus, if a dealer presents consumers with an unqualified representation of low financing terms, those terms must be available to typical consumers. Alternatively, a dealer may offer low financing terms to consumers with particular credit characteristics if that requirement is presented in a manner that does not deceive reasonable consumers. For example, a dealer may offer ''0% annual percentage rate (APR) for consumers with a credit score above 800.'' By contrast, it would be deceptive if the dealer offered ''0% APR,'' and then separately disclosed in fine print that such terms are only available to consumers with a credit score above 800, because the qualifying disclosure is inconsistent with an offer of ''0% APR'' that contained no limitations and thus indicated that 0% APR is available to the typical consumer regardless of credit score.[134] Further, the Commission notes that to qualify as clear and conspicuous, ''disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'' [135]

Lastly, another dealership association commenter asked how the proposed definition translates to visual, audible, and electronic media disclosures and expressed concern about subjectivity, characterizing the terms ''easily'' understood and ''unavoidable'' within the proposed definition as subjective and open to different interpretations, particularly in the context of websites and internet promotions. Here, the Commission declines to mandate more prescriptive language regarding, for example, font sizes, what volumes are to be used, and where exactly the language should appear on a website, such as on an overlay with mandated color, size, and location.[136] As courts [137] have recognized, whether a disclosure is clear and conspicuous is an objective standard rather than a subjective one. While more prescriptive language would provide additional objective criteria, the Commission is concerned such language might constrain dealers from determining the best way to meet the definition's requirements for their consumers under the circumstances involved, and might require dealers that are already making clear and conspicuous disclosures to change their existing disclosure materials.

The Commission reiterates that the definition of ''Clear(ly) and Conspicuous(ly)'' elaborates basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures in a volume they can hear. Regarding the requirement that internet disclosures be unavoidable, this language requires evaluating an objective standard—whether or not consumers could have avoided the disclosure. In addition, the disclosure must be easily noticeable and easily understandable, as set forth expressly in the definition. Disclosures that do not meet this standard include those that are buried in other text, including as illustrated by many FTC actions against dealers.[138] Regarding the requirement that disclosures be ''easily'' noticeable and understandable, the standard is also an objective one, evaluated from the perspective of a reasonable consumer. Determining how reasonable consumers are likely to respond may be resolved on the basis of the advertisement, context, or disclosure itself, or based on extrinsic evidence, such as consumer complaints.[139] To this end, as noted previously, the definition enumerates in seven subparts the meaning of clear and conspicuous using simple terms that provide additional guidance on how dealers may make disclosures that are easily understandable and easily noticeable to the consumer.

After carefully considering the comments, the Commission adopts § 463.2(d) with a modification to clarify, through the addition of parentheses—''Clear(ly) and Conspicuous(ly)''—that the definition applies whether the term is used as an adjective or adverb. Consistent with the Commission's experience addressing unfair or deceptive conduct, the Commission has defined the term ''Clear(ly) and Conspicuous(ly)'' to include disclosures that are easily understandable and easily noticeable, while also providing dealers with additional information on how to meet those requirements.[140]

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[132] Comment of Ohio Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–6657 at 4.

[133] *See* FTC Policy Statement on Deception, *supra* note 42, at 2–5.

[134] Complaint ¶¶ 5–7, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016) (alleging ads touting attractive terms deceptively failed to disclose high credit score requirement).

[135] *Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F.2d 1489, 1496–97 (1st Cir. 1989); *see also Fed. Trade Comm'n* v. *Brown & Williamson Tobacco Corp.,* 778 F.2d 35, 42–43 (D.C. Cir. 1985) (finding that a disclosure in virtually illegible form, placed in an inconspicuous corner of Barclay advertisements, did not eliminate deception); *see Fed. Trade Comm'n* v. *Cap. Choice Consumer Credit, Inc.,* 2003 U.S. Dist. LEXIS 29086, at *5 (S.D. Fla. June 2, 2003) (finding that, where advertisements promised a general purpose credit card, such as VISA or MasterCard, ''fine print on reverse side'' of ad clarifying that the credit card was a ''merchandise card and not a major bank card'' was inadequate to modify net impression); *Fed. Trade Comm'n* v. *Cyberspace.com LLC,* 453 F.3d 1196, 1200 (9th Cir. 2006) (rejecting defendant's argument that truthful fine print notices on reverse side of checks, invoices, and marketing inserts cured deception that check/invoice was a refund rather than offer for services); *Fed. Trade Comm'n* v. *Alcoholism Cure Corp.,* No. 3:10–cv–266–J–34JBT, 2011 WL 13137951, at * 51 (M.D. Fla. Sept. 16, 2011) (finding that ''not MD'' disclaimers were inadequate to dispel net impression regarding professional qualifications of defendant and other employees as advertised); *Fed. Trade Comm'n* v. *Wash. Data Res.,* 856 F. Supp. 2d 1247, 1274–75 (M.D. Fla. 2012) (rejecting defendants' argument that retainer agreement contained sufficient disclaimer to dispel a misrepresentation about whether a home loan was guaranteed).

[136] The Commission has included such requirements elsewhere. *See, e.g.,* Order ¶ 6, *United States* v. *Sunkey Publ'g, Inc.,* No: 3:18–cv–1444–HNJ (N.D. Ala. Sept. 6, 2018).

[137] *See. e.g., Palmer* v. *Champion Mortg.,* 465 F.3d 24, 28 (1st Cir. 2006) (applying an objective standard in evaluating Truth in Lending Act claim regarding clear and conspicuous disclosure); *Smith* v. *Check-N-Go of Ill., Inc.,* 200 F.3d 511, 515 (7th Cir. 1999) (same); *Zamarippa* v. *Cy's Car Sales, Inc.,* 674 F.2d 877, 879 (11th Cir. 1982) (same); *Bustamante* v. *First Fed. Sav. & Loan Ass'n,* 619 F.2d 360, 364 (5th Cir. 1980) (same); *see also Herrera* v. *First N. Sav. & Loan Ass'n,* 805 F.2d 896, 900 (10th Cir. 1986) (resolving question of clear and conspicuous disclosure under Truth in Lending Act as a legal, rather than factual, matter); *Dixey* v. *Idaho First Nat'l Bank,* 677 F.2d 749 (9th Cir. 1982) (same).

[138] Complaint ¶¶ 6–14, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015); Complaint ¶ 13, *City Nissan Inc.,* No. C–4524 (F.T.C. May 4, 2015); Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint ¶¶ 4–9, 12–15, 18–20, *Billion Auto, Inc.,* No. C–4356 (F.T.C. May 1, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt and failing to disclose legally required financing and leasing terms); *see also* Complaint ¶¶ 57–60, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

[139] *See* FTC Policy Statement on Deception, *supra* note 42, at 2–5 (describing application of reasonable consumer standard).

[140] *See, e.g.,* Decision and Order, JS Autoworld, Inc., No. C–4535 (F.T.C. Aug. 13, 2015); Decision and Order, Nat'l Payment Network, Inc., No. C–4521 (F.T.C. May 4, 2015); Decision and Order, Matt Blatt Inc., No. C–4532 (F.T.C. July 2, 2015); Decision and Order, Ganley Ford West, Inc., No. C–4428 (F.T.C. Jan. 28, 2014).

(e) Motor Vehicle (Finalized as '' 'Covered Motor Vehicle' or 'Vehicle' '')

The proposed rule defined the term ''Motor Vehicle'' as ''(1) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road; (2) Recreational boats and marine equipment; (3) Motorcycles; (4) Motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in §§ 571.3(b) and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and (5) Other vehicles that are titled and sold through Dealers.'' The Commission has determined to finalize the definition with the modifications discussed in the following paragraphs.

The Commission received several comments regarding the substance and scope of this proposed definition. A number of industry association commenters requested that certain vehicle types, including marine vehicles, motorcycles, RVs, and other recreational vehicles be excluded from coverage. These commenters contended that the dealerships that sell such vehicles function differently from automobile dealerships, and that recreational vehicles are discretionary, rather than essential, purchases. After careful consideration, the Commission is excluding recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the definition of '' 'Covered Motor Vehicle' or 'Vehicle.' '' Moving forward, the Commission will continue to monitor for unfair and deceptive practices to determine whether further action is warranted to protect consumers, through law enforcement, a future rulemaking, or other measures. The Commission notes that no dealer may misrepresent material terms; deceive customers about prices, add-ons, or payments; charge for products that provide no benefit; or charge consumers without express, informed consent. To the extent that dealers engage in such conduct, they are in violation of the FTC Act.

Another commenter contended it was unclear whether all-terrain vehicles, go-carts, snowmobiles, scooters, electric bicycles, and golf carts were covered by the proposed definition. In response, the Commission has modified the first enumerated subpart of the definition to refer only to vehicles designed for use on a ''public'' street, highway, or road, and to expressly exclude scooters, electric bicycles, and golf carts. The definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' in the Final Rule does not cover all-terrain vehicles, go-carts, or snowmobiles because such vehicles are not designed for use on a ''public'' street, highway, or road.[141]

A number of industry association commenters claimed that the proposed definition conflicts with definitions of motor vehicle under various State laws, and one such commenter requested that, rather than finalize a definition of ''Motor Vehicle,'' the Commission defer to the definitions promulgated by each State's department of motor vehicles. The commenters did not explain how the Rule's definition may actually conflict with any laws, or how any alleged duplication would harm consumers or competition. To the extent that States have broader or narrower definitions, it is not clear why motor vehicle dealers covered by the Rule cannot comply with the Rule's provisions and applicable State laws. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Section 463.9 provides further discussion of State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of ''Motor Vehicle'' with modifications, including adding the word ''Covered'' to the definition to reflect the fact that the definition is narrower than the term ''Motor Vehicle'' in the NPRM and adding ''or Vehicle'' to the definition to clarify that all references in the Rule to the term ''Covered Motor Vehicle'' and ''Vehicle'' refer to the defined term.

(f) Dealer or Motor Vehicle Dealer (Finalized as '' 'Covered Motor Vehicle Dealer' or 'Dealer' '')

The proposed rule defined the term ''Dealer'' or ''Motor Vehicle Dealer'' as ''any person or resident in the United States, or any territory of the United States, that: (1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; (2) Takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and (3) Is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' Based on the following, the Commission is finalizing this definition in the Final Rule with modifications for clarity.

Many stakeholders commented in support of the proposed rule and expressed no concern over this definition. Other commenters expressed views that the Commission examines in the following paragraphs.

A few industry association commenters contended that parts of the proposed definition may have captured certain financial entities, such as financial entities that maintain licenses to engage in the sale of motor vehicles, and requested that the Commission make clear that any rule does not apply to such entities. In response, the Commission notes that only entities that meet all three components of the definition are covered ''Dealers.'' Thus, an entity that maintains an applicable license to engage in the sale of Covered Motor Vehicles but is not, for example, predominantly engaged in the sale or leasing of motor vehicles would not be a covered ''Dealer.''

Another industry association commenter similarly requested a ''carve-out'' from any definition of ''Dealer'' for trusts and trusts' investors.[142] This commenter asserted that trusts and their investors do not satisfy two of the definition's components and did not describe how any part of the definition creates concerns or is unclear. The Commission reiterates that if an entity meets the three parts of the ''Covered Motor Vehicle Dealer'' definition, then it is covered; if an entity does not meet these three parts, it is not covered. The Commission sees no benefit to adding language stating that entities that do not meet the definition are not covered.

Other commenters, including vehicle association commenters, claimed that dealerships specializing in RV, marine, motorcycles, and other recreational vehicles, including certain high-end recreational vehicles,[143] should be excluded from coverage, generally contending that such dealerships operate differently from automobile dealerships, and that these types of vehicles are used for different purposes than are automobiles. As explained in the section-by-section analysis of the definition of ''Covered Motor Vehicle'' in SBP III.B.2(e), after considering stakeholder comments, the Commission

[141] According to the National Highway Traffic Safety Administration, ''Public road means any road under the jurisdiction of and maintained by a public authority and open to public travel.'' 23 CFR 1300.3.

[142] Comment of Structured Fin. Ass'n, Doc. No. FTC–2022–0046–7646 at 3.

[143] The Marine Retailers Association of the Americas requested that transactions in excess of $70,000 be excluded from coverage, as an alternative to excluding marine transactions altogether. *See* Comment of Marine Retailers Ass'n of the Ams., Doc. No. FTC–2022–046–9291 at 4.

is removing marine, motorcycle, RV, and certain other vehicles from the definition in § 463.2(e), and to reflect this change, finalizing the defined term as '' 'Covered Motor Vehicle' or 'Vehicle,' '' thereby excluding from the Final Rule entities who otherwise would have qualified as ''Dealers'' solely based on their sale and servicing, or leasing and servicing, of such vehicles. The Commission underscores that, regardless of the definition of ''Covered Motor Vehicle'' under the Final Rule, unfair and deceptive practices remain unlawful under the FTC Act. The Commission will continue to monitor all vehicle markets to determine whether additional action is warranted to protect consumers.

Some dealership association commenters argued that, under the Commission's proposal, this definition exempted dealers subject to the jurisdiction of the CFPB. Other such commenters similarly contended that, under the proposal, used car dealers that do not engage in extensive post-sale repairs do not ''service'' vehicles or that do not have separate service departments may have been excluded from coverage, contending further that excluding such dealers would put other dealers at a competitive disadvantage. Contrary to these commenters' assertions, the definition does not contain such exclusions. By its plain terms, the definition applies to dealers that meet its three enumerated components. Nowhere does the definition limit coverage of dealers based on CFPB jurisdictional considerations. Likewise, the definition does not condition coverage on whether a dealership has a service department or include any other requirement or limitation beyond those enumerated in § 463.2(f). By its plain meaning, the term ''servicing'' covers, for instance, ''checking and repairing a vehicle, machine, etc. to keep it in good condition.'' [144] As the Commission has previously stated, the term ''servicing'' ''captures activities undertaken by essentially all used car dealers.'' [145] Thus, the definition does not place dealers with separate servicing departments at a competitive disadvantage, and the Commission need not remove the term ''servicing of motor vehicles'' from the Final Rule.

One such commenter further contended that the proposed definition did not cover certain entities, including certain direct sellers or manufacturers or others not licensed in a particular State, or lenders who offer add-on products such as GAP agreements and debt suspension products. As previously discussed, the Final Rule applies to all dealers that meet the three parts of this definition.[146] To the extent that the definition does not apply to specific entities, this reflects the scope and bounds of the rulemaking authority Congress delegated to the Commission under the Dodd-Frank Act.[147]

Finally, some industry and dealership association commenters posited that the proposal conflicted with Federal and State law or duplicated the regulatory authority of State enforcement agencies. These commenters did not provide information regarding how duplicative laws prohibiting misrepresentations, requiring disclosures, or prohibiting charges for items that would not benefit the consumer or for items without express, informed consent would create harmful consequences, and the Commission is not aware of any laws that allow such conduct by those that the Rule defines as ''Covered Motor Vehicle Dealer[s].'' Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the Rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. To the extent the Rule may overlap with State law, dealers can comply with these laws and also with the requirements that follow from the operation, in the Rule, of the Commission's definition. To the extent there is truly an inconsistency between the provisions of the Final Rule and a State law, § 463.9 sets out the Rule's relation to State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' with modifications for clarity. The definition in the Final Rule incorporates the phrase ''including any individual or entity'' to confirm that the term ''person,'' like all undefined terms in this part, is used according to its ordinary meaning and includes individuals and corporate entities and adds the word ''Covered'' to the definition to reflect the narrowed scope of ''Covered Motor Vehicle.'' [148]

(g) Express, Informed Consent

The proposed rule defined the term ''Express, Informed Consent'' as ''an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions'' of ''(1) What the charge is for'' and ''(2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service.'' The proposed rule also included in this definition three examples of what does not constitute express, informed consent: ''(i) A signed or initialed document, by itself; (ii) Prechecked

[144] The Oxford Advanced American Dictionary defines ''servicing'' as ''the act of checking and repairing a vehicle, machine, etc. to keep it in good condition''; *see also* 15 U.S.C. 5519(b)(3) (referring to ''the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service'').

[145] Used Motor Vehicle Trade Regulation Rule (''Used Car Rule''), 81 FR 81664, 81667 (Nov. 18, 2016).

[146] *See* 12 U.S.C. 5519(a), (f).

[147] Section 1029(d) of the Dodd-Frank Act defines ''motor vehicle dealer'' as ''any person or resident in the United States, or any territory of the United States, who—(A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (b) takes title to, holds an ownership in, or takes physical custody of motor vehicles.'' 15 U.S.C. 5519(f)(2).

Parts (A) and (B) of this definition are identical to parts (1) and (2) of the definition of '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' in the Final Rule.

Section 1029(d) of the Dodd-Frank Act states that the Commission ''is authorized to prescribe rules under sections 5 and 18(a)(1)(B) of the Federal Trade Commission Act in accordance with section 553 of title 5, United States Code, with respect to a person described in subsection (a).'' 15 U.S.C. 5519(d). Section 1029(a) in turn, provides the CFPB ''may not exercise any rulemaking, supervisory, enforcement or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' 15 U.S.C. 5519(a). The last clause is identical to part (3) of the definition in the Final Rule.

Several commenters requested that the Commission allow consumers to buy vehicles directly from manufacturers. Nothing in the Rule prohibits consumers from doing so.

[148] *See, e.g., Person,* Black's Law Dictionary (11th ed. 2019) (defining ''person'' to include ''[a] human being'' and ''[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.''); *Person,* Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/person* (last visited Dec. 5, 2023) (defining ''person'' to include ''human'' and ''one (such as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties''); *see also* 12 U.S.C. 5481(19) (Dodd-Frank Act statutory authority for the Final Rule defining ''person'' as ''an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity''); 1 U.S.C. 1 (Dictionary Act defining ''person'' to include ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals''). The application of covered motor vehicle dealer and dealer to entities also is consistent with these terms' use in the NPRM and commenter understanding of these terms in the course of public comment.

boxes; or (iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.'' In both the NPRM and in the provisions the Commission is finalizing, this definition is used exclusively in § 463.5(c). As such, comments regarding the definition are examined in the discussion of that provision in SBP III.E.2(c). As stated therein, the Commission is finalizing this definition substantively as proposed.

(h) GAP Agreement

The proposed rule defined the term ''GAP Agreement'' as ''an agreement to indemnify a vehicle purchaser or lessee for any of the difference between the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss and the amount owed on the vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the vehicle, or to waive the unpaid difference between money received from the purchaser's or lessee's motor vehicle insurer and some or all of the amount owed on the vehicle at the time of the unrecovered theft or total loss.'' The proposed definition also noted that this included ''products or services otherwise titled 'Guaranteed Automobile Protection Agreement,' 'Guaranteed Asset Protection Agreement,' 'GAP insurance,' or 'GAP Waiver[ ].' '' This term appeared in two sections of the rule proposal: in the provision regarding dealer charges for add-ons from which the consumer would not benefit at proposed § 463.5(a), and in the recordkeeping provision at proposed § 463.6(a)(4). Comments regarding the proposed definition are examined in the discussion of § 463.5(a) in SBP III.E.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with typographical modifications to correct a misplaced period in the original proposal and a modification removing the extraneous term ''insured's'' from the phrase ''actual cash value of the insured's Vehicle.'' In addition, the Final Rule capitalizes the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e).

(i) Government Charges

The proposed rule defined ''Government Charges'' as ''all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.'' This term appeared in two provisions of the rule proposal: in the proposed definition of ''Offering Price'' at § 463.2(k), which pertains to the proposed offering price disclosure provision at § 463.4(a); as well as in the proposed provision relating to undisclosed or unselected Add-ons at § 463.5(b). As explained in further detail in the paragraph-by paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with a typographical modification to include a serial comma for consistency.

(j) Material or Materially

The proposed rule defined ''Material'' or ''Materially'' as ''likely to affect a person's choice of, or conduct regarding, goods or services.'' This term appeared in the prohibited misrepresentations provisions at § 463.3(b) and (g), and in the recordkeeping provision at § 463.6(a). As described in detail in the section-by-section analysis of § 463.3 in SBP III.C, the Final Rule modifies the introductory paragraph of § 463.3 from the Commission's original proposal to add the word ''Material,'' such that the Commission's materiality standard applies to all subparts of § 463.3. The Final Rule accordingly removes the word ''Material'' from § 463.3(b) and (g) so as to avoid duplication. Based on the following, the Commission is finalizing this definition, now at § 463.2(j), substantively as proposed.

A dealership association commenter noted that the proposed definition did not use the term ''significance,'' and asserted that ''Material'' information should be significant and not ''rooted in personal preference.'' [149] The Commission notes that this definition adopts the meaning of the term as articulated through decades of enforcement actions [150] instead of using a different term such as ''significance,'' and does not use the term ''personal preference'' or rely on ''personal preference'' any more than the phrase ''likely to affect'' or ''significant'' does. Thus, the Commission is finalizing this definition substantively as proposed.

(k) Offering Price

The proposed rule defined ''Offering Price'' as ''the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.'' This term appeared in two provisions of the rule proposal: in the proposed offering price disclosure provision at § 463.4(a), as well as in the proposed provision relating to undisclosed or unselected add-ons at § 463.5(b). As explained in further detail in the paragraph-by-paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such, will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a).[151] As stated therein, the Commission is finalizing this definition largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price. In addition, the definition in the Final Rule substitutes ''Vehicle'' for ''motor vehicle'' to clarify that the term conforms with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e).

C. § 463.3: Prohibited Misrepresentations

1. General Comments

The proposed rule set forth prohibitions against certain misrepresentations by motor vehicle dealers. Based on the following, the Commission has determined to finalize these prohibitions, with minor revisions.

The following paragraphs discuss comments relating to § 463.3 generally and Commission responses to such comments, followed by comments relating to each paragraph of § 463.3 and Commission responses to such comments.

The NPRM proposed prohibiting dealers from making any misrepresentation, expressly or by implication, regarding specific listed categories. The Commission received many comments regarding this

[149] Comment of Ga. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–10806 at 4.

[150] *See* FTC Policy Statement on Deception, *supra* note 42, at 1–2, 5; *see also Fed. Trade Comm'n* v. *Fleetcor Techs., Inc.,* 620 F. Supp. 3d 1268, 1303 (N.D. Ga. 2022); *Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 816 (1984).

[151] Some commenters, including certain industry associations, requested that the Rule include additional definitions, including for the terms ''charged,'' ''item,'' ''discount,'' ''rebate,'' ''trade-in value,'' and ''online service.'' In response, the Commission notes that for terms not defined in the Rule, the plain meaning of the terms apply.

proposal, including comments supporting such a provision, comments urging the Commission to broaden the provision, and comments urging the Commission to limit or forgo the provision.

Thousands of commenters expressed support for the proposed rule.[152] Many of these commenters specifically expressed concern about misleading advertisements and deceptive pricing. Many individual commenters cited examples of such conduct from their own experiences purchasing or leasing vehicles, and many commenters with experience operating or working for a dealership shared their observations or experiences. For example:

- I have been looking for a car at MSRP and most dealers[’] websites will list it at that price. [T]hen when you drive there the[y] will say well there is a market adjustment from 5,000 to 20,000 dollars. [N]ow . . . you need a car and have wasted 3–4 hours and picked out what you thought was your next car.[153]
- I am currently in discussions with two dealerships for a new car. Both assure me there is absolutely no dealer markup, come to find out they are adding 3/5k of ‘‘mandatory’’ add-ons respectively once I get in the door.[154]
- The last vehicle I purchased 2 years ago was a nightmare. Drove 5 hrs[.] to a dealer in Southern California. I called the dealer and confirmed the price on their website was what I was going to pay. When I arrived there, they had a list of $2500 [i]n additional charges that were not disclosed when I called and before I started driving. Purchasing a vehicle shouldn’t be such a stressful process.[155]
- Most recently I started looking myself for a new lease, and looked at the RAV 4 prime. Went to my local dealer after seeing an ad on their site for $450 a month. Not only did they not honor the deal, but wouldn’t even discuss that it was on their own site. I was told the SE model was [$5000] over MSRP and the XSE was [$8000] over.[156]
- I have contacted 10 different car dealerships in the past month looking to purchase a new or used SUV. 9 out of the 10 dealerships I contacted online or visited in-person in California changed or lied about the online advertised price of the vehicle I was inquiring about or said the car was sold or not available and tried to sell me a more expensive vehicle.[157]
- Once I was led to the F&I office I was told that I HAD to buy a $995 paint protection product that I didn[’]t want or need. I asked to see the contract for this product which clearly stated in bold letters ‘ACCEPTANCE OF THIS CONTRACT IS VOLUNTARY AND DOES NOT AFFECT THE FINANCING OF THE VEHICLE’ I pointed this out to the salesman and told him that I didn’t want this product[.] [H]e looked me in the eyes with my wife present and said ‘‘You have to buy it[.]’’[158]
- At the dealership, the salesman offered a price of $38,000, over $8,000 more than the advertised price. When I challenged the extra cost, he said the advertisement included every possible rebate and discount and no one could receive them together (some were exclusionary with other discounts).[159]
- While there are good honorable dealerships, far too many play games. Rarely is the price of [a] car advertised online or via mail EVER the actual price. Far too often in the F&I office the finance manager tries to [gloss] over add[-]ons that they just arbitrarily added on without telling you OR state I cannot get your loan approved without an extended warranty as an example I experienced. . . . I worked for a Toyota dealership many years ago and left the industry because it made me sick seeing the games played taking advantage of people. Change is needed and sooner than later.[160]
- I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no one should be allowed to engage in such exploitative conduct in the course of running a business.[161]
- I am in the auto industry and work at a very transparent and honest dealership. I think most of these rules are great. I hear horror stories about honest people seeing a car advertised for one price, only to be told there are additional a[d]d-ons and markups once they arrive. I think this is unfair. I’m also shocked every time I hear about a dealership charging for mandatory window etching and nitrogen filled tires. I even know of reputable dealerships that add GPS tracking and theft recovery devices to every new car, even though these cars come with GPS theft recovery from the manufacturer. Stopping these practices will help restore consumers’ faith in car dealerships, save them money, and lead to a more honest and ethical industry. . . .[162]

Other commenters expressed support for transparent pricing generally, stating, for example:

- A consumer should be able to see a price, walk into a dealership, and pay that price. Plain and simple, just like ANY OTHER RETAILER.’’[163]
- If I walk into Best Buy and see a price they HAVE to sell it to me for that price or cheaper. These rules are long over due.[164]
- I believe if they advertise a car, it should be available for sale—at the advertised price—just as a supermarket can’t advertise a price for something they don’t have, or add a ‘coupon redemption fee’ to it. I believe these rules are an extremely reasonable approach to a long-standing problem and urge you to adopt them.[165]
- I used to work in the retail auto industry and these proposed rules will help everyone (including the dealers who are fighting them). Consumers will benefit from the transaction transparency, and over the long term even the shady dealers will benefit by treating consumers fairly and developing long term relations.[166]
- These regulations would be the best thing to happen for consumer protection since the Mo[n]roney Label. I not only have had to navigate and negotiate erroneous fees at dealers, but I’ve also

[152] *See* Motor Vehicle Dealers Trade Regulation Rule, Comment Docket, *https://www.regulations.gov/document/FTC-2022-0046-0001/comment.*

[153] Individual commenter, Doc. No. FTC–2022–0046–0036.

[154] Individual commenter, Doc. No. FTC–2022–0046–0099.

[155] Individual commenter, Doc. No. FTC–2022–0046–0906.

[156] Individual commenter, Doc. No. FTC–2022–0046–1878.

[157] Individual commenter, Doc. No. FTC–2022–0046–3686.

[158] Individual commenter, Doc. No. FTC–2022–0046–4752.

[159] Individual commenter, Doc. No. FTC–2022–0046–5580.

[160] Individual commenter, Doc. No. FTC–2022–0046–2378.

[161] Individual commenter, Doc. No. FTC–2022–0046–3693.

[162] Individual commenter, Doc. No. FTC–2022–0046–4959.

[163] Individual commenter, Doc. No. FTC–2022–0046–0017.

[164] Individual commenter, Doc. No. FTC–2022–0046–0034.

[165] Individual commenter, Doc. No. FTC–2022–0046–0005.

[166] Individual commenter, Doc. No. FTC–2022–0046–1935.

worked at dealers whose transparency and forthrightness put them at a disadvantage. Many dealers advertise vehicles that can not [sic] be purchased or leased at the advertised price due to deceptive adverts either not disclosed or in a print so fine it can't be read. Please pass this ruling. My grandma shouldn't have to pay more than someone else just because she's not a good negotiator.[167]

Consumer advocacy organization commenters and individual commenters urged the FTC to include additional specific provisions in § 463.3, including a prohibition against misrepresentations regarding the safety, mechanical or structural condition, odometer reading, or history of a vehicle. Similarly, commenters including a municipal regulator urged the Commission to specifically prohibit misrepresentations regarding certification of used vehicles, citing enforcement actions it brought against dealers that misrepresented used vehicles as ''certified pre-owned'' or ''manufacturer certified.'' The FTC takes seriously deception relating to the safety or condition of a vehicle and the practice of charging consumers more based on false claims or reassurances.[168] Depending on the claim made by the dealership and the specific facts at issue, deceptive conduct in either of these areas may be covered by the enumerated misrepresentation paragraphs the Commission is finalizing, such as by § 463.3(a) if it relates to the terms of the purchase, lease, or financing. The FTC will continue to monitor dealer misrepresentations to determine whether additional action is needed.

In addition, a number of credit union commenters requested that the Commission explicitly address misrepresentations involving dealers' refusal to accept outside financing to purchase a vehicle. These commenters cited several examples of consumers being told that they could not use outside financing, that they would not receive a lower interest rate from an outside financial institution, or that a particular interest rate was the best rate the consumer can get. The Rule already covers such conduct. For example, § 463.3(a) of the Rule, which prohibits dealers from misrepresenting the cost or terms of financing a vehicle, covers these and other misrepresentations regarding financing, including the availability of outside or ''indirect'' financing terms, or the costs of such financing as compared to those of any dealer-provided financing.

Two individual commenters posited that any language prohibiting misrepresentations should explicitly include the word ''omissions,'' in order to ensure that dealers do not sneak in additional costs without consumers' consent or understanding. The Commission appreciates this concern, and notes that the Rule has many provisions prohibiting such misconduct, including the required disclosures regarding price, add-ons, and total amount of payments in § 463.4 of the Final Rule, as well as the requirement in § 463.5(c) to obtain consumers' express, informed consent before charging for any items.

Other commenters, including dealership associations, individual commenters, and a United States Representative, questioned whether certain of the proposed misrepresentation provisions were duplicative of other laws, such as the Truth in Lending Act (''TILA''), the Consumer Leasing Act (''CLA''), or State regulations, and in some instances whether compliance with State regulations should act as a safe harbor. The Commission notes that another statute—the FTC Act—already prohibits misrepresentations in or affecting commerce, and to the extent there is duplication between the FTC Act and other existing statutes pertaining to deception, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition.[169] The Commission further notes that the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is otherwise already illegal under Federal law, and will aid law-abiding dealers that lose business to competitors that act unlawfully.[170] State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, as set forth in § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Because dealers are already prohibited from engaging in ''deceptive acts or practices'' under the FTC Act, dealers should be able to comply with these provisions without the need for a safe harbor.

Industry association commenters also claimed that the prohibited misrepresentation proposal ignored the materiality prong of the Commission's deception standard, and further observed that some of the prohibited misrepresentations in the proposed rule explicitly included a materiality requirement,[171] while others did not. As the NPRM made clear, the Commission's proposed misrepresentation section, at § 463.3, addressed misrepresentations that are all material.[172] The Commission need not explicitly specify materiality in its description of these misrepresentations; indeed, the Commission has long considered certain categories of information, express claims, and intended implied claims to be presumptively material.[173] Nevertheless, rather than using the term ''Material'' in certain individual enumerated paragraphs, the Commission has determined to modify the introductory text of § 463.3 from the Commission's original proposal in order

[167] Individual commenter, Doc. No. FTC–2022–0046–10441.

[168] *See, e.g.,* Complaint, *CarMax, Inc.,* No. C–4605 (F.T.C. Mar. 22, 2017) (alleging Defendants misled consumers by representing that the used motor vehicles Defendants sold had been subject to rigorous inspection but omitting important safety information about recalls); Complaint, *West-Herr Auto. Grp., Inc.,* No. C–4607 (F.T.C. Mar. 22, 2017) (alleging Defendants failed to disclose, or disclose adequately, that used motor vehicles it sold were subject to open recalls for safety issues); Complaint, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017) (alleging deceptive failure to disclose material information about the safety of used motor vehicles sold by Defendants); Complaint ¶¶ 20–24, *Fed. Trade Comm'n* v. *Passport Imports, Inc.,* No. 8:18–cv–03118 (D. Md. Oct. 10, 2018) (alleging Defendants misled consumers by mailing ''Urgent Recall'' notices that were similar to and had the same color scheme as notices manufacturers are required by the U.S. Department of Transportation's NHTSA to use when sending information about vehicle recalls, even though in the ''vast majority of instances'' the recipients' cars were not subject to an open recall).

[169] One commenter expressed concern that the prohibited misrepresentations would cause dealerships to provide less information, because discussing pricing and quotes would result in providing further documentation for every conversation. However, as the FTC Act already prohibits misrepresentations, and given that pricing and financing information are among the most salient aspects of a consumer's shopping for a vehicle, the Commission considers it unlikely that § 463.3 would result in less information or the creation of additional documentation.

[170] Under section 19(a)(1) of the FTC Act, the Commission may sue in Federal district court ''any person, partnership, or corporation'' that ''violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices.'' 15 U.S.C. 57b(a)(1). Where such liability is found, under section 19(b) a court may ''grant such relief as [it] finds necessary to redress injury . . . resulting from the rule violation,'' including the ''rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages.'' *Id.* 57b(b).

A few commenters requested that the Rule go further in providing remedies, including by allowing for a private right of action to enforce Rule violations. The Commission notes that, depending on State law, consumers may be able to use State statutes that prohibit unfair or deceptive practices to challenge conduct that violates this Rule.

There is nothing in the FTC Act or this Rule that would preclude consumers from exercising any such legal rights under State law. The Commission will continue to monitor the market to determine whether additional steps are needed.

[171] *See* NPRM at 42045 (proposed § 463.3(b), (g)).

[172] NPRM at 42019.

[173] FTC Policy Statement on Deception, *supra* note 42, at 5 & nn.47–55.

to specifically prohibit misrepresentations regarding material information about the enumerated paragraphs. As such, the Commission is also removing what would otherwise be redundant references to the term ''Material'' within paragraphs (b) and (g) of § 463.3.

A national dealership association incorrectly asserted that this section is problematic because there is no requirement that the representation or omission be material or be viewed from the perspective of a consumer acting reasonably under the circumstances. As adopted in the final rule, this section adds the term ''Material,'' stating that it is an unfair or deceptive practice for any motor vehicle dealer to make any misrepresentation, expressly or by implication, regarding material information about the specific categories enumerated in § 463.3.[174] The Commission is not aware of situations where dealers have made misrepresentations expressly or by implication regarding material information about these specific categories that are not deceptive or unfair, nor did commenters describe any such situations.

The Commission further notes that, by the terms of this section, a court must find that the dealer made an express or implied misrepresentation regarding material information for § 463.3 to be violated. For an express or implied misrepresentation regarding material information to be made in violation of the FTC Act and this Rule, there must be a representation that misleads consumers acting reasonably under the circumstances regarding material information. Whether such a representation has occurred depends on the facts. In the case of implied representations, whether a representation has occurred is often evident from an examination of the representation itself, including, for example, an evaluation of the document in which a representation is made, the juxtaposition of language in that document, the nature of the representation, and the nature of the transaction.[175] In other situations, extrinsic evidence that it is reasonable for consumers to reach the implied representation may be helpful, such as consumer testimony, surveys, or other reliable evidence of consumer interpretation.[176]

For example, if a dealer offers discounted coffee for customers who visit its dealership before 10 a.m. and honors that offer, but makes no representations, expressly or by implication, about discounted cars, the dealer will not have violated § 463.3(d), which prohibits express or implied misrepresentations regarding rebates and discounts, even if a consumer holds an unreasonable belief that the offer was for discounted cars. On the other hand, if a dealership's advertisement depicts a car with a consumer standing next to it holding a cup of coffee, and states, ''10% discount available before 10 a.m.,'' such an advertisement can convey several representations that may mislead reasonable consumers,[177] including that the car is available at a 10% discount.

Commenters including industry associations opined on the term ''implied,'' contending for example that the idea that a misrepresentation can be implied is overly broad, and a dealership association commenter expressed concern that the inclusion of ''implied'' creates too much uncertainty. As has been recognized under the law for decades, however, representations can mislead consumers, even without making express claims.[178] Take, for example, an advertisement that shows a picture of a new sedan for sale. Even if the advertisement does not expressly state that consumers could use the vehicle to drive at speeds higher than 25 miles per hour, there is an implied representation that a product is fit for the purposes for which it is sold.[179] Thus, limiting the Rule to prohibit only express misrepresentations would significantly hamper its usefulness to consumers.

One industry association commenter further argued that the proposed rule created a new deception standard that ignored intent and reliance. This argument, however, misstates the law, which does not require intent [180] or reliance [181] to establish deception.

Thus, the Commission is finalizing the introductory paragraph of § 463.3 largely as proposed, with a modification stating that it applies to misrepresentations regarding material information. For consistency with other parts of the Rule, the Commission is also removing the shorthand ''FTC Act'' that appeared in parentheses after ''the Federal Trade Commission Act'' in the introductory paragraph of the proposed rule. For clarity and consistency with the revised definition of ''Covered Motor Vehicle Dealer'' (at § 463.2(f) and discussed in SBP III.B.2(f)), the Commission is adding the word ''Covered'' to ''Motor Vehicle Dealer'' in the introductory paragraph. Finally, without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3, at newly designated paragraph (q): ''The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices

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[174] The Final Rule prohibits misrepresentations in specific categories. In contrast, some FTC rules go further by prohibiting misrepresentations of ''any material aspect'' of the transaction. *See, e.g.,* Mortgage Assistance Relief Services Rule, 16 CFR 322.3(b); Telemarketing Sales Rule, 16 CFR 310.3(a)(2)(x).

[175] FTC Policy Statement on Deception, *supra* note 42, at 2 (*citing Am. Home Prods.,* 98 F.T.C. 136, 374 (1981), *aff'd,* 695 F.2d 681, 687 (3d Cir. 1982) (evaluation of the entire document); *Warner Lambert,* 86 F.T.C. 1398, 1489–90 (1975), *aff'd* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978) (juxtaposition of phrases); *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 456 (1972), *aff'd,* 481 F.2d 246 (6th Cir.), *cert. denied,* 414 U.S. 1112 (1973) (nature of the claim); *see also Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311, 319 (7th Cir. 1992) (''Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.'').

[176] FTC Policy Statement on Deception, *supra* note 42, at 2 n.8.

[177] The interpretation or reaction does not have to be the only one; when a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *See* FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

[178] The FTC's Policy Statement on Deception and scores of FTC cases make clear that both express and implied claims can be deceptive. *See, e.g., ECM Biofilms, Inc.* v. *Fed. Trade Comm'n,* 851 F.3d 599 (6th Cir. 2017) (affirming Commission's finding that an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC,* No. C–9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *aff'd as modified, POM Wonderful, LLC* v. *Fed. Trade Comm'n,* 777 F.3d 478 (D.C. Cir. 2015) (finding that company's advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft ads juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk).

[179] FTC Policy Statement on Deception, *supra* note 42, at 2; *Int'l Harvester Co.,* 104 F.T.C. 949, 1057–58 (1984).

[180] *See Fed. Trade Comm'n* v. *Freecom Commc'ns,* 401 F.3d 1192, 1202 (10th Cir. 2005) (''Because the primary purpose of § 5 is to protect the consumer public rather than punish the wrongdoer, the intent to deceive the consumer is not an element of a § 5 violation.'').

[181] *See Fed. Trade Comm'n* v. *Figgie Int'l, Inc.,* 994 F.2d 595, 605–06 (9th Cir. 1993) (holding that section 19 of the FTC Act does not require proof of individual consumer reliance; rather, there is a ''presumption of actual reliance'' that arises once the Commission has proved that a defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product).

defined in this part, including those in §§ 463.4 and 463.5.''

The Commission examines each paragraph of § 463.3, including by examining related comments and Commission responses to those comments. The Commission then discusses the corresponding provisions of the Final Rule.

2. Paragraph-by-Paragraph Analysis of § 463.3

(a) The Costs or Terms of Purchasing, Financing, or Leasing a Vehicle

Proposed § 463.3(a) prohibited misrepresentations regarding the cost or terms of purchasing, financing, or leasing a vehicle. The Commission is finalizing this provision largely as proposed, with the minor modification of capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e) (explained in SBP III.B.2(e)). As previously discussed, the addition of ''material'' to the introductory paragraph of § 463.3 will apply to this paragraph and to all paragraphs of § 463.3 that follow.

A number of commenters expressed support for this proposed provision, contending, *inter alia,* that it would level the playing field for car buyers and address unfair and deceptive practices related to financing terms and conditions.

The Commission received a number of industry association comments requesting that the Commission clarify the operation of proposed § 463.3(a), including for example, by clarifying whether it would require dealers to discuss all purchase, finance, or lease terms, or whether it would require dealers to read aloud all the terms of the buyer's order and finance or lease agreement. Dealership association commenters expressed a related concern that this proposed provision lacked specific guidance on dealer compliance.

To begin, misrepresentations regarding ''costs or terms of purchasing, financing, or leasing a vehicle'' refer to the ordinary plain meaning of the words used in the provision.[182] Second, as the language in the introductory paragraph of § 463.3 makes clear, its paragraphs—including paragraph (a) of § 463.3—prohibit misrepresentations regarding material information. By its terms, this paragraph requires no particular affirmative disclosures, whether written or oral; rather, this paragraph obligates dealers to refrain from misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle.[183]

The Commission received comments from industry associations requesting that the Final Rule provide a safe harbor from liability stemming from dealers' violations of the Rule to vehicle credit contract assignees, who take or receive these contracts subject to all claims and defenses consumers could assert against the dealer under the Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, also known as the ''Holder Rule.'' [184] The Rule, however, does not create liability for these entities under the Holder Rule where it did not previously exist; the Rule addresses conduct that is unfair or deceptive under the FTC Act. When enacting the Holder Rule, the Commission did not include a safe harbor or exceptions involving any specific deceptive or unfair conduct, and the Commission declines to do so through this Rule.

A comment from a motor vehicle industry association argued that this provision would likely be inapplicable, or less impactful, with regard to RV sales because the RV industry rarely offers leases, if at all, and because RV sales are usually not financed through RV manufacturer-controlled financing companies. To the extent that specific provisions do not apply to specific entities, such provisions do not impose any obligations upon those entities. Nevertheless, as explained in the analysis of the ''Covered Motor Vehicle'' definition, § 463.2(e), the Commission is excluding recreational vehicle dealers from the definition of ''Covered Motor Vehicle.''

After carefully considering the comments, the Commission is finalizing paragraph (a) of § 463.3 with the minor modification of capitalizing ''Vehicle.'' This provision prohibits misrepresentations regarding ''[t]he costs or terms of purchasing, financing, or leasing a Vehicle.'' Misrepresentations of the price, discounts, or other terms are likely to cause consumers to waste time pursuing unavailable or inapplicable offers and to spend more money on a vehicle rather than undergoing the hours-long process to begin the vehicle search and shopping process anew at another dealership. Prohibiting these misrepresentations will save consumers time and money and ensure that dealers compete on a level playing field.[185]

(b) Any Costs, Limitation, Benefit, or Any Other Aspect of an Add-On Product or Service

Proposed § 463.3(b) prohibited misrepresentations concerning any costs, limitation, benefit, or any other material aspect of an add-on product or service. Section 463.3(b) of the Final Rule adopts this provision without substantive modification. As described in detail in SBP III.C.1, the Commission

[182] Examples of ''costs or terms of purchasing, financing, or leasing a vehicle'' include, among other things, express or implied representations regarding a vehicle's total cost, down payments, interest rates, repayment schedules, the price for added features, other charges, certainty or finality of terms, and the availability of discounts. The Commission has brought numerous enforcement actions where, for example, dealers have misrepresented the total price a consumer could pay for vehicles, or concealed a required down payment or other restrictions on the offer. *See, e.g.,* Complaint ¶¶ 10–11, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging false ads stating a certain price but charging consumers higher prices); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing (i) ads were for lease offers only and required substantial initial payment, (ii) discounts were subject to material limitations, or (iii) other legally required disclosures); Complaint ¶¶ 7–16, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018) (alleging false ads touting attractive terms, but concealing substantial down payments, offers were for leases and not purchases, material eligibility restrictions, and other legally required disclosures).

[183] Some commenters repeat this and similar questions, regarding what types of disclosures are required, through provision (o); the same response applies—provisions (a) through (o) do not affirmatively require particular disclosures. As with all misrepresentations prohibited by the Rule, and under section 5 of the FTC Act, misrepresentations are barred whether they are made expressly or by implication.

[184] *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 CFR 433.2 [hereinafter Holder Rule].

[185] The National Automobile Dealers Association commissioned a survey, released in May of 2023, that asserted the Commission's proposed rule would lead to an increase in consumer transaction time. Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022—14214), CFR part 463'' (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf.* This survey was released more than seven months after the closure of the comment period for the notice of proposed rulemaking on September 12, 2022, and is not part of this rulemaking record. These facts notwithstanding, the Commission observes that each respondent to this survey was presented with a leading statement at the beginning of the survey asserting, *inter alia,* that the proposed rule would impose ''new duties [that] are expected to create additional monitoring, training, forms, and compliance review responsibilities as well as a modification of record keeping systems and coordination with outside IT and other vendors'' and ''increase the time of a motor vehicle transaction, inhibit online sales, limit price disclosures, and increase customer confusion and frustration.'' *Id.* at 34, 36 (introductory instructions on the survey instrument sent to respondents). In addition, this survey did not explain its selection process or criteria for the 60 dealers it surveyed, nor why only 40 such dealerships provided fully completed survey responses. Moreover, the survey report attributed much of this estimated increase to proposed rule provisions that the Commission is not finalizing.

is modifying § 463.3 from the Commission's original proposal to include the term ''Material'' in the introductory paragraph rather than in paragraphs (b) or (g) of § 463.3. Section 463.3(b) of the Final Rule therefore deletes reference to the term ''Material.''

The Commission received a number of comments expressing support for prohibiting misrepresentations about add-ons, including comments that requested specific additional add-on-related misrepresentation prohibitions. For example, an auto dealer commenter expressed support for prohibiting misrepresentations about whether or not a car has add-ons already installed. Consumer advocacy organization commenters recommended that the Commission include a new paragraph in § 463.3 prohibiting misrepresentations regarding the consumer's right to cancel add-on products or services. This provision, however, already covers such conduct: It prohibits misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on product or service. ''Material'' means likely to affect a consumer's conduct or choices.[186] A consumer's right to cancel is likely to affect the consumer's conduct regarding an add-on product or service. Thus, § 463.3(b) includes representations about a consumer's right to cancel an add-on product or service.

A number of dealership association commenters argued that the language used in this provision is vague or confusing. The terms ''Material'' and ''Add-on Product or Service,'' however, are specifically defined in § 463.2. The remaining terms in this provision are commonly used and can be understood according to their plain meaning.[187] The NPRM examined misrepresentations regarding the coverage and costs of add-ons, and enforcement actions by the Commission and other agencies have documented many instances of such misrepresentations.[188] Examples of the type of conduct prohibited include misrepresenting whether add-ons are required in order to purchase or lease a vehicle, including by representing that such charges are required when in fact they are not, or misrepresenting that advertised prices do not include fees beyond routine taxes and fees only to subsequently require the purchase of add-ons; misrepresenting what is, or is not, covered by, among others, an extended warranty, service or maintenance plan, or GAP agreement;[189] and misrepresenting that consumers have provided express, informed consent to be charged for add-ons.

Commenters including a number of motor vehicle dealership associations requested that the Commission clarify how extensive disclosures would need to be to satisfy this provision. One such commenter requested that the Commission explain what conduct would be required under this paragraph, and expressed concern that, if the paragraph required disclosures, such a requirement would affect the length of the transaction. Another industry association commenter suggested that, in the event dealers provide consumers with a verbal or written disclosure stating that such products have costs, limitations, or benefits, and stating information about other material aspects, the Commission modify its proposal to shift to consumers the burden of proving any relevant dealer misrepresentation. An individual commenter expressed support for applying § 463.3(a) and (b) to dealer advertisements of free lifetime benefits programs and requiring dealers to make disclosures about any costs, limitations, benefits, or any other aspect of an add-on product or service. The Commission notes that paragraphs (a) and (b) of § 463.3 already apply to free lifetime benefits programs. Regarding disclosures, the Commission is concerned about including additional disclosure requirements beyond the few areas included in the Rule, or shifting the burden to consumers to hunt for and decipher disclosures, given that the auto finance and lease process is already lengthy, complex, document-heavy, and dense. Accordingly, as discussed in regard to § 463.3(a), these provisions do not mandate set disclosures or allow for disclosures to be used as a shield when there are misrepresentations to consumers; rather, they prohibit express or implied misrepresentations.[190]

Several dealership association commenters pointed to State laws that, they contended, may already prohibit misrepresentations about add-ons or may otherwise protect consumers. As discussed previously, to the extent there may be duplication between the provisions the Commission is finalizing and other laws, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under § 463.9, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

Based on a review of the comments and the responses discussed, the Commission adopts paragraph (b) of § 463.3 without substantive modification. As discussed in SBP III.C.1, the Commission has determined to modify the introductory paragraph of § 463.3 from the Commission's original proposal so that each paragraph of § 463.3 prohibits misrepresentations regarding material information. As such, the Commission is finalizing a version of § 463.3(b) that removes what would

[186] *See* FTC Policy Statement on Deception, *supra* note 42, at 2, 5; *see also Fed. Trade Comm'n* v. *Crescent Publ'g Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001).

[187] *E.g., Cost,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/cost* (''Cost'' is defined as ''the amount of money needed to buy, do, or make something''); *Limitation,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/limitation* (''Limitation'' is defined as ''something that controls or reduces something''); *Benefit,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/benefit* (''Benefit'' is defined as ''a helpful or good effect, or something intended to help'').

[188] *See, e.g.,* Complaint ¶¶ 26–27, 70–71, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging deceptive and unauthorized add-on charges; unfair discrimination against minority consumers); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 4–14, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4–13, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims). *Cf.* Consent Order ¶¶ 10–16, *Santander Consumer USA, Inc.,* CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding defendant sold GAP product allegedly providing ''full coverage'' to consumers with loan-to-value ratios (''LTVs'') above 125%, when in fact coverage is limited to 125% of LTV).

[189] *See, e.g.,* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 12, Summer 2016'' 5 (June 2016), *https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf* (finding that one or more auto lenders deceptively advertised the benefits of their GAP agreement products, leaving the impression that these products would fully cover the remaining balance of a consumer's loan in the event of vehicle loss when, in fact, the product only covered amounts below a certain loan to value ratio).

[190] It is well-settled that, if one makes a claim that, absent additional information, would mislead a consumer acting reasonably under the circumstances about a material fact, such conduct would violate the law. *See* FTC Policy Statement on Deception, *supra* note 42, at 2; *Int'l Harvester Co.,* 104 F.T.C. 949, 1057–58 (1984).

otherwise be redundant explicit reference to the term ''Material.'' This provision prohibits misrepresentations regarding ''[a]ny costs, limitation, benefit, or any other aspect of an Add-on Product or Service.'' Misrepresentations regarding add-ons are likely to affect a consumer's conduct, including the consumer's decision to purchase the product or service.

(c) Whether Terms Are, or Transaction Is, for Financing or a Lease

Proposed § 463.3(c) prohibited misrepresentations regarding whether the terms are, or the transaction is, for financing or a lease. Upon review and consideration of public comments, the Commission is finalizing paragraph (c) of § 463.3 without modification from the Commission's original proposal.

A few industry association and individual commenters posited that this proposed provision was unnecessary, either because other statutes or regulations, including TILA and some State regulations, address this issue, or because vehicle manufacturers already monitor such misrepresentations. As noted in SBP III.C.1, even given the possibility of overlap between this provision and existing Federal or State law, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Further, given that the conduct covered by this provision is already unlawful under the FTC Act and may duplicate other laws, or be prohibited by manufacturer rules, it should not be difficult to follow this provision.[191]

Accordingly, after careful consideration, the Commission adopts paragraph (c) of § 463.3 as proposed. Misrepresentations regarding whether terms are, or a transaction is, for financing or a lease are likely to affect a consumer's conduct, including by causing consumers to enter into a monetary transaction for a product they do not want, or, if the true circumstances are revealed prior to consummation of the transaction, to waste time traveling to, and potentially spending hours at, the dealership.

(d) The Availability of Any Rebates or Discounts That Are Factored Into the Advertised Price but Not Available to All Consumers

Proposed § 463.3(d) prohibited misrepresentations concerning the availability of any rebates or discounts that are factored into the advertised price but not available to all consumers. Upon review and consideration of public comments, the Commission is finalizing paragraph (d) of § 463.3 without modification from the Commission's original proposal.

Comments in support of this proposed provision, including those from a group of State attorneys general and from two United States Senators, generally contended that the proposed provision would increase the transparency of the purchase transaction by requiring dealers to be honest when they advertise the availability of discounts.

An individual commenter suggested that the Commission modify proposed § 463.3(d) to require dealers to disclose all representations regarding rebates or discounts in writing, in a clear and conspicuous manner. The Commission notes this paragraph prohibits misrepresentations regardless of the medium. Further, this paragraph focuses on misrepresentations; disclosures regarding price, add-ons, and total of payments are addressed in the discussion of § 463.4, as is a discussion of why the Commission has determined not to include additional disclosure requirements in this Final Rule. The same commenter also requested that the Final Rule text include examples of situations where discounts or rebates may not be available. The Commission describes examples here rather than adding them to the Final Rule text, as it would be difficult to anticipate all such examples and the text would become unwieldy. Examples include where an advertised rebate or discount applies only to the most expensive version of a particular vehicle make and model or is only available to consumers with high credit scores.

The Commission received comments from a dealership association and an individual commenter asking for additional detail about proposed § 463.3(d), pointing to a State regulation that includes disclosures and asking which types of rebates the provision covers. Here, the Commission notes that, as the language in § 463.3(d) states, this provision applies to ''*any* rebates and discounts'' advertised by dealers, and is not limited to any particular type of rebate or discount.[192] The terms in this provision may be interpreted according to their plain meaning, as they are commonly used and understood.[193] Additionally, the language of this provision, the NPRM, and Commission enforcement actions provide further context. In proposing § 463.3(d) to specifically address the availability of discounts and rebates, the Commission included additional language (''that are factored into the advertised price but not available to all consumers'') to describe the manner in which such misrepresentations often occur: a dealer represents an advertised price which includes a discount or rebate that is not generally available to consumers.[194] The NPRM's discussion of proposed § 463.3(d) described both a scenario in which a dealer advertised a rebate or discount separately, and one in which rebates or discounts are factored into the advertised price but the rebates and discounts are not available to a typical consumer. The conduct in either such scenario would violate this provision and, depending on the circumstances, may violate other provisions the Commission is finalizing, such as paragraph (a) of § 463.3. Enforcement actions cited in the NPRM provide further illustration of deceptive practices involving rebates and discounts.[195] The Commission declines

[191] The FTC has alleged that misrepresentations that particular terms are available for financing or for a lease violate the FTC Act. *See* Complaint ¶¶ 38–39, *Fed. Trade Comm'n* v. *Tate's Auto Ctr.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing ads were for lease offers only); Complaint ¶¶ 10, 13, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015) (same); Complaint ¶¶ 9–12, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018) (same); Complaint ¶¶ 36–38, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 28–37, 44, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging advertisements with key terms that were not generally available).

[192] Section 463.3(d) (emphasis added).

[193] *See, e.g., Rebate,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/rebate* (last visited Dec. 5, 2023) (defining ''rebate'' as ''an amount of money that is returned to you, especially by the government, for example when you have paid too much tax'' or ''an amount of money that is paid back to you after you have paid too much''); *Discount,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/discount* (last visited Dec. 5, 2023) (''[A] reduction in the usual price'').

[194] *See* NPRM section IV.C, 87 FR at 42020 (proposed § 463.3(d) prohibited misrepresentations concerning ''[t]he availability of any rebates or discounts that are factored into the advertised price but not available to all consumers,'' and the NPRM explained ''[w]hen dealers advertise rebates and discounts, or offer prices that factor in such rebates and discounts, but in fact those rebates and discounts are not available to the typical consumer, but only a select set of customers, such conduct induces the consumer to select and transact with the dealer under false pretenses'').

[195] *See, e.g.,* Complaint ¶¶ 6–13, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 8–9, *JS Autoworld, Inc.,* No. C–4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7–9, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing

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to add additional requirements, such as disclosure requirements, to its Final Rule, given the already lengthy, complex, and document-heavy nature of auto transactions.

A number of dealership association commenters contended that the proposed paragraph would prohibit dealers from displaying beneficial information to consumers or would prohibit dealers from advertising rebates and incentives of limited availability. In addition, commenters including one such dealership association requested that the Commission adopt an approach the commenter contended is used in some States: allowing dealers to display, below the advertised sales price, a rebate or incentive that is not available to all purchasers. Moreover, a number of industry association and dealership association commenters argued that the proposed paragraph was more stringent than, and inconsistent with, the Commission's prior articulation of the deception standard, further noting the existence of Commission orders that prohibit defendants from representing that a price, discount, rebate, or other incentive is available, unless it is in fact available to all or unless a defendant provides a clear and conspicuous disclosure of any qualifications or restrictions. Section 463.3(d) prohibits misrepresentations; it does not prohibit a dealer from advertising, in a truthful manner, rebates or discounts with limitations. Thus, this paragraph allows for the representation of limited offers, as long as such representation is truthful, and any limitations are clear and conspicuous to consumers. The paragraph is also consistent with the Commission's prior enforcement order practice in this area, which both prohibits misrepresentations regarding rebates and prohibits representations regarding rebates without disclosing any material qualifications or restrictions.[196] The paragraph simply contains one of these prohibitions but not the second.

A dealership association commenter expressed concern that this proposed provision would penalize dealers if consumers were to confuse a rebate or discount offered for one vehicle with a vehicle that does not contain such an offer. As under current law, dealers are prohibited under § 463.3(d) from both express and implied misrepresentations. If, for example, a dealer states or implies that a discount is available on several types of vehicles when, in truth, the discount is only available on one such type of vehicle, such conduct would violate this paragraph. If, alternatively, the dealer does not state or imply that a discount is available for several types of vehicles, and offers a discount for one type of vehicle, this conduct would not violate this paragraph, as long as the dealer makes no other express or implied misrepresentations.

After careful review of the comments, the Commission is adopting paragraph (d) of § 463.3 as proposed. When dealers advertise rebates or discounts in a misleading manner, including when such rebates or discounts are not available to the typical consumer, or apply only to the most expensive versions of the make and model,[197] such conduct induces consumers to select and transact with the dealer under false pretenses.[198]

(e) The Availability of Vehicles at an Advertised Price

Proposed § 463.3(e) prohibited misrepresentations regarding the availability of vehicles at an advertised price. Upon reviewing the comments pertaining to this provision, the Commission is finalizing paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicles.''

One individual commenter recommended that proposed § 463.3(e) be expanded to prohibit certain specific misrepresentations about advertised vehicle availability, including whether any specific vehicle is already reserved for another consumer; whether the availability is subject to a requirement that the consumer pay a deposit; and regarding the amount of time until the vehicle becomes available. Another individual commenter recommended that the Rule require disclosure of how long each vehicle has been in the dealer's inventory, to prevent dealers from misrepresenting that a vehicle recently became available. Here, the Commission notes that, to the extent any such misrepresentations regarding the availability of vehicles were made with express or implied reference to the price of the vehicle, each would be prohibited by § 463.3(e).[199] Furthermore, to the extent such misrepresentations included reference to the subject of another paragraph of § 463.3, they would be prohibited by the Final Rule. For example, if an advertisement were to make a claim about the monthly payment for a specific vehicle, but the vehicle is not actually available, it would be covered under the bar against misrepresentations regarding costs or terms in paragraph (a) of § 463.3. In addition, under the Final Rule, dealers are also subject to disclosure requirements under § 463.4, including the requirement at § 463.4(a) to disclose the vehicle's offering price in any advertisement that references a specific vehicle, or any monetary amount or financing term for any vehicle. And if a dealer discloses the offering price for a vehicle, but the vehicle is not available to consumers, § 463.3(e) applies. Beyond this, the Commission will continue to monitor whether other misrepresentations regarding availability are being made without reference to price, or to the subject of another paragraph of § 463.3, to determine whether additional action is warranted.

The Commission received comments from a number of dealership associations and individuals requesting that the Final Rule limit dealers' responsibility for unanticipated delays, or otherwise expressing concern about

discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶¶ 4–5, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts but failed to disclose consumer would have to qualify for multiple rebates not generally available to them); Complaint ¶¶ 4–5, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose discounts were only available on the most expensive models).

[196] *See, e.g.,* Decision and Order, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014).

[197] *See* Complaint ¶¶ 4–5, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014) (alleging false ads touting price discount but concealing offer was limited to certain high-end models).

[198] *See* Complaint ¶¶ 8–9, *JS Autoworld, Inc.,* No. C–4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7–9, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶ 14, *TXVT Ltd. P'ship,* No. C–4508 (F.T.C. Feb. 12, 2015) (alleging false ads failed to disclose that it would match consumers' income tax refunds only up to $1,000); Complaint ¶¶ 4–5, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014) (alleging false ads touting pricing and discounts but concealing material qualifications and restrictions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6–13, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); *see also* Auto Buyer Study, *supra* note 25, at 8 (''A number of [study] participants were attracted by promotional offers in ads that they did not qualify for, but did not realize that they did not qualify until they got to the dealer. Some did not learn that they did not qualify until they got to the financing stage of the transaction.'').

[199] The commenter also expressed concern about misrepresentations regarding the refundability of deposits and recommended that the Commission include language in § 463.3(e) addressing this issue. Because representations and practices regarding the refundability of deposits are related to the costs or terms of purchasing, financing, or leasing a vehicle, this issue is covered by § 463.3(a). Thus, the Commission declines to adopt the commenter's recommendation.

how dealers would be able to comply with this proposed provision. One industry association commenter stated that unanticipated delays could result from factors beyond the reasonable control of the dealer, such as shipping or production issues. Other dealership association commenters contended that, because of supply chain disruptions, adjustments to inventory and other information may not always be displayed on a retailer's website instantaneously.

As is the case under current law, under this provision, dealers may not make claims about the availability of vehicles at an advertised price without a reasonable basis at the time the claims are made.[200] Objective claims about products or services represent, explicitly or by implication, that an advertiser has a reasonable basis to support those claims.[201] Consumers would be less likely to be affected by claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.[202] If a dealer has a reasonable basis to make a claim about the availability of vehicles at the time the claim is made, the dealer would not be in violation of the provision if a vehicle later becomes unavailable because of circumstances that a dealer could not reasonably anticipate or control.

A few dealership association commenters claimed that promulgation of § 463.3(e) would cause regulatory confusion because State guidelines or rules already address issues about the availability of vehicles, including, for example, by requiring dealers to note the location of the vehicle.[203] As described in SBP III.C.1, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. To the extent there are actual inconsistencies, § 463.9 is clear that this Rule's prohibition against misrepresentations controls.

After careful consideration of the comments, the Commission is adopting paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicles.'' This paragraph prohibits dealers from promoting low prices for specific vehicles, but then later misrepresenting, among other things, that the advertised vehicle is no longer available or no longer available at the advertised price. Such misrepresentations are likely to induce consumers to waste their time traveling to a particular dealership to pursue a specific offer on a specific vehicle when the offer or vehicle itself may not actually be available.

(f) Whether Any Consumer Has Been or Will Be Preapproved or Guaranteed for Any Product, Service, or Term

Proposed § 463.3(f) prohibited misrepresentations regarding whether a consumer has been or will be preapproved or guaranteed for any product, service, or term. Upon reviewing public comments, the Commission is finalizing paragraph (f) of § 463.3 without modification from the Commission's original proposal.

One dealership association commenter recommended that compliance with a State law that prohibits certain misleading statements, such as ''we finance anyone'' and ''no credit rejected'' and similar statements, should function as a safe harbor against liability under this proposed paragraph.[204] Yet, while compliance with the State law cited may require dealers to refrain from using certain frequently misleading statements, as described by the commenter, that law does not generally prohibit all misrepresentations regarding material information about consumer preapprovals or guarantees; even if it did, there is no evidence that duplicative laws prohibiting misrepresentations harm consumers or competition, and no evidence of benefits to consumers or competition in allowing one such law to act as a safe harbor against another such law. Further, given that current law already prohibits deceptive conduct generally, dealers should be able to comply with the Commission's Rule, which provides further protections for consumers and law-abiding dealers. Thus, the Commission declines to adopt the recommended safe harbor.

Therefore, after careful consideration, the Commission is finalizing paragraph (f) of § 463.3. Misrepresentations regarding preapproval or guarantees for a product, service, or term—as with misrepresentations about availability and price, described previously—are likely to impact consumers' conduct with regard to motor vehicle sales, financing, or leasing transactions, including by inducing consumers to waste time pursuing illusory offers.

(g) Any Information on or About a Consumer's Application for Financing

Proposed § 463.3(g) prohibited dealers from misrepresenting any material information on or about a consumer's application for financing. After carefully reviewing public comments, the Commission is adopting paragraph (g) of § 463.3 without substantive modification. As with § 463.3(b), the only adopted modification is the deletion of the term ''Material,'' which nonetheless applies to the operation of each of the misrepresentation paragraphs in § 463.3, including paragraph (g), through the addition of the term in the introductory paragraph of § 463.3.

[200] FTC Policy Statement on Deception, *supra* note 42, at 1 n.5 (''Advertising that lacks a reasonable basis is also deceptive.'') (citing *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 451–52 (1972) (additional citations omitted)); *see Fed. Trade Comm'n* v. *US Sales Corp.,* 785 F. Supp. 737, 748 (N.D. Ill. 1992) (''Apart from challenging the truthfulness of an advertiser's representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims.''); *see also Fed. Trade Comm'n* v. *Am. Screening, LLC,* 4:20–CV–01021–RLW (E.D. Mo. July 14, 2022) (granting summary judgment for the FTC upon finding that American Screening's claim that its COVID–19 protective equipment was available and would ship quickly was false and lacked a reasonable basis); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052 (C.D. Cal. 2012) (finding that the defendants' representations were unsubstantiated in violation of section 5, because Defendants conceded that during the time period in which their infomercial was aired they did not have evidence supporting their representations that consumers who purchased their product would be able to earn money easily and because survey results revealed that less than one percent of consumers actually generated any revenue or profits); *Fed. Trade Comm'n* v. *Elegant Sols., Inc.,* 8:19–cv–01333–JVS–KES (C.D. Cal., July 6, 2020) (finding that defendants made false or unsubstantiated representations, including representing that consumers would be enrolled in a repayment plan that may be forgiven after a specific number of years even though there were no Federal loan forgiveness programs with those repayment terms).

[201] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

[202] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *see Fed. Trade Comm'n* v. *Am. Screening, LLC,* 4:20–CV–01021–RLW (E.D. Mo., July 14, 2022) (granting FTC's motion for summary judgment and finding that Defendants' representations that it had protective equipment in stock and would ship it to consumers within seven to ten business days were material to consumers seeking such equipment during a global pandemic).

[203] This provision would not prohibit dealers from advertising a vehicle with limitations on availability in a truthful manner, such that any limitations are clear and conspicuous to the consumer. For example, dealers should not affirmatively represent that a vehicle is available on its lot without a reasonable basis that the vehicle is on the lot or without clearly and conspicuously noting that the vehicle will be made available after transfer from an affiliate's lot.

[204] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 21; *see* 43 Tex. Admin. Code 215.247(2) (2023).

The Commission received a number of comments regarding this provision, including comments that expressed support for prohibiting misrepresentations about a consumer's application for financing.

A credit union commenter requested that, in addition to this proposal, the Commission consider implementing a requirement to clearly and conspicuously disclose any potential financing limitations prior to vehicle purchase negotiations, contending that such a measure would better enable consumers to choose a motor vehicle dealer and financing option that best serves their needs. To the extent a dealer misrepresents a consumer's financing options or limitations, including prior to or during the process of selling, leasing, or arranging financing for a vehicle, such conduct is prohibited by this provision, and depending on the circumstances, may also violate other provisions of the Rule. For example, as discussed in this paragraph-by-paragraph analysis, § 463.3(a) of the Final Rule prohibits misrepresentations regarding the cost or terms of financing a vehicle; this prohibition includes misrepresentations about available vehicle financing. Furthermore, this provision pertains to misrepresentations; comments pertaining to proposed disclosures regarding price, add-ons, and total of payments are examined in the Commission's discussion of § 463.4, wherein the Commission explains its determination not to finalize any additional disclosure requirements not included in its NPRM.

An individual commenter, while expressing support for regulation of such misrepresentations, also noted concern for the ''grave consequences of falsifying information on a customer's application for financing,'' and urged the Commission to consult with other law enforcement agencies to further address such problems.[205] The Commission appreciates the concern and the seriousness of falsifying information on a consumer's application for financing, and coordinates regularly with other law enforcement agencies regarding areas of shared jurisdiction and responsibility, including motor vehicle sales and financing. The Commission will continue to monitor financing application falsification issues to determine whether any additional action, beyond § 463.3(g), is needed.

A number of dealership association commenters contended that the proposed language was vague and did not adequately explain the type of behavior this paragraph would prohibit. Relatedly, some dealership association commenters contended that this provision lacked specific guidance about what a motor vehicle dealer must or must not disclose. This provision, however, utilizes terms which are commonly used and understood, and which may be interpreted according to their plain meaning. Read together with the introductory paragraph of § 463.3, § 463.3(g) prohibits misrepresentation . . . regarding material information about ''[a]ny information on . . . a consumer's application for financing.'' By its terms, this prohibition includes any misrepresentations of material information on a financing application. For example, dealers would make misrepresentations in violation of this provision by including, on a consumer's application that is submitted to a third-party financing institution, consumer income information that is different from what the consumers have stated to the dealer that the consumers actually earn, or by representing a different down payment amount than the amount the consumer has actually provided, or by misrepresenting that the vehicle is being sold or leased with certain add-on products.[206] Moreover, as described in detail with regard to other paragraphs of § 463.3, this provision does not require any particular affirmative disclosures, instead obligating dealers to refrain from certain misrepresentations.

One dealership association commenter questioned whether a dealer would be held responsible for a customer's false statement about his or her income. If a consumer falsely states they have a higher income, that consumer would not be misled into thinking he has a higher income. If, however, a consumer's application falsely states a higher income because a dealer has altered the information, that consumer would be misled into thinking that the application they are signing accurately reflects the information the consumer provided, and § 463.3(g) would be violated. Additionally, if a dealer advises a consumer to include other sources of payment as income or advises the consumer to list a higher income in other ways, such conduct may mislead the consumer into thinking that it is proper to calculate income for auto retail installment contracts in a particular way, and there may be a violation of § 463.3(g).

After careful review and consideration of the comments, the Commission adopts paragraph (g) of § 463.3 without substantive modification, prohibiting misrepresentations regarding material information about any information on or about a consumer's application for financing. It is likely to affect a consumer's choices if the consumer knows a dealer is misrepresenting the consumer's income, or other aspects of financing applications. If, for example, a consumer knew the truth—that the dealer is inflating the consumer's income such that the consumer would not otherwise obtain financing for a particular vehicle—the consumer might opt to finance a less expensive car, rather than risking repossession. Material misrepresentations on consumers' financing paperwork are also likely to cause consumers substantial injury, including by causing them to take on debt beyond that which the financing company would have approved, and increasing the risk of repossession and harmful consequences to consumers' credit. Consumers cannot avoid the injury from dealers misrepresenting the information consumers provide them, and this practice provides no countervailing benefits to consumers or competition.

(h) When the Transaction Is Final or Binding on All Parties

(i) Keeping Cash Down Payments or Trade-In Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction

Proposed § 463.3(h) prohibited dealers from misrepresenting when the transaction is final or binding on all parties. Proposed § 463.3(i) prohibited dealers from making misrepresentations about keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction. After careful review and consideration of the comments, the Commission is finalizing paragraphs (h) and (i) of § 463.3 with the minor modification of capitalizing the defined term ''Vehicles'' in § 463.3(i) to conform with the revised definition at § 463.2(e).

Some commenters, including a group of State attorneys general and consumer

[205] Individual commenter, Doc. No. FTC–2022–0046–7445 at 12.

[206] *See* Complaint ¶¶ 18–36, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018); Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 30, Summer 2023'' 5 (July 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-30_2023-07.pdf* (finding that dealers ''fraudulently included'' in financing documents add-ons, such as undercoating, that were not actually present on the vehicle, creating ''improperly inflated loan amounts'' that caused consumers to pay improper additional interest).

advocacy organizations, generally supported prohibiting misrepresentations about when the transaction is final or binding on all parties but urged the Commission to include additional requirements or prohibitions. For instance, several commenters, including consumer advocacy organizations and individual commenters, requested that the Commission add to its Final Rule a provision requiring dealers to include, in every consumer credit contract, a finality clause stating that the transaction is final as soon as the consumer credit contract is signed, or alternatively, a provision requiring dealers to include in retail installment contracts a clause prohibiting financing-contingent sales. Commenters including a group of State attorneys general recommended that the Commission require any dealer that does not ultimately secure financing under previously presented terms to unwind the transaction, return any down payment in full, and return any traded-in vehicle. Such commenters also recommended that the Commission implement restrictions, such as requiring dealers to be reasonably certain that a consumer will qualify for quoted financing terms; requiring a written disclosure that the consumer must sign advising the consumer that financing is not final; or setting a short deadline by which the dealer must either arrange financing or cancel the transaction. Other commenters, including a State consumer protection agency, also supported requiring the contractual contingency to be disclosed conspicuously and limiting the contingency to a short period of time. A number of these commenters, including consumer advocacy organizations, provided examples of how spot delivery transactions can harm consumers.

The provision's prohibitions and requirements address many of these commenters' concerns regarding spot delivery and yo-yo financing. Spot delivery and yo-yo financing refer to situations where a dealer delivers a vehicle to a consumer on the spot before the financing or leasing has been finalized, leads a consumer to believe that the transaction is final, and then later directs the consumer to return the vehicle and engages in certain tactics, such as failing to return the consumer's trade-in vehicle while refusing to honor the finance or lease transaction, or pressuring the consumer to enter into a new transaction.[207] Paragraphs (h) and (i) of § 463.3 prohibit misrepresentations regarding the finality of the transaction and return of down payments and trade-in vehicles. Under these provisions, if a consumer is under the impression that the transaction is final, and the dealer subsequently causes the consumer to return the vehicle to the lot because the transaction was not final, or the dealer takes or threatens to take possession of the vehicle but refuses to return the down payment or trade-in vehicle, the dealer has violated either § 463.3(h), by misrepresenting the finality of the transaction, or § 463.3(i), by falsely representing, expressly or by implication, that the dealer has a legal basis to keep the down payment or trade-in vehicle in the event the transaction is not finalized, or both.[208]

Regarding the recommendation to include a requirement that dealers be reasonably certain that consumers will qualify for quoted financing terms, the Rule the Commission is finalizing already contains several provisions in addition to § 463.3(h) and (i) that address this conduct. For example, the Rule prohibits misrepresentations regarding material information about the costs or terms of financing (§ 463.3(a)), or about whether any consumer has been or will be preapproved or guaranteed for any product, service, or term (§ 463.3(f)). As explained in the paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e), existing law requires dealers to have a reasonable basis for their claims. Objective claims about products or services represent, explicitly or by implication, that an advertiser has a reasonable basis to support those claims.[209] Thus, to avoid misrepresentation, dealers must reasonably believe that consumers will qualify for quoted financing terms, or that the transaction will be finalized on the terms presented, in order to represent such terms to consumers.

Regarding additional provisions that would require certain contractual measures, such as finality clauses or prohibitions against financing-contingent sales, the Commission is concerned that requiring specific contract provisions would obligate dealers that are not engaged in spot delivery to change their contracts even though their customers do not experience harm stemming from spot delivery practices. Before requiring any such changes, the Commission has determined to continue to monitor the market to evaluate whether additional steps are warranted.[210]

Some commenters, including dealership associations, requested that the Commission clarify how dealers could document compliance with these proposed provisions, such as how dealers could establish that appropriate disclosures had been made. One such commenter, for instance, asked whether written agreements required by State law were sufficient to satisfy the requirements of these provisions. As noted elsewhere in this paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, these provisions do not require any particular affirmative disclosures, instead obligating dealers to refrain from

[207] Complaint ¶¶ 67–72, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016); *State ex rel. Dewine* v. *Dads Car Lot Inc.,* No. 13–cv–4036, 2014 BL 468717, at * 1 (Ohio Com. Pl. June 6, 2014) (finding defendant violated State consumer sales practices act by including ''spot delivery'' document that allowed defendant to keep ''all funds on deposit''); Att'ys Gen. of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 4 (Apr. 13, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf* (recommending, among other rules aimed at deterring yo-yo sales, FTC adopt rules that would require dealers to disclose the consumer's ''right to walk away'' if financing is rejected and, in the context of spot delivery, to disclose financing has not been finalized as well as the responsibilities and potential consequences for consumers); Legal Aid Just. Ctr., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00066 at 26, 29 (Jan. 30, 2012), *https://downloads.regulations.gov/FTC-2022-0036-0062/attachment_2.pdf* (explaining that in a yo-yo sale the dealer misrepresents to the consumer that credit has been finalized, when in fact the dealer treats the sale as contingent, retaining the ability to call off or seize the vehicle later; a ''yo-yo case can result in substantial distress to the person who has been tricked''; and ''[t]he harm to the marketplace occurs when the consumer believes a credit sale has been completed and stops shopping for a car on credit''); Nat'l Consumer L. Ctr., ''In Harm's Way—At Home: Consumer Scams and the Direct Targeting of America's Military and Veterans'' 41 (May 2003), *https://filearchive.nclc.org/special_projects/military/report-scams-facing-military.pdf* (listing ''Spot Delivery'' or ''yo-yo sales'' among scams commonly aimed at military members).

[208] *See Orkin Exterminating Co., Inc.,* 108 F.T.C. 263 (1986), *aff'd sub nom. Orkin Exterminating Co.* v. *F.T.C.,* 849 F.2d 1354 (11th Cir. 1988) (finding that defendant's practice of unilaterally raising consumers' annual renewal fees where the consumers' contracts contained a ''lifetime guarantee'' as to the amount of the fee was unfair under section 5 of the FTC Act); *see also* First Amended Complaint ¶¶ 59–61, *Fed. Trade Comm'n* v. *BF Labs, Inc.,* No. 4:14–cv–00815 (W.D. Mo. May 14, 2015) (alleging as unfair defendants' practice of unilaterally failing to provide paid-for services while refusing to refund consumers' upfront payments).

[209] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

[210] On May 31, 2023, the Commission received a petition for rulemaking under 16 CFR 1.31 regarding yo-yo financing. Petition for Rulemaking Concerning the Finality of a Car Purchase (Yo-Yo Financing), Doc. No. FTC–2023–0035–0002. The Commission will address this petition separately.

certain misrepresentations. Section 463.6 discusses records dealers need to keep to demonstrate compliance with the requirements of the Final Rule, and enumerates five such categories of records, including copies of finance and lease documents signed by the consumer, whether or not final approval is received for a financing or lease transaction. The Commission declines to include in this Final Rule additional requirements regarding any specific documents dealers must keep in order to demonstrate compliance with § 463.3(h) or (i).

One individual commenter requested that the Commission include in the CFR the examples of harmful conduct related to yo-yo financing that it published in the NPRM.[211] The Commission has determined that each such example describes conduct that violates this rulemaking. Rather than adding them to the text of the Final Rule, the Commission repeats those examples in this paragraph-by-paragraph analysis of § 463.3(h) and (i), in order to avoid voluminous modifications to the Rule text itself.

Commenters including a dealership association asserted that the issue of when a contract is final or binding is one of State law, and thus it is within the purview of each State to determine when a contract is final or binding, arguing that § 463.3(h) therefore should be removed from the Final Rule. Another such commenter contended that even courts experienced in contract interpretation have difficulty determining when an agreement is final, and that dealers therefore are likely to transgress this prohibition in proposed § 463.5(h) accidentally. This provision, however, requires that a dealer's express or implied representations regarding material information be truthful, which is consistent with current law and with the Commission's authority to prohibit unfair or deceptive acts or practices. Moreover, under § 463.9, this Rule does not affect State law pertaining to contracts so long as State law is not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.[212] In the case of § 463.3(h), for example, an inconsistency would include State law allowing material misrepresentations regarding whether transactions are final; the Commission is unaware of any such law. Further, to the extent dealers are concerned they may transgress this prohibition because courts have had difficulty interpreting their contracts, then, as they should be doing under current law prohibiting misrepresentations, dealers should carefully consider the net impression they are conveying with the language they use, both in their contracts and in the context in which these contracts are presented, as such language may confuse consumers as well.

Several dealership association commenters claimed that State law already prohibits misrepresentations about spot delivery transactions or otherwise protects consumers in such transactions. One such commenter asserted that Massachusetts law prohibits spot deliveries, and cautioned the FTC not to create uncertainty with its Rule such that one might think spot deliveries are allowed in Massachusetts. Another such commenter asked whether this provision applies in addition to State law or instead of it. Other commenters, including consumer advocacy organizations, asserted that less than half of the States have statutes, regulations, or administrative pronouncements about yo-yo transactions; that there are significant variations in such law from State to State; and that State regulation often does not provide sufficient protections for consumers. As described throughout the paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, State law may provide more or less specific requirements than those under the Final Rule as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. As for any States that prohibit spot delivery, such prohibitions are consistent with the provisions of this Rule. Finally, as to whether additional provisions are warranted to protect consumers, the Commission will continue to monitor the market to make this determination.

Commenters including an industry association contended that the Commission should not take action to disrupt spot delivery transactions to consumers, stating that there may be reasons to keep down payments even when consumers are not permitted to keep the vehicle, or claiming that although abusive spot deliveries have occurred, they are not a systemic problem in the marketplace. The Commission, however, need not show that abusive spot deliveries are systemic in order to finalize these provisions barring misrepresentations.[213] Further, these misrepresentation prohibitions do not alter requirements under current law prohibiting dealers from making express or implied misrepresentations.

After careful consideration of the recommendations and record, the Commission has determined to finalize paragraphs (h) and (i) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicles'' in § 463.3(i). The Commission notes, however, that it has significant concerns about consumer harm due to yo-yo financing and will continue to examine these issues even as it finalizes these prohibitions against certain misrepresentations. Misrepresentations about when the transaction is final or binding on all parties, as well as about keeping down payments or trade-in vehicles, charging fees, or initiating legal process or any action, are likely to affect consumer conduct, including regarding whether to enter into a new transaction with less beneficial terms for the consumer, and are likely to mislead consumers.

(i) Keeping Cash Down Payments or Trade-In Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction

Proposed § 463.3(i) is discussed with § 463.3(h).

(j) Whether or When a Dealer Will Pay Off Some or All of the Financing or Lease on a Consumer's Trade-in Vehicle

Proposed § 463.3(j) prohibited misrepresentations regarding whether or when a motor vehicle dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle. The Commission is finalizing paragraph (j) of § 463.3 largely as proposed, with minor modifications—substituting ''Dealer'' for ''Motor Vehicle Dealer'' and capitalizing ''Vehicle''—to conform with the revised definitions of '' 'Covered Motor Vehicle' or 'Vehicle' '' and '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' at § 463.2(e) and (f).

The Commission received several comments in response to this paragraph, including from individual commenters who expressed support for prohibiting dealers from misrepresenting whether they would pay off outstanding balances

[211] *See* NPRM at 42020–21. Individual commenter, Doc. No. FTC–2022–0046–9469 at 5–6.

[212] One commenter questioned whether this section would prohibit a dealer from retaining a down payment on a special order vehicle where the customer refuses to take delivery of the vehicle. Comment of Minn. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8670 at 10. Sections 463.3(h) and (i) prevent misrepresentations, including misrepresenting that a dealer can keep a down payment when a dealer does not have a legal basis to do so. If the dealer does not make a misrepresentation, this provision would not be violated.

[213] *See* SBP I.A, n.3.

remaining on a trade-in vehicle.[214] Other commenters, including an industry association and dealership associations, requested that the Commission limit dealer responsibility under this provision for unanticipated delays stemming from circumstances beyond a dealer's reasonable control, arguing that proposed § 463.3(j) made no exception for unanticipated delays such as a previous financing source declining to accept a payoff or refusing to release the vehicle title after receiving a payoff.[215] The Commission notes that, as is the case under current law, under this provision, dealers are not permitted to make claims about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle if the truth of those claims depends on circumstances outside their control and the dealer does not possess a reasonable basis for such claims.[216]

An individual commenter contended that requiring additional disclosures about this provision would confuse the consumer.[217] This provision, however, does not necessitate any affirmative disclosures from dealers. Instead, it prohibits dealers from misleading consumers about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle.

One State consumer protection agency commenter requested that the Commission require, in situations where a buyer's credit information or trade-in vehicle are evidently insufficient to support a deal, that the dealer require additional down payment or other security, or affirmatively disclose that the dealer is not responsible for paying off liens.[218] Without further information on the costs and benefits of such a proposal, the Commission declines to add such requirements to this Final Rule. The Commission notes, however, that the Rule prohibits dealers from misleading consumers regarding when trade-in vehicles have negative equity and from otherwise failing to obtain the consumer's express, informed consent prior to charging the consumer for any item, including any amounts associated with trading in a vehicle. The Commission will continue to monitor this area to determine whether any such additional measures are warranted to protect consumers or competition.

The Commission also received a number of comments from dealership associations arguing that existing State and Federal laws address dealers' obligations in connection with informing consumers how much each consumer is responsible for financing. The Commission notes that commenters presented no actual conflicts between this provision and other laws, and to the extent duplicative laws prohibit misrepresentations in this area, the Commission has not observed harmful consequences to consumers or competition. Further, as noted elsewhere in the section-by-section analysis, State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, under § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

After carefully considering the comments, the Commission is finalizing this provision with the two minor modifications to conform with the defined terms '' 'Covered Motor Vehicle' or 'Vehicle' '' and '' 'Covered Motor Vehicle Dealer' or 'Dealer.' '' This provision prohibits dealers from making misrepresentations about paying off the financing or lease on a trade-in vehicle. Such conduct includes misrepresenting to consumers who trade in a vehicle that the dealer will pay off any outstanding balance owed on the trade-in vehicle when the consumer purchases a vehicle from the dealer. For example, when such a dealer takes a trade-in, if the dealer remits payment to the entity to whom the trade-in payment is owed, as consumers would expect, but also adds this payment to the amount the consumer owes on the vehicle the consumer is purchasing from the dealer, the consumer is the party that has ultimately paid off the trade-in amount, contrary to the impression made by the dealer. This provision also prohibits dealers that are going out of business from representing expressly or by implication that they will pay off liens if they do not, in fact, pay off the liens, or do not pay them off in a timely manner. Such misrepresentations are likely to affect a consumer's choice to visit a particular dealership or select a particular vehicle.

(k) Whether Consumer Reviews or Ratings Are Unbiased, Independent, or Ordinary Consumer Reviews or Ratings of the Dealer or the Dealer's Products or Services

Proposed § 463.3(k) prohibited misrepresentations about whether ''consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services.'' Upon careful review and consideration of the comments, the Commission is finalizing paragraph (k) of § 463.3 with one technical clarification to replace ''its'' with ''the Dealer's.'' The Rule's requirements apply to all individuals and entities that meet the definition of ''Dealer.''

An individual commenter recommended that the Commission modify this provision to include language explicitly prohibiting dealers from creating, editorializing, modifying, or removing consumer reviews.[219] Here, the Commission notes that if such acts or practices would result in reviews that are not independent or do not otherwise reflect ordinary consumer experience, they already would violate this provision. For example, if a dealer created a positive review, edited or modified negative reviews to make them sound positive, or removed negative reviews while keeping positive reviews, such practices would violate this provision.

A few individual commenters recommended that the Rule include additional provisions related to consumer reviews, including a requirement for the creation of an online database for consumer reviews and complaints about dealerships, and a requirement for dealers to post consumer reviews online and in the dealership location. The Commission notes that while some reviews are available online, additional information could assist consumers, and the Commission will consider whether such

[214] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–3770 (''I agree that these changes need to take place. No one should have to pay what was owed on a trade in after the dealership said they would pay off the trade in . . . .'').

[215] For example, commenters stated that occasionally the previous finance or lease source will not provide a timely payoff for a traded vehicle or will refuse to accept a payoff claiming more money is due; or a previous finance or lease source may accept a payoff, but will refuse to credit its former customer's account and release the title promptly. In addition, an industry association commenter requested that the Commission narrow this prohibition to specifically address the fact patterns giving rise to it that the Commission sets forth in the NPRM, and, in so doing recognize that it is in a dealer's business interest to pay off the existing loan quickly so that the vehicle can be more easily and quickly retailed.

[216] *See* paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e) (discussing deception and reasonable basis).

[217] *See* Individual commenter, Doc. No. FTC–2022–0046–7905 at 1.

[218] *See* Comment of State of S.C. Dep't of Consumer Affs., Doc. No. FTC–2022–0046–7891 at 6.

[219] Individual commenter, Doc. No. FTC–2022–0046–2364 (''Many favorable ([*i.e.*] 5 star) Dealer reviews I have read appear suspect with generic, similar wording (or no wording at all) seemingly provided to offset lower Dealer ([*i.e.*] 1 star) ratings. I recommend that for [§ 463.3(k)] the following (or similar) be appended: Additionally, consumer reviews may not be created, editorialized, modified or removed by any Dealer or third party acting at the direction of any Dealer. Consumer reviews should be modifiable or removable by the originating author.'').

measures are needed as it continues to monitor the marketplace, including after the Rule goes into effect.

Several dealership associations asked what type or format of reviews or ratings would be covered by this proposed provision. As proposed, § 463.3(k) applied to all reviews or ratings, in any format or wherever displayed, that are likely to mislead consumers as to whether such reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings. Relatedly, industry and dealership associations contended that the language used in the proposed provision was vague and confusing, and requested that the Commission further define the phrase, ''unbiased, independent, or ordinary consumer reviews or ratings.'' To begin, the operative terms in this phrase are commonly used and understood and may be interpreted according to their plain meaning without further definition. Moreover, the Commission has, for decades, provided information and guidance on avoiding deception through the use of endorsements, testimonials, and online reviews.[220] Enforcement actions by the Commission have documented examples of the types of misrepresentations that would be covered by this provision.[221] For example, dealerships and their employees have posted positive, five-star online reviews that falsely purport to be objective or independent.[222] As these sources make clear, a person who is unbiased, independent, and an ordinary consumer would be someone who was not paid or given something of value to write a review and who has no employment or familial relationship or other unexpected material connection to the dealership.[223]

An industry association commenter expressed concern that this proposed provision did not appear to be limited to misrepresentations that may occur when a dealership, and not an unrelated third party, affirmatively publishes consumer reviews. To the extent an independent third party that does not have a material connection with the dealership makes any such claims, those claims would not be covered by this provision. This provision concerns situations where there is such a relationship between the third party and the dealer. For example, if a dealer were to pay a third party or consumer to post positive reviews that misrepresent their status as unbiased, independent, or ordinary consumer reviews, the dealer would be violating this provision.[224]

One industry association commenter contended that the Consumer Review Fairness Act[225] already prohibits the conduct covered by this provision. The Consumer Review Fairness Act makes it illegal for businesses to have form contracts that disallow or restrict consumers from posting negative reviews. Section 463.3(k) prohibits misrepresentations regarding the authenticity of consumer reviews generally. These provisions are not in conflict, and as discussed in SBP III.C.1, to the extent the provision creates any duplication, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct.

Whether reviews or ratings about a seller or the seller's products or services are from unbiased, independent, or ordinary consumers is material to consumers' decision-making because a consumer is more likely to interact with a particular dealership if the dealership has positive reviews or ratings from unbiased, independent, or ordinary consumers. Thus, after careful review of all the comments, the Commission is finalizing paragraph (k) of § 463.3 without substantive modification from the Commission's original proposal.

(l) Whether the Dealer or Any of the Dealer's Personnel or Products or Services Is or Was Affiliated With, Endorsed or Approved by, or Otherwise Associated With the United States Government or Any Federal, State, or Local Government Agency, Unit, or Department, Including the United States Department of Defense or Its Military Departments

Proposed § 463.3(*l*) prohibited misrepresentations that ''the Dealer or any of its personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.'' Upon careful review and consideration of the comments, the Commission is finalizing paragraph (*l*) of § 463.3 with one technical clarification to replace ''its'' with ''the Dealer's.'' The Rule's requirements apply to all individuals and entities that meet the definition of ''Dealer.''

One individual commenter recommended that the Commission additionally prohibit dealers from ''causing any person to impersonate a police officer for any purpose.'' [226] The commenter contended that such a prohibition would address a common yo-yo financing tactic, wherein dealers exert pressure on consumers to return vehicles by calling the consumers on the phone, falsely claiming to be police officers, and falsely representing that there is a warrant for the consumers' arrest or that the dealer has reported the consumers' vehicles as stolen. The Commission is likewise concerned about such conduct, and notes that it would be covered by the language in this paragraph, which applies broadly to misrepresentations of affiliation with, endorsement or approval by, or association with ''any Federal, State, or local government agency, unit, or department,'' including State or local police officials.[227] By misrepresenting

[220] *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) (to be codified at 16 CFR 465), *https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf;* Fed. Trade Comm'n, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR 255; Fed. Trade Comm'n, ''FTC's Endorsement Guides: What People are Asking,'' *https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking;* Fed. Trade Comm'n, ''Soliciting and Paying for Online Reviews: A Guide for Marketers,'' *https://www.ftc.gov/business-guidance/resources/soliciting-paying-online-reviews-guide-marketers;* Fed. Trade Comm'n, ''Disclosures 101 for Social Media Influencers,'' *https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers.*

[221] *See* Complaint ¶¶ 73–78, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016); *see also* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364, 49371–75 (July 31, 2023) (to be codified at 16 CFR 465), *https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf* (discussing such enforcement actions).

[222] *See* Complaint ¶¶ 73–78, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).

[223] One commenter conducted a study of Google reviews of U.S. car dealerships from April 2008 to September 2022. The commenter found by examining a 2% sample of these reviews that consumers gave on average 4.47 stars out of 5 stars and made several other conclusions about consumer satisfaction with the auto transaction experience based on that methodology. Comment of Inst. for Regul. Analysis & Engagement, Doc. No. FTC–2022–0046–10164 at 2–5. The Commission notes that, consistent with its enforcement experience, there is no guarantee that those reviews are a genuine reflection of consumer experience. Moreover, the Commission notes that oftentimes consumers do not realize that they have been charged without their authorization. *See* SBP II.B. Thus, such a study that relies on Google star ratings is not conclusive of consumer experience.

[224] *See* § 463.1 (''It is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly . . . .'').

[225] *See* 15 U.S.C. 45b.

[226] Individual commenter, Doc. No. FTC–2022–0046–7445 at 17.

[227] The Commission discussed government impersonation scams in its Notice of Proposed Rulemaking for a Trade Regulation Rule on Impersonation of Government and Business. *See* 87 FR 62741 (Oct. 17, 2022). The Commission observed, *inter alia,* ''ongoing widespread fraud

police involvement in potential vehicle repossession, such conduct would also violate paragraph (o) of § 463.3 of the Final Rule.

A number of dealership association commenters contended that some States address this type of deception.[228] As noted in response to similar commenter contentions regarding other proposed provisions, the Commission has seen no harm to consumers or competition from duplicative misrepresentation prohibitions, and overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Moreover, including such a provision in the Final Rule additionally benefits consumers who encounter such conduct, and aids law-abiding dealers that otherwise lose business to competitors that act unlawfully. Further, § 463.9 discusses part 463's relation to State laws.

A dealership association commenter claimed that many dealerships in the commenter's State work with military personnel to promote charitable causes, and questioned whether a banner listing a dealership at a charitable military event would be considered a misrepresentation that the dealership is ''associated'' with the military.[229] Here, the Commission notes that a banner that conveys true participation in a charitable military event, and does not deceptively represent an affiliation with, endorsement or approval by, or association with the military, would not violate this provision. The Commission's law enforcement practice provides further guidance on this point: the Commission's many enforcement actions alleging misrepresentation of government affiliation provide examples of the types of conduct that would violate this provision.[230]

Representations about whether a seller or any of its personnel, products, or services is or was affiliated with, endorsed or approved by, or otherwise associated with the government are likely to affect consumers' conduct. Consumers are more likely to visit a dealership and select a vehicle or product if they believe that a specific dealer or a dealer's personnel, products, or services have been approved by a government entity. The Commission thus adopts paragraph (*l*) of § 463.3 without substantive modification from the Commission's original proposal.

(m) Whether Consumers Have Won a Prize or Sweepstakes

Proposed § 463.3(m) prohibited misrepresentations about whether consumers have won a prize or sweepstakes. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (m) of § 463.3 without modification from its original proposal.

Comments from dealership associations contended that some States or municipalities address this type of deception. As discussed in SBP III.C.1, the Commission has not seen harm to consumers or competition from multiple prohibitions against misrepresentations. Furthermore, any significant overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Finally, § 463.9 discusses part 463's relation to State laws.

Misrepresentations about whether consumers have won a prize or sweepstakes harm consumers by inducing consumers to choose and transact with a particular dealership under false pretenses. Thus, the Commission adopts paragraph (m) of § 463.3 without modification from the Commission's original proposal.

(n) Whether, or Under What Circumstances, a Vehicle May Be Moved, Including Across State Lines or Out of the Country

Proposed § 463.3(n) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be moved, including across State lines or out of the country. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing the word ''State,'' as well as the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e).

The Commission received comments including from dealership associations arguing that proposed § 463.3(n) would pose issues for dealers who must comply with limitations imposed by manufacturers or distributors on the export of new motor vehicles. These commenters requested clarification about liability under this provision in the event dealers communicate any such export limitations to consumers or take other steps to prevent the export of new vehicles. Section 463.3(n), however, does not prohibit dealers from accurately and non-deceptively communicating whether, or under what circumstances, a vehicle may be moved—it instead prohibits representations that mislead consumers about this information.

Commenters including a dealership association objected to this proposed provision by asserting that a State or insurance company may prescribe, and the parties to a contract may agree upon, whether a leased or purchased vehicle may be driven to a particular area. This provision, however, does not prevent parties from discussing and agreeing to whether a vehicle may be moved. Instead, § 463.3(n) prohibits misrepresentations about whether, or under what circumstances, a vehicle may be moved, including regarding any liens or other restrictions that would prevent or hinder consumers' ability to move the vehicle beyond certain boundaries. Furthermore, interaction with State laws is explained in the section-by-section analysis of § 463.9.

Representations about whether, and under what circumstances, a consumer may move a vehicle are material as they are likely to affect a reasonable consumer's decision to purchase a vehicle, including decisions of military consumers who may frequently need to move.[231]

schemes in which scammers impersonate law enforcement or government officials in attempts to extort money or steal personally identifiable information.'' *See id.* at 62742 (citing announcements on March 7, 2022, and May 20, 2022, by the Federal Bureau of Investigation and the Social Security Administration's Office of the Inspector General, in coordination with other Federal law enforcement agencies, respectively).

[228] One commenter further opined that ''the Department of Defense has itself dealt with this situation in the case of military lending and sales.'' Comment of Kan. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–4510 at 7.

[229] Comment of N.C. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–11223 at 9.

[230] *See, e.g.,* Complaint ¶¶ 5–6, 9–11, 14, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020) (alleging auto marketer misrepresented that it provided COVID–19 stimulus relief to consumers); Complaint ¶¶ 14–26, *Fed. Trade Comm'n* v. *Ponte Invs., LLC,* No. 1:20–cv–00177 (D.R.I. Apr. 17, 2020) (alleging misrepresentation of government affiliation by company that impersonated the U.S. Small Business Administration with business names ''SBA Loan Program'' and ''SBA Loan Program.com'' and claimed to help businesses obtain access to coronavirus relief programs administered by the agency); Complaint ¶¶ 24–36, *Fed. Trade Comm'n* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. Sept. 13, 2016) (alleging defendants misrepresented affiliation with U.S. Department of Transportation by claiming to be the ''Compliance Unit'' of ''DOTAuthority'' and providing a telephone number with a Washington, DC area code).

[231] *See, e.g.,* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing, & Leasing Motor Vehicles,'' Public Roundtable, Panel 1: Military Consumers and the Auto Sales and Financing Process, Remarks by Hollister K. ''Holly'' Petraeus, Dir., Off. of Servicemember Affs., CFPB, Tr. at 11 (Aug. 2, 2011), *https://www.ftc.gov/system/files/documents/public_events/52654/080211_ftc_sess1.pdf* (''[S]ervicemembers don't always realize if they buy and finance a car here in the U.S., they can't take it out of the country unless they have a letter of permission from the lienholder to do so. And some of the lienholders won't give that permission. . . . [W]e [heard from] a JAG in Germany saying, 'I see a number of people who end

Continued

Based on a review of the comments and for the reasons previously discussed, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing ''State'' and the defined term ''Vehicle.''

(o) Whether, or Under What Circumstances, a Vehicle May Be Repossessed

Proposed § 463.3(o) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be repossessed. After careful review and consideration of the comments, the Commission is finalizing paragraph (o) of § 463.3 with the minor modification of capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e).

A number of commenters, including consumer advocacy organizations and a group of State attorneys general, expressed concern about electronic disablement of vehicles, including through the use of starter interrupt devices, which are sometimes utilized for vehicle repossession. Many of these commenters expressed concern about the potential for harm to consumers if such devices are activated without regard to the location or operational state of the vehicle, and recommended that the Commission restrict their use. Alternatively, one such commenter recommended that the Commission add a provision to part 463 that would require dealers to disclose any such technology, obtain the consumer's express, informed consent to its use, and limit its use to one time, not to exceed 30 days, once a consumer is in default. Finally, the comment from a group of State attorneys general recommended that the Commission require additional disclosures any time a starter interrupt device is installed, provide advance notice to consumers prior to activating such devices, and enable consumers to restart their vehicles in emergency or unsafe situations.[232]

The Commission recognizes the potential for abuse with regard to vehicle disablement technology.[233] It is already illegal under section 5 of the FTC Act to engage in deception, including regarding vehicle disablement technology, and to unfairly cause substantial injury to consumers, such as by disabling a vehicle while it is being operated on the highway.[234] This provision will further provide protection for consumers from unfair or deceptive conduct surrounding the repossession of vehicles. Moving forward, the Commission will continue to monitor the motor vehicle marketplace for developments in this area to determine whether additional restrictions are warranted.

A number of dealership association commenters contended that this provision would inhibit dealers from making representations about their lawful rights to repossess vehicles, positing that, upon making any such representations, this provision might require dealers to carry out repossessions without exception or risk violating this provision. This provision, however, does not prevent dealers from providing accurate information to consumers about when a vehicle can, or will, be repossessed. Even where dealers have a lawful right to repossess a vehicle, current law, as well as this provision, prohibit dealers from misrepresenting whether or when they may take such action. Current law, including at the Federal level, imposes some such restrictions in this regard: for example, the Servicemembers Civil Relief Act prohibits repossession of vehicles during a servicemember's period of military service without a court order, as long as the servicemember either placed a deposit for the vehicle or made at least one installment payment on the contract before entering military service.[235] This provision prevents dealers from representing that they may repossess military consumers' vehicles under such circumstances. However, dealers may still accurately and non-deceptively inform a consumer about the circumstances under which a vehicle can be repossessed or when the dealer may take action. In providing consumers with such information, however, dealers must refrain from representing, including by implication, that repossession is likely when in truth it is not.

After considering the comments, the Commission is finalizing paragraph (o) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicle.'' This provision prohibits dealers from making misrepresentations regarding material information about repossession of a vehicle. Information about whether, or under what circumstances, a vehicle may be repossessed is likely to affect consumers' conduct, including by impacting military consumers' conduct regarding which payments to prioritize while serving our country.

(p) Any of the Required Disclosures Identified in This Part

Proposed § 463.3(p) prohibited misrepresentations of any of the required disclosures identified in this part. As the Commission noted in its NPRM, this was including but not limited to representations that limit or contradict the required disclosures.[236] Upon careful review and consideration of the comments, the Commission is finalizing paragraph (p) of § 463.3 as proposed.

The Commission received a dealership association comment that contended generally that the proposed prohibited misrepresentations in this provision were already addressed in State statutes and regulations, and asserted that such State measures should suffice given that, according to the commenter, State regulators are more readily available to the public. As discussed in SBP III.C.1, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct, and commenters did not cite State laws that permit misrepresentations or otherwise present a possible conflict with the Rule. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Furthermore, State laws

up having to do what you would call ''voluntary repossession'' on their car because they bought this car, they're excited about it, and . . . the person who made them the loan didn't say ''Oh, by the way, if you go overseas, we're not gonna let you take it with you.''' And . . . sometimes, they'll find that their warranty is no good overseas, either.'').

[232] Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 13.

[233] *See, e.g.,* Complaint ¶¶ 10–21, *CFPB* v. *USASF Servicing, LLC,* No. 1:23-cv-03433–VCM (N.D. Ga. Aug. 2, 2023); Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 28, Fall 2022'' 6–7 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (finding that, in certain instances, auto servicers engaged in unfair acts or practices by activating vehicle disabling devices in consumers' vehicles when consumers were not past due on payment, contrary to relevant contracts and disclosures, including by causing the devices to sound late payment warning beeps and by preventing consumers from starting their vehicles).

[234] *See* 15 U.S.C. 45; *see also, e.g., Int'l Harvester Co.,* 104 F.T.C. 949, 1064–67 (1984) (finding that manufacturer's failure to adequately disclose that its tractors had a serious safety hazard constituted unfair conduct, where the hazard caused serious injury to a small number of consumers, consumers could not have reasonably avoided the harm because the respondent did not adequately disclose the serious risk, and the cost of the respondent disclosing the risk was very small in relation to the substantial injury).

[235] *See* 50 U.S.C. 3952(a).

[236] NPRM at 42022.

may provide more or less specific requirements, as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Accordingly, the Commission adopts this provision without modification from its original proposal.

The Commission hereby determines it is an unfair or deceptive act in violation of the FTC Act for any dealer to make any misrepresentations, expressly or by implication, regarding material information about the subjects set forth in the paragraphs of § 463.3. Such misrepresentations are likely to cause consumers to waste significant time or money beyond what dealers led them to believe would be necessary to purchase or lease a vehicle. Thus, these misrepresentations are material and are likely to cause substantial injury to consumers. This injury is not reasonably avoidable by consumers themselves because information about the truth or falsity of the dealer's misrepresentations is within the control of the dealer, and there are no countervailing benefits to consumers or to competition from the illegal practice of making misrepresentations. Further, these provisions also serve to help prevent dealers from failing to make disclosures required by § 463.4, and from charging for add-ons that provide no benefit and from failing to obtain express, informed consent for charges, as required by § 463.5, including by prohibiting misrepresentations regarding costs and terms.[237] To reflect this, and without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3, at newly designated paragraph (q): ''The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5.'' Thus, this Rule requires dealers to refrain from making material misrepresentations about the topics enumerated in § 463.3. The prohibitions contained in § 463.3 help protect consumers from deceptive representations and promote the ability of honest dealers to compete on honest terms.

D. § 463.4: Disclosure Requirements

1. Overview

The proposed rule included five disclosure requirements for motor vehicle dealers regarding certain pricing and financing information (in proposed § 463.4(a) through (e)). These provisions proposed to require dealers to disclose a vehicle's offering price; an add-on list with each optional add-on for which the dealer charges consumers and the price of each such add-on; that such add-ons are not required and that the consumer can purchase or lease a vehicle without the add-ons; and information about a vehicle's total of payments when making certain representations about monthly payments.

In its NPRM, the Commission specifically requested comments regarding key aspects of the proposed disclosures. In response, various stakeholder groups and individuals provided comments regarding the proposed provisions. In this section, the Commission discusses the comments, responses to the comments, and any changes made to this section based on the comments.

The Commission received many comments in favor of its proposal, including from consumer groups, financial services groups, dealerships and dealership employees, individual consumers, and others. These comments supported the proposed disclosures as addressing bad actors and unlawful practices in the automotive marketplace while promoting transparency, reducing consumer confusion, and refraining from inhibiting consumer choice or materially increasing the time or paperwork required.

A number of such comments, however, urged the Commission to adopt additional disclosures, both in the areas covered by its proposal and elsewhere. Regarding disclosures covered in the proposal, for example, commenters suggested more detailed requirements, including regarding specific disclosure language and specific placement of disclosures. The Commission agrees with commenters that key information affecting pricing, add-ons, and costs must be disclosed clearly and conspicuously to consumers in order to address consumer deception and unauthorized charges during the motor vehicle buying and leasing process. To provide flexibility for dealers and room for disclosures to be made in a manner that is clear and conspicuous to consumers in particular circumstances, however, the Commission declines to include additional prescriptive language about the form of such disclosures. Further, the Commission emphasizes that, in accordance with the provision being finalized at § 463.3(p), any material misrepresentations regarding the disclosures in the Final Rule violate section 5 of the FTC Act[238] and part 463.

The additional disclosures recommended by commenters included, *inter alia:* a disclosure regarding the installation and use of any electronic disabling devices; a disclosure explaining the fees certain lenders may charge to accept a consumer's loan application; a disclosure of the invoice price, or the price a dealer paid the manufacturer for the vehicle; a disclosure of any potential value gap between a vehicle's price and its appraised value; a disclosure, prior to purchase negotiations, of any potential financing limitations imposed by the dealer; a disclosure of credit characteristics relied upon by the dealer and certain terms; a disclosure that, as with a mortgage loan settlement statement, itemizes all the elements of the sale for car purchases; [239] and disclosure signage in dealership showrooms or on sales desks explaining that add-ons are not required. As for disclosures in additional areas, the Commission recognizes that vehicle purchase and lease transactions are lengthy and document-heavy, and while consumers may benefit from additional information, each additional disclosure requirement could increase the cost to comply with part 463 and would risk crowding out the information in the Commission's proposed disclosures. Accordingly, the Commission has determined not to expand § 463.4 of this Final Rule to include additional disclosures.[240] The Commission will

[237] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' such unfair or deceptive acts or practices).

[238] 15 U.S.C. 45.

[239] Comment of Or. Consumer Just., Doc. No. FTC–2022–0046–8492 at 4; *cf.* Individual commenter, Doc. No. FTC–2022–0046–0144 (recommending the disclosed offering price separately list MSRP, markup, all fees, and add-on costs); Comment of Legal Aid Just. Ctr., Doc. No. FTC–2022–0046–7833 at 2 (''[D]ealers should be required to verbally disclose and explain in a language the customer understands the material terms of the contact [sic] (including APR, total number of monthly payments required, etc.) *before* customers sign[] the contract and receive the customers' consent that they understand these terms. After this verbal disclosure, a consent form should be required. This form should be provided in the language preferred by the customer, and should ensure that the customer was provided with accurate and agreed-upon terms prior to signing.''); Individual commenter, Doc. No. FTC–2022–0046–1641 (''Mortgage lenders are required to give a borrower a disclosure document prior to closing to show all costs and expenses; car dealers should have to do the same thing.'').

[240] In addition to the disclosures noted, a few commenters requested additional provisions to address concerns regarding transparency in pricing,

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continue to monitor the marketplace to evaluate the efficacy and sufficiency of the present disclosures.

In addition, the Commission received a number of comments requesting that it publish forms for the disclosures proposed in this section. These comments requested either that the use of such forms be required or that the Commission provide a ''safe harbor'' from liability under part 463 for dealerships that utilize them.[241] The Commission did not receive, in the course of public comment, evidence sufficient to conclude that uniform formatting for the delivery of such disclosures would be necessary to make them effective. Nor has the Commission received evidence to establish that mandating use of a particular form disclosure would obviate deceptive and unfair conduct in all circumstances. For example, forms that were required or that provided a ''safe harbor'' from liability could be presented (1) with other elements that are distracting or confusing, (2) with information that modifies or contradicts the form disclosures, (3) with instructions, discouragement, or time pressure that causes consumers not to review the forms or that makes such review impracticable or impossible, or (4) through the use of forms that are pre-completed in whole or in part, to the extent this makes the information therein easy for consumers to miss. The end result of such an approach would be to enable deception while also making such deception more difficult to detect. Accordingly, the Commission declines to mandate particular disclosure forms as a requirement across all transactions or to shield against liability even where dealers otherwise engage in deceptive or unfair conduct. The Commission also notes that, because it is not mandating particular disclosure forms, dealers that are already complying with the law will avoid additional compliance costs associated with using a new form, and all dealers will have the flexibility to convey the disclosures in a manner that is clear and conspicuous under the particular circumstances of their transactions.

The Commission also received comments that expressed opposition to this section. Some individual commenters argued that the required disclosures were unduly extensive, prescriptive or untested, or that the substance of these disclosures is already conveyed to consumers before the consummation of the transaction. In response, the Commission stresses that this section is limited in both its scope and its requirements. Each of the disclosures in § 463.4 is focused on one key category of information: vehicle price, add-on optionality, or total of payments. This section requires the clear and conspicuous disclosure of this information but does not include prescriptive requirements. So, for example, a written disclosure would have to be in a size that stands out, but a specific font or font size is not mandated, nor are the specific terms or format used, nor are any particular uses of capitalization, punctuation, ink color, or paper color or size. The proposal refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information, including so that dealers already conveying this information in a non-deceptive manner may continue to do so. Accordingly, the Commission also finds that testing of these requirements is unnecessary. Furthermore, each of the disclosure requirements being finalized addresses the unfair or deceptive act or practice of withholding essential information from consumers or presenting such information to them in a deceptive manner. After reviewing comments, including those that contended the proposal was not prescriptive enough, the Commission concludes that this is the correct approach, and as such, has determined not to adopt any additional specifications dictating the form or manner in which the disclosures must be presented to consumers. Here, as elsewhere, the Commission will continue its long track record of working to assist with legal compliance.[242] Further, for dealers already conveying this information clearly and conspicuously, complying with this provision should not be burdensome.

Other commenters, including an industry association, contended that these disclosures would have the effect of limiting the products and services consumers are offered or otherwise restrict lawful sales practices. In response, the Commission reiterates that this section focuses on one of the most foundational pieces of information regarding the sale of vehicles, add-ons, and financing: their cost. Dealers already providing this information in a non-deceptive manner will need to make minimal, if any, changes to their disclosure practices. The Commission has seen no evidence that disclosing cost information has caused dealers to cease offering products.

Some commenters, including dealership associations, contended that the presence of some State standards in this area makes Federal regulation unnecessary or contradictory. In response, the Commission notes that it drew from several State statutory and regulatory provisions in formulating its proposal, and it observes that the existence and functioning of such standards demonstrates the practicability of such disclosure measures. Dealers can comply with any State laws requiring the same conduct as well as this section. Similarly, to the extent a State requires additional disclosures regarding vehicle price, add-ons, or total of payments, nothing prevents dealers from providing those disclosures as well as those required under § 463.4 so long as the State disclosures are not inconsistent with part 463. To the extent there is truly a conflict between this section and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of part 463. Moreover, a number of States do not have existing standards in the areas covered by this part; in such States, the Commission's disclosures will operate as a key safeguard.

Other commenters, including an industry association, argued that requiring disclosures would increase the time and paperwork for consumers to

including related to interest rates, and that the Rule require dealers to maintain a fiduciary relationship to customers. The Commission recognizes the concerns regarding pricing transparency and deceptive conduct related to pricing, and will continue to monitor such issues, including after this provision (§ 463.4(a), offering price disclosure) and the misrepresentation provisions (§ 463.3) are in effect.

[241] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 104, 122; Comment of Ohio Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–6657 at 6, 9; *see* Comment of Compliance Sys., Doc. No. FTC–2022–0046–7836 at 1.

[242] Each year since FY2002, the Small Business Administration's Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See* U.S. Small Bus. Admin., ''National Ombudsman's Annual Reports to Congress,'' *https://www.sba.gov/document/report—national-ombudsmans-annual-reports-congress* (providing reports from FY2013–FY2020); Letter from Edith Ramirez, Chairwoman, Fed. Trade Comm'n, to Senator David Vitter, Chairman, Comm. on Small Bus. and Entrepreneurship at 1 (Nov. 16, 2015), *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/eighth_section_212_report_to_congress_july_2014-june_2015.pdf* (citing Commission's ''A'' rating for ''Compliance Assistance'' by the Nat'l Ombudsman from FY2002–FY–2014).

buy or lease a vehicle. In response, the Commission notes that the section includes requirements for the disclosure of salient, material information early in the process, thus eliminating the time consumers would otherwise spend pursuing misleading offers—time which can then be spent pursuing truthful offers in the absence of deception. These measures will further allow consumers to compare dealerships in advance based on truthful terms; thus, dealerships will earn business based on the actual terms offered, and not lose business to dealers who compete by omitting or hiding actual terms. Moreover, the disclosures required by this section are limited to key information affecting pricing, add-ons, and total of payments, needed to address consumer deception and unauthorized charges during the vehicle-buying and leasing process, and are required to be in writing only where the dealer is responding to written consumer communications or already providing consumers with representations in writing.[243] As explained in detail in the paragraph-by-paragraph analysis of § 463.4(e) in SBP III.D.2(e), in order to avoid any additional written disclosure requirements, the Commission is declining to mandate that its required disclosures be made in writing in every instance.

An industry association commenter argued that the proposed disclosure requirements in § 463.4 of the NPRM violate the First Amendment. This commenter contended that the proposed disclosures constituted compelled speech; that they would be subject to intermediate judicial scrutiny were they to be challenged in court; and that, in the event of such a challenge, the Commission's actions would fail to satisfy that standard of scrutiny, or a less stringent one.

The Commission first addresses the applicable First Amendment standard of review for this rulemaking effort in the event of a judicial challenge. If so challenged, the disclosures in § 463.4 would not be subject to intermediate judicial scrutiny, but instead to the less rigorous review standard set forth in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985). When, as is the case here, a regulation ''impose[s] a disclosure requirement rather than an affirmative limitation on speech,'' and is ''directed at *misleading* commercial speech,'' *Zauderer* governs.[244]

Under that standard, a commercial speaker's rights ''are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'' [245] In *Zauderer,* the Court upheld a rule requiring attorneys who advertised on a contingency-fee basis to disclose that clients who did not prevail in litigation might nevertheless be liable for significant costs.[246] The Court found that ''the possibility of deception is [] self-evident'' when an advertisement discloses only one type of charge (fees) without mentioning another (costs).[247] In upholding the challenged rule as reasonable, the Court emphasized that the rule merely mandated disclosure of ''purely factual and uncontroversial information about the terms under which . . . services will be available,'' and that the ''constitutionally protected interest in *not* providing [such] information . . . is minimal.'' [248]

As in *Zauderer,* § 463.4 requires only ''purely factual and uncontroversial information about the terms under which [commercial goods or services] will be available.'' [249] These material facts include the offering price of the motor vehicle; that add-on products or services are not required and the consumer can purchase or lease the vehicle without the add-on, if true; the total amount the consumer will pay to purchase or lease the vehicle and, if that amount assumes the consumer will provide consideration, the amount of such consideration; and when a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. As in *Zauderer,* any ''constitutionally protected interest'' a motor vehicle dealer might have ''in *not* providing [this] factual information . . . is minimal.'' [250]

Courts applying *Zauderer* have repeatedly affirmed the constitutionality of regulations requiring disclosures of complete information about the cost of a purchase, which are similar to the required disclosures in § 463.4. For example, courts upheld a regulation requiring schools to ''disclose the 'total cost' of . . . tuition, fees, books, and supplies for its programs,'' finding that this information was ''purely factual and uncontroversial.'' [251] In another instance, a court upheld under *Zauderer* a rule requiring airlines to prominently disclose the ''total, final price'' of airfare, finding it was ''reasonably related to the government's interest in preventing deception of consumers.'' [252] In yet another case, a court upheld a rule requiring hospitals to disclose their rates to consumers, finding they were '' 'factual and uncontroversial' and directly relevant to 'the terms under which [hospitals'] services will be available' to consumers.'' [253] The disclosure provisions the Commission is finalizing in § 463.4, like the provisions upheld in these cases, merely require factual and uncontroversial disclosures to provide consumers with accurate and timely pricing and financing information as they consider motor vehicle purchases and leases.[254]

As discussed, *Zauderer* applies here because § 463.4 would ''impose a disclosure requirement rather than an affirmative limitation on speech.'' [255] The Commission notes, however, that disclosure requirements in § 463.4 likewise would pass muster even if, as the commenter suggested, they were evaluated under the intermediate scrutiny standard formulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980), and subsequent cases applying that standard.[256] As an initial matter, *Central Hudson* applies not to *disclosure requirements,* such as those the commenter challenges, but to *affirmative limitations* on speech.[257] The *Central Hudson* test requires restrictions on lawful, non-misleading speech to satisfy three remaining criteria. First, there must be a substantial governmental interest in the restriction; second, the restriction must directly advance that interest; and third, the restriction may not be more

[243] *See* § 463.4(a) (stating that Offering Price must be disclosed in writing if the communication with the consumer, or the dealer's response, is in writing); § 463.4(c), (d), (e) (requiring that disclosures be in writing if the dealer's associated representation is in writing).

[244] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010) (emphasis original).

[245] *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 651 (1985).

[246] *Id.* at 652.

[247] *Id.* at 652–53.

[248] *Id.* at 651.

[249] *See id.* at 651.

[250] *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 651 (1985) (emphasis original).

[251] *Ass'n of Priv. Sector Colls. & Univs.* v. *Duncan,* 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff'd,* 640 F. App'x 5 (D.C. Cir. 2016).

[252] *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.,* 687 F.3d 403, 412–15 (D.C. Cir. 2012) (internal brackets omitted).

[253] *Am. Hosp. Ass'n* v. *Azar,* 983 F.3d 528, 540 (D.C. Cir. 2020) (quoting *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 650–651 (1985)).

[254] Further, as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the failure to disclose this information is itself a deceptive or unfair practice.

[255] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010).

[256] The commenter attributes the intermediate scrutiny test to *Pagan* v. *Fruchey,* 492 F.3d 766, 771 (6th Cir. 2007), though it was in fact formulated by the Supreme Court in *Central Hudson.*

[257] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010).

extensive than necessary to advance the interest.[258] Under the *Central Hudson* test, it is not necessary that ''the manner of restriction is absolutely the least severe that will achieve the desired end.'' [259] Rather, there merely must be a '' 'fit' between the [restriction's] ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable.'' [260] In other words, the restriction should be ''one whose scope is 'in proportion to the interest served.' '' [261]

The disclosure provisions the Commission is finalizing in § 463.4 satisfy these criteria. First, the disclosure provisions serve a substantial governmental interest by requiring motor vehicle dealers to provide accurate terms, and in particular, accurate pricing information, in advertising and sales discussions.[262] As the Supreme Court has made clear, the government's ''interest in ensuring the accuracy of commercial information in the marketplace is substantial.'' [263] And as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the disclosure requirements set forth there are aimed at ensuring that consumers receive accurate pricing information and other material transaction terms, and that dealers refrain from the unfair or deceptive act or practice of failing to provide this information.[264] The required disclosures directly advance, ''fit'' reasonably with, and are proportionate to, their intended ends of prohibiting and preventing unfair or deceptive conduct in motor vehicle transactions. They prevent dealers from luring consumers to dealerships with unfair or deceptive advertising tactics, from padding prices with unwanted add-on products or services, and from misdirecting consumers about the true cost of a vehicle through discussions of monthly payment amounts. The disclosure requirements effectively ''impose[] no burden on speech other than requiring [motor vehicle dealers] to disclose the total price consumers will have to pay. This the First Amendment plainly permits.'' [265]

After careful consideration of the comments, the Commission has determined to finalize the introductory paragraph of § 463.4 and certain of the disclosure requirements included in its NPRM, with some minor textual changes. The introductory paragraph of the NPRM proposed that it would be ''a violation of this part and an unfair or deceptive act or practice in violation of section 5 of FTC Act for any Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.'' The Commission is finalizing this paragraph with the minor textual change of substituting ''Federal Trade Commission Act'' for ''FTC Act'' for clarity and conformity with other parts of the Rule. The Commission is also adding the word ''Covered'' to the defined term ''Covered Motor Vehicle Dealer'' to conform with the revised definition at § 463.2(f), discussed in SBP III.B.2(f).

The Commission is finalizing the specific disclosure requirements proposed at § 463.4(a), (c), (d), and (e), with modifications noted in the paragraph-by-paragraph analysis in SBP III.D.2(a), III.D.2(c), III.D.2(d), and III.D.2(e).

In the paragraphs that follow, the Commission discusses the disclosure requirements proposed in the NPRM, the comments relating to the specific disclosures, responses to the comments, and the disclosure requirements adopted in § 463.4.

2. Paragraph-by-Paragraph Analysis of § 463.4

(a) Offering Price

The offering price disclosure provision in proposed § 463.4(a) required dealers to disclose a vehicle's offering price in advertisements that reference a specific vehicle or represent a monetary amount or financing term for any vehicle, as well as upon receipt of a consumer communication about a specific vehicle or any monetary amount or financing term for any vehicle. The Commission proposed defining ''Offering Price,'' in § 463.2(k), as ''the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.'' The Commission also proposed defining the term ''Government Charges,'' then in § 463.2(h), to mean ''all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.'' For the reasons discussed in the following paragraphs, the Commission is finalizing the offering price disclosure provision at § 463.4(a), as well as the corresponding ''Offering Price'' and ''Government Charges'' definitions in § 463.2 (finalized at § 463.2(k) and (i), respectively), largely as proposed. The Commission is including a modification to the offering price definition to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price, and is substituting ''Vehicle'' for ''motor vehicle'' to conform with the revised definition at § 463.2(e), discussed in SBP III.B.2(e). Additionally, the Commission is including a typographical modification to the ''Government Charges'' definition to include a serial comma for consistency. The Commission also is capitalizing the defined terms ''Vehicle'' throughout, in its singular, plural, and possessive forms, and is adding language to the end of § 463.4(a)(3)(ii) clarifying that the requirements in § 463.4(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

The Commission received a significant number of comments on its

[258] *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 566 (1980). Although the Supreme Court in *Central Hudson* treated the question whether regulated speech is truthful and non-misleading as one of four criteria, it has alternately treated this question as a threshold inquiry, after which the three remaining criteria are evaluated. *See Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 623–24 (1995). Because the government is ''free to prevent the dissemination of commercial speech that is false, deceptive, or misleading,'' *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 638 (1985), if a challenged restriction fails this threshold inquiry, *Central Hudson* does not apply.

[259] *Bd. of Trs. of State Univ. of N.Y.* v. *Fox,* 492 U.S. 469, 480 (1989).

[260] *Id.* (citation omitted).

[261] *Id.* (quoting *In re R.M.J.,* 455 U.S. 191, 203 (1982)).

[262] NPRM at 42012.

[263] *Edenfield* v. *Fane,* 507 U.S. 761, 769 (1993).

[264] Nothing could be more directly relevant to accurate pricing than disclosure of the actual price itself. *See Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.,* 687 F.3d 403, 415 (D.C. Cir. 2012) (substantial governmental interest ''is clearly and directly advanced by a regulation requiring that the total, final price be'' prominently disclosed).

[265] *Id.* Further, the Commission has taken into account prior enforcement work and other initiatives. *See* NPRM at 42022–25 (explaining rationale behind disclosure requirements and extensively citing prior enforcement experience and record evidence); *see also Lorillard Tobacco Co.* v. *Reilly,* 533 U.S. 525, 555 (2001) (''We do not . . . require that empirical data come accompanied by a surfeit of background information. We have permitted litigants to justify speech restrictions by reference to studies and anecdotes . . . or even . . . based solely on history, consensus, and simple common sense.'' (internal quotation marks and alterations omitted)); *Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 628, (1995) (same); *Burson* v. *Freeman,* 504 U.S. 191, 211 (1992) (finding speech restrictions justified even under strict scrutiny based on a ''long history, a substantial consensus, and simple common sense''); *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 251 (2010) (''When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it may determine that the advertisement had a tendency to mislead.'' (internal quotation marks and alterations omitted)); *Am. Hosp. Ass'n* v. *Azar,* 983 F.3d 528, 540 (D.C. Cir. 2020) (finding reasonable relationship between rule and governmental interests where ''the Secretary, relying on complaints from consumers, studies of state initiatives, and analysis of industry practices, reasonably concluded that the rule's disclosure scheme will help the vast majority of consumers'').

proposed offering price disclosures. Many commenters supported the Commission's proposal to require dealers to provide uniform, comprehensive, and accurate pricing information. These commenters noted, *inter alia,* that despite laws generally prohibiting unfair or deceptive acts or practices, present market conditions fail to balance the ''playing field'' of information between consumers and motor vehicle dealers, allowing dealers to take advantage of consumers by hiding information about pricing, imposing surprise price increases, or using pricing advertising tactics that systematically deceive consumers.[266] Many consumers also underscored the need for the proposed disclosure requirements. Commenters in support noted, for instance:

- Buying a car has always been a horrible experience for me. The endless driving to dealerships who advertise vehicles for a sale price only to find that the vehicle does not exist, or the price advertised for the specific vehicle is not what they had posted. The salespersons[']s tactics, always attempting to put you in a vehicle based on a car payment, along with dancing around the simple question of the actual out the door price of the vehicle. . . . It is such a shame that the dealerships just do not give the customer the price of the vehicle without them wanting to start a ''folder'' and take all of your information, a copy of your drivers license, ect [sic] . . . . Please regulate the automobile dealerships, especially now when it seems they are at their worst with these ridiculous add on fees (paint and upholstery protector, ect [sic] which was not added at the manufacturer) along with adjustments on top of the MSRP.[267]
- Buying a car in the US is now akin to what I used to do in the Army: Before going into the dealership, I have to spend hours conducting ''intelligence prep of the battlefield'' to understand the tactics the dealership's sales and finance & incentives staff will throw at me. . . . It has been made increasingly worse by dealerships that advertise a false price to entice a buyer but ''bait-and-switch'' with Additional Dealer Mark-Ups (ADM), and bogus fees and charges for supposedly dealer-installed items tha[t] the consumer doesn't want in the first place. . . . Unless the FTC passes this proposed rule, things will get worse before they get better.[268]
- Though I am not usually a fan of adding layers of governmental regulations to what should be a simple transaction, there definitely needs to be a change in what is allowed in the car buying process. . . . As consumers we should not have to spend hours reading tiny print in obscure sections of a website in order to validate a posted price. The price should not be elevated at the last minute in a hidden line item such as a mandatory detailing package or service plan you do not want or need to the tune of thousands of dollars. . . . We should not have to spend hours at a dealer and go through mounds of paperwork with a fine tooth comb in order to simply see the ACTUAL price of the vehicle. It is a ridiculous ploy to confuse people into purchasing things they do not want or need.[269]
- I have been trying to buy a new car for the last two years but with unexpected costs I am not able to have a clear written contract on the car and its pricing. I have contacted several dealers in my area and many of them have issues that prevent me from commited [sic] to buying from them. This ranges from them not being able to give me a written sheet of the cost of the car, fees, ect [sic] showing me how much I will be paying in the end. . . . Most of the dealerships I spoke to would not give me a sales sheet of the vehicle I want to purchase to show me how much I will be paying in total. I would have to put a down payment and just trust them over the phone. If I can't get it in writing it is hard to commit to a down payment I could lose.[270]
- Vehicles are typically the second largest purchase made by people. Given the choices available according to respective needs/wants, purchasing a vehicle should be the same as going to any other mass-market retailer and picking that appliance with a set price. So why do we need to haggle or expend additional intellectual and emotional bandwidth towards ensuring that the transaction is as initially stated? There are instances where I'd rather be back conducting combat operations in Iraq than go through the dealer process, as it incenses me that this corrupt way of doing business is given a free pass. . . . If you are a reputable and honest dealership, then there should be no worry; it will be business as usual.[271]
- Think of us, the car buying public. We are mad as hell. Please start fixing this crooked business model where nobody even knows what they are supposed to be paying.[272]
- As a consumer, I fully support this new proposed rules update. The dealership experience has been an anxiety provoking event everytime [sic] I attempt to purchase a car. I have multiple friends and family that all report shady practices, bait and switch, and up charging at point of sale during their car buying process. Please pass these regulations! [273]
- I am writing in FULL support of the FTC rules and regulations. . . . Buyers deserve to know Out the door prices and not be hassled by nonsensical add-ons for the dealership's benefit. People should feel comfortable and excited to buy their 1st car rather than the dread I feel.[274]
- We find the vehicle we came to see and see a sticker beside the manufacture[r] one with added prices. These typically include car alarms, VIN etching, protection packages, floor mats, market adjustment, etc. We go to purchase the vehicle now and they say that none of these can be removed from the price of the car (even though they advertised them without them at a much lower price). We attempt to negotiate them off and find out their [sic] is an additional addon like reconditioning fee. We fail at getting the price of the vehicle down to the advertised price and leave.[275]
- I have financed all of my cars, and the total cost for the vehicle has always been hidden, either physically or through the dealer trying to move focus onto other numbers such as the monthly payment. Since monthly payments will vary due to credit history, down payments, interest rates, taxes, and more, it is not an effective tool for measuring a deal. $300 a month could be a great deal on one car, and a horrible deal on another. I would greatly benefit from the proposal[']s provision to clearly list and advertise the price of the car without additional add[-]ons. It would greatly reduce the work of finding the right car at the right dealership. In each of the 3 cases, I have gone to multiple dealers, wanting to purchase a specific vehicle on their lot, and walked away because of the hidden

[266] *See, e.g.,* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 17–20.

[267] Individual commenter, Doc. No. FTC–2022–0046–6649.

[268] Individual commenter, Doc. No. FTC–2022–0046–6225.

[269] Individual commenter, Doc. No. FTC–2022–0046–6089.

[270] Individual commenter, Doc. No. FTC–2022–0046–6656.

[271] Individual commenter, Doc. No. FTC–2022–0046–5238.

[272] Individual commenter, Doc. No. FTC–2022–0046–5227.

[273] Individual commenter, Doc. No. FTC–2022–0046–5228.

[274] Individual commenter, Doc. No. FTC–2022–0046–5219.

[275] Individual commenter, Doc. No. FTC–2022–0046–0900.

costs being added to the price of the car.[276]

• I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no one should be allowed to engage in such exploitative conduct in the course of running a business. . . . Good, ethical dealers will not have to make any changes if these rules are put into place. I also happen to know that several of the comments in opposition to the proposed regulations are solicited by dealerships and their management. The dealership group I work for, for example, sent out a company-wide email encouraging employees to post comments on this site in opposition to these rules. But there's no question: The American people want these regulations. They need these regulations. The only ones that don't want them are crooked auto dealerships across the US. It's been far too long that such dealerships have run amuck with underhanded sales practices and deception. I would urge the FTC to stand strong against . . . dealership groups[]or any lobbyists and get these rules passed! I know there will be stiff resistance but it's of the utmost importance to good dealerships, transparent salespeople, and, most importantly, the average American consumer![277]

A number of commenters supported the offering price disclosure requirement and associated definitions; some expressed support while urging additional protections. A number of commenters, including consumer advocacy organizations as well as individual commenters, requested that the Commission require a vehicle's offering price to include additional items, such as charges for add-ons attached to the vehicle when it is offered, and charges for add-ons required by the dealer to be sold with the vehicle; to exclude rebate information, including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate; and to prohibit the exclusion of certain charges, including the advertisement of an offering price that factors out a down payment amount.[278]

To begin, the Commission notes that by the terms of the proposed ''Offering Price'' definition, the only charges a dealer was permitted to exclude from a vehicle's offering price were required *government* charges. Thus, under the proposal, if a dealer were to charge any consumer for a preinstalled add-on, or require any consumer to pay for an add-on to purchase or finance the vehicle, then the charges for such add-ons would be required to be included in the vehicle's offering price.[279] In addition, while the proposed provision did not prevent dealers from presenting consumers with accurate and non-misleading additional information, including terms of limited availability, the required offering price disclosure needed to remain clearly and conspicuously presented to consumers, and could not be based on discounts or rebates that are not available to ''any consumer,'' including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate. Similarly, under the proposal, if the dealer required a down payment amount to sell or finance the vehicle, the offering price could not factor out such an amount.

With respect to the proposed definition of ''Government Charges,'' which is used in the definition of ''Offering Price,'' a number of consumer advocacy organization commenters contended the definition should be narrow to accomplish the Commission's goal of ensuring that consumers have access to accurate pricing information before they enter a dealership, emphasizing that only charges that are imposed by, and payable to, a government entity should be permitted to be excluded from a vehicle's offering price, and that document fees that some States allow dealers to charge should not be excluded from the offering price. The Commission notes that, as proposed, the term ''Government Charges'' is limited to those charges ''imposed by a Federal, State or local government agency, unit, or department.'' The Commission specified in this proposed definition that such charges need be ''imposed by'' a government entity rather than, for instance, having merely been ''authorized by'' or ''allowed by'' such an entity. This language does not reach charges that are authorized by a government entity but not required, since such charges have not been ''imposed'' [280] by the government. This distinction therefore excludes from the definition of ''Government Charges'' fees, such as dealership document preparation fees that State or local law does not require consumers to pay. Furthermore, the definition of ''Offering Price'' at § 463.2(k) permits only ''required'' government charges to be excluded from a vehicle's offering price. Thus, charges the government does not require consumers to pay, but allows the dealer to charge or to pass along to the consumer, such as document fees, must be included in the disclosed offering price if the dealer requires such charges of any consumer.

Relatedly, an individual commenter suggested that the Commission delete the phrase ''inspection or certification costs'' from the definition of ''Government Charges'' in order to avoid confusion about the status of inspection or certification charges that ''are NOT imposed by the Government,'' as well as explicitly state in the definition that the term does ''not include dealer document or document processing fees (''doc fees''), or electronic titling and registration fees, which are not imposed by the Government.'' [281] Regarding the phrase ''inspection or certification costs,'' such costs that are *not* ''imposed'' by the government are excluded from the definition of ''Government Charges,'' as the plain language makes clear. Similarly, as noted, dealer document or document processing fees and any other fees that are not imposed by the government are excluded from the definition, as the plain language states.

Some commenters, including a group of State attorneys general, likewise recommended that a vehicle's offering price include ''anticipated'' or

[276] Individual commenter, Doc. No. FTC–2022–0046–6490.

[277] Individual commenter, Doc. No. FTC–2022–0046–3693.

[278] A number of these commenters further requested that the term ''Offering Price'' include additional dealer fees that are known to the dealer at the time they are advertised and imposed by the dealer rather than a government entity. These requests are addressed in the discussion of the Commission's definition of ''Government Charges'' in SBP III.B.2(i).

[279] If a dealer does not require any consumer to pay for an add-on, current law, as well as provisions in this Rule, require dealers to refrain from deception in this regard. *See, e.g.,* § 463.3(a), (b) (prohibiting material misrepresentations regarding the costs or terms of purchasing, financing, or leasing a vehicle, as well as any costs, limitation, benefit, or any other material aspect of add-ons); § 463.4(c) (requiring disclosures regarding optional add-ons).

[280] *See, e.g., Impose,* Cambridge Advanced Learner's Dictionary & Thesaurus, *https://dictionary.cambridge.org/us/dictionary/english/impose* (''to officially force a rule, tax, punishment, etc. to be obeyed or received'').

[281] Individual commenter, Doc. No. FTC–2022–0046–7445 at 15–16.

''estimated'' government charges.[282] The Commission agrees that consumers would benefit from knowing this information early on in their shopping experience, and notes that dealers are permitted under this Final Rule to provide additional, truthful information along with a vehicle's offering price. Rather than requiring that anticipated government charges be included in the offering price, the Commission is modifying the definition from its original proposal to make clear that dealers need not exclude any such charges from the offering price. The Commission will evaluate whether the definition, as finalized, as well as its associated disclosure, effectively address deceptive and unfair market conduct, and will consider future modifications as market practices evolve.

Thus, the Commission is finalizing a definition of ''Offering Price'' that clarifies that dealers may, but need not, exclude required government charges from a vehicle's offering price that meets the requirements of § 463.2(k). In particular, the Commission is finalizing a definition of ''Offering Price'' that removes the phrase ''excluding only'' and adds the phrase ''provided that the Dealer may exclude only'' in its place. The definition also substitutes ''Vehicle'' for ''motor vehicle'' to conform with the revised definition of '''Covered Motor Vehicle' or 'Vehicle''' at § 463.2(e), such that the definition reads as follows: ''Offering Price means the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.''

Other commenters, including consumer advocacy organizations, proposed additional requirements to the disclosure at § 463.4(a): prescribing formatting, posting, and presentation requirements for offering price information, such as attaching a written offering price to each vehicle, providing written offering price information in response to consumer communications regardless of whether the communications are written, and requiring offering price to be the most conspicuous piece of information displayed to consumers. Regarding the manner in which the offering price must be presented, the Commission proposed that all disclosures under § 463.4, including the offering price disclosure, be presented clearly and conspicuously. As previously discussed, the proposed disclosure provisions were directed at addressing unlawful conduct while providing dealers with flexibility to present such disclosures in a manner that is clear and conspicuous to their consumers under the particular circumstances. Thus, the Commission has determined not to adopt further formatting, posting, or presentation requirements for its offering price disclosure.

Some commenters, including consumer advocacy organizations and a consumer protection agency, proposed that the Commission adopt an additional requirement providing that dealers must accept an offer from a buyer of the offering price. In response, the Commission notes that, under its proposal, if a dealer were requiring any consumer to pay a price that was higher than the disclosed offering price, or adding other conditions—such as requiring the use of a particular finance company or the purchase of an add-on—to obtain the vehicle at the offering price, such practices would violate part 463, including the offering price provision, which requires disclosure of the full cash price for which the dealer will sell or finance the vehicle to any consumer,[283] and the related requirement the Commission is finalizing under § 463.3(p), which prohibits misrepresentations regarding the required disclosures in part 463.[284]

An individual commenter proposed that the Commission adopt additional requirements requiring dealers to itemize and disclose each sub-component of the offering price, including any applicable document fee. The Commission notes that it has not been presented with any evidence that the benefits of such additional disclosure requirements outweigh the costs to consumers and competition. The Commission may consider additional such restrictions or additional guidance in the future, based on stakeholder experience with part 463 and whether it effectively remediates unlawful conduct.

Other individual commenters proposed that the Commission impose limitations on the price of the vehicle—for example, prohibiting dealers from charging more than MSRP for the vehicle—or prohibit or limit particular charges, such as dealer fees, document fees, and destination charges. The Commission notes that several Rule provisions will prohibit hidden charges and deception related to pricing, including § 463.4(a) (offering price disclosure) and § 463.3(a) (prohibition against misrepresenting the costs or terms of purchasing, financing, or leasing a vehicle). Before including additional provisions, the Commission will continue studying the market, including after the Rule is in effect, to determine whether additional steps are needed.

Other commenters opposed the offering price disclosure and related definitions. Commenters including an industry association contended that, by defining ''Offering Price'' in § 463.2(k) as the price ''for which a Dealer will sell or finance the motor vehicle to any consumer,'' the Commission would prohibit dealers from changing vehicle prices as market conditions change, thereby making vehicle pricing less dynamic than under current industry practice.

Section 463.4 and the offering price definition in § 463.2(k), however, do not alter the current status quo on pricing accuracy or pricing changes. Consistent with the law, the offering price—as with a presently advertised price—must be truthful and non-misleading. If the offering price is only available for a certain period of time, the advertisement must convey that fact clearly and conspicuously, and if it is no longer available, the dealer must cease advertising the offering price.[285]

Some commenters expressed a related concern that the Commission's offering price disclosure requirement could require dealers to change their practices when an advertised vehicle is no longer available. For example, one industry commenter asked whether, under such circumstances, a dealer would somehow be obligated to sell some other vehicle

[282] *See, e.g.,* Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 7; Comment of Consumer Att'ys & Advocs., Doc. No. FTC–2022–0046–7695 at 2–3 (requesting that the vehicle's offering price include ''an estimate of government fees and charges such as sales tax and registration based on the dealer's location'').

[283] *See* § 463.2(k) (defining ''Offering Price'' as ''the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges'').

[284] Some commenters described situations in which a dealer may decline to sell or finance a vehicle to a particular consumer, including due to legal requirements, irrespective of whether the dealer otherwise intends to honor its offering price disclosures. These situations include, for example, a consumer who presented identity theft indicia under the Commission's Red Flags Rule, 16 CFR 681; a consumer on the Specially Designated Nationals List maintained by the Office of Foreign Assets Control; a consumer who cannot produce the required proof of insurance or license to complete the transaction; or a consumer who is abusive or violent at the dealership. The Commission's offering price provision is a pricing disclosure; it will not otherwise alter the status quo on whether a given sale or financing transaction must be consummated.

[285] As is the case under current law, under part 463, any qualifying information necessary to prevent deception regarding a material fact must be conveyed clearly and conspicuously. *See* FTC Policy Statement on Deception, *supra* note 42, at 1 n.4, 4.

to that consumer at the offering price. Here, the offering price disclosure requirement does not alter the status quo: Under § 463.4(a), as under current law, if an offer is limited to a particular period of time, the offer must convey that fact, and once a price is no longer available, the dealer must cease advertising that price. Regarding which vehicles to sell at an advertised offering price, under the Commission's proposal, the dealer must disclose the offering price for the vehicles advertised. If the dealer charges a different price, then the dealer has not disclosed the offering price for which the dealer will sell or finance the vehicle, and the dealer has misrepresented the price of the vehicle, in violation of several provisions, including §§ 463.3(b) and (p) and 463.4(a). For example, if a dealer conveys that all vehicles of a certain nature or in a certain category are available at a particular offering price, but charges a higher offering price for any vehicle of that nature or in that category, the dealer has violated the Rule.

Other comments, including from a member of Congress and from dealership associations, raised concerns that the Commission's proposal would limit dealers from advertising rebates, discounts, or incentives of limited availability, including when qualifications for such rebates, discounts, or incentives are identified in the advertising, further contending that such a result would contradict prior FTC practice. Relatedly, commenters including an industry association questioned whether the Commission's proposal prohibited dealers from advertising additional vehicle prices, contending that such a result would conflict with the longstanding obligation under Federal law to disclose a vehicle's Manufacturer's Suggested Retail Price, or MSRP. The Commission notes, however, that the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including terms of limited availability, so long as the required offering price disclosure remains clearly and conspicuously presented to consumers.[286] If, however, a dealer's disclosure were to give consumers a net pricing impression that is contrary to that which is actually available, then the disclosure would violate § 463.4(a), and the related requirement under § 463.3(p).[287]

Some commenters, including dealership associations, generally concluded the Commission's proposed offering price definition, or its associated disclosure provision, were unnecessary, confusing, burdensome, or likely to hinder comparison shopping. Some commenters, for instance, contended that their respective States already prohibit misrepresenting price terms, rendering the Commission's proposal redundant. The Commission notes, however, that a simple disclosure of the offering price, using the same definition across States, addresses multiple issues, including: the promotion of prices based on dealer discounts, rebates, or other price reductions when such benefits are in fact subject to hidden or undisclosed restrictions that render them unavailable to typical customers; the concealment or omission of additional dealer charges, such as for document preparation fees, amounting to several hundred dollars; the advertisement of a price without disclosing material limitations or additional charges required by the dealer that are fixed and thus can be readily included in the price at the outset; and the inducement to pursue pricing offers that are not actually available or to pay more for a vehicle due to inadequate or nonexistent disclosures. Moreover, this disclosure and the associated definitions should produce the corollary benefit of increasing price competition among dealers, who will be able to compete on truthful, standard terms.[288] The Commission also concludes that the claim that its offering price disclosure requirement would limit comparison shopping appears to follow from the mistaken notion that the offering price disclosure prohibits dealerships from conveying accurate additional information to consumers, including information about rebates, discounts, or other limited-availability incentives.

Relatedly, some dealership association commenters contended there are areas of overlap, or potential conflict, with State law. Pursuant to § 463.9 of part 463, where it is possible for dealers to comply with both State law and the provisions of this regulation, or where State law affords greater consumer protection, part 463 will not displace existing State pricing or disclosure regimes. This addresses many of the commenters' concerns about State law. Some dealership associations, for instance, contend that their respective States require dealers to separately disclose a dealer document fee and not represent that the fee is required by the State, or that they allow dealers, with certain limitations, to incorporate rebates into an advertised price. Regarding document fees, dealers can simultaneously comply with part 463, which requires document fees to be included in the offering price unless they are ''required'' government charges, and with State law that permits but does not require document fees to be excluded from a vehicle's advertised price, or that requires disclosure of the amount of the document fee and that such a fee is not required by the State, by disclosing the offering price and any additional State-required information, such as the amount of the dealer document fee. Similarly, regarding rebates, in addition to the offering price, dealers may provide consumers with additional pricing information, including regarding rebates or other incentive pricing, so long as the offering price remains clear and conspicuous, and any additional information is truthful and non-misleading and otherwise complies with part 463 and existing law.

Another dealership association commenter urged the Commission to consider using an existing definition, including a State-law definition of ''sales price'' or the definition of ''cash price'' under the Truth in Lending Act's Regulation Z, in lieu of its proposed offering price definition.[289] The Commission notes that its offering price definition overlaps substantially with the commenter's suggested State-law ''sales price'' definition, which, according to the commenter, requires that a vehicle's advertised price be one at which ''the dealer must be willing to sell the motor vehicle . . . to any retail

[286] A number of dealership associations expressed a related concern that the Commission, through its offering price proposal, was somehow seeking to restrict competition between dealers to being only about the price of vehicles. The associations described other areas, beyond vehicle price, by which dealerships currently distinguish themselves (*e.g.,* their range of products and services; their service availability; the convenience of their locations; and the nature of their sales staffing and process). In response, the Commission notes that it has long recognized the importance of protecting competition across both price and quality metrics, including providing consumers with truthful, nondeceptive advertising. *See, e.g., Cal. Dental Ass'n* v. *Fed. Trade Comm'n,* 526 U.S. 756, 766–68 (1999) (affirming Commission exercise of law enforcement authority against industry guidelines that unlawfully restricted both price advertising and advertising relating to the quality of dental services). As noted, the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including information about any such distinguishing characteristics, so long as the offering price is presented clearly and conspicuously.

[287] For reference, § 463.3(p), which the Commission is finalizing, *see* SBP III.C.2(p), prohibits dealers from making material misrepresentations regarding ''[a]ny of the required disclosures'' under the Final Rule.

[288] *See* NPRM at 42023.

[289] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 29–30.

buyer''; which ''must'' include certain additional charges that are fixed and thus can be readily included in the price at the outset, including ''[d]estination and dealer preparation charges''; and which permits only certain categories of costs and charges to be excluded.[290] Based on the commenter's description, unlike the Commission's definition, this State-law definition permits the exclusion of fees ''allowed'' by law or those which the law has ''prescribed.'' [291] Again, the Rule permits only charges that the government *requires* the consumer to pay to be excluded from a vehicle's offering price, by defining ''Offering Price'' to allow only ''required Government Charges'' to be excluded. This difference from the State law described by the commenter, however, creates no conflict—a dealer governed by that State law will be able to comply with both requirements by disclosing an offering price that excludes only required government charges and includes allowable government charges.

Similarly, commenters have not demonstrated any actual conflicts between the proposed offering price definition and TILA's definition of ''cash price.'' [292] Dealers can comply with both requirements by disclosing an offering price that excludes only required government charges. And the Rule's definition addresses specific unfair and deceptive conduct in the auto marketplace. Were offering prices to exclude additional categories, the resulting disclosure provision at § 463.4(a) would permit dealers to lure consumers to dealership lots based on a price that is not actually the price the dealer would require the consumer to pay, a result that would require consumers to spend time traveling to the dealership and time on the lot to attempt to discover the true price, and that would place dealerships that choose to advertise the price truthfully at a competitive disadvantage.

Relatedly, commenters including an industry association contended that no additional regulation of pricing or credit and lease advertising was necessary beyond that provided by existing practice or by the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M, and relatedly, that the Commission's offering price disclosure requirement duplicated, modified, or ignored such existing law. The disclosure requirement, however, is consistent with these existing legal obligations and does not disturb them; dealers can and should make the disclosures required under TILA and other laws as well as the offering price disclosure required by the Final Rule. The provision requires dealers to disclose simple and highly material pricing information under certain circumstances.[293] Providing consumers with accurate and timely pricing and financing information is critical, especially in the context of motor vehicle sales.[294]

Several commenters requested modifications to limit or expand the proposed definition of ''Government Charges,'' or clarification regarding this term's application to certain fees. For example, commenters, including a dealership association, urged the Commission to modify this proposed definition to include charges that are ''allowed to be charged but not required or imposed by a Federal, State, or local government agency, unit, or department.'' [295] One such commenter provided the example of certain registration and title charges, which it described as ''not necessarily imposed or mandatory fees'' and for which ''the amount may vary, depending on the county'' and the dealership, and within a governmentally determined range.[296] Regarding registration and title charges, to the extent such charges are required by a government agency, unit, or department, then they fall within the ''Government Charges'' definition as charges ''imposed by'' such agency, unit, or department. If, however, there are title, registration, or other fees, beyond any title and registration fees required by the government, that dealers are allowed, but not required, to charge, such fees do not fall within the ''Government Charges'' definition, and to the extent a dealer imposes such allowable charges on any consumer, such fees must be included in the offering price. Were the Commission to categorize such allowed, but not required, amounts as ''Government Charges,'' dealers would be allowed to exclude them from a vehicle's offering price but then require consumers to pay them anyway, thereby allowing dealers to lure consumers to their lots based on a price that is not actually the price the dealer would require the consumer to pay—a fact that consumers would not learn until they have spent time traveling to the dealership and time on the lot, if they learn this fact at all.[297] Further, under such circumstances, dealerships that choose to advertise the price truthfully would be at a competitive disadvantage. The Commission therefore declines to finalize the definition with such a modification.

Commenters, including a number of dealership associations, contended there were burdens associated with the Commission's offering price disclosure requirement, claiming it would cause dealers to require documenting every contact with a consumer in which a specific vehicle was mentioned, thereby lengthening the sales process and increasing the recordkeeping burden. Comments regarding recordkeeping requirements, including records that must be created and maintained under this Rule, are addressed in the section-by-section analysis of § 463.6. Here, the Commission notes that accurate pricing communication is already required by law. Section 463.4(a) does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,[298] will operate as a key safeguard in States without such provisions, and, as discussed in the following paragraphs, addresses deceptive and unfair conduct. Further, this offering price requirement will save consumers time when

[290] *Id.; see also* 43 Tex. Admin. Code 215.250(a), (b) (2023).

[291] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 29–30; *see also* 43 Tex. Admin. Code 215.250(b)(3) (2023).

[292] *See* 12 CFR 226.2(a)(9).

[293] The industry association commenter further contended that this provision would apply to dealers based on whether they have a service department, but this is incorrect, as explained in the analysis of the definition of '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' in SBP III.B.2(f).

[294] *See, e.g.,* Buckle Up, *supra* note 63, at 5 (noting consumer confusion about how the vehicle price they were offered was determined and that consumers did not understand they could negotiate price); *id.* at 9 (observing add-on products or services, which typically increase a vehicle's purchase price, were ''the single greatest area of confusion'' in the study); Att'ys Gen. of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112–1 at 5–6 (Apr. 13, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf.*

[295] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 14.

[296] *Id.*

[297] Indeed, as the Commission also noted in its NPRM, an entity that induces the first contact through false or misleading representation is liable under the FTC Act, regardless if the buyer later becomes fully informed. See, *e.g., Resort Car Rental Sys., Inc.* v. *Fed. Trade Comm'n,* 518 F.2d 962, 964 (9th Cir. 1975); *Fed. Trade Comm'n* v. *Gill,* 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd,* 265 F.3d 944 (9th Cir. 2001).

[298] For example, California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory fees such as tax, title, and registration fees. Cal. Veh. Code 11713.1(b), (c) (2023); Wis. Admin. Code. Trans. 139.03(3) (2023). In Louisiana, the advertised price must be the full cash price for which a vehicle will be sold to any and all members of the buying public. La. Admin. Code tit. 46, pt. V, 719 (2023).

shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time otherwise spent pursuing misleading offers. For dealers already disclosing accurate pricing information upfront, this provision allows them to compete on an even playing field.

Another industry association commenter contended that, by requiring offering price to be disclosed when an advertisement references a specific vehicle or represents a monetary amount or financing term ''by implication,'' the Commission's disclosure requirement could apply to advertisements that merely list a dealer's website, on which specific vehicles and their prices appear. Under the Commission's proposal, an advertisement that does not expressly reference a specific vehicle or expressly refer to a monetary amount or financing term would not do so ''by implication'' solely by referring to a website, document, or other destination where such information may otherwise be available, absent evidence that the net impression of a reasonable consumer is that the advertisement implicitly references such terms.[299] The phrasing in the Commission's requirement—''expressly or by implication''—refers to the nature of the claims conveyed by a dealer's advertisement (*i.e.,* whether such claims are made expressly or by implication). For more than three decades, the Commission has explained express and implied claims as follows:

> Express claims directly state the representation at issue. Implied claims are any claims that are not express. They range on a continuum from claims that would be ''virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.'' [300]

This same industry association commenter contended that its aforementioned concerns—that the disclosure requirement would prohibit dynamic pricing, and that the requirement would extend to advertisements simply by virtue of their referencing a dealer's website—would together cause dealers to curb their pricing representations in advertising, either by limiting such representations to a vehicle's MSRP or by factoring out pricing altogether. As previously discussed, these concerns appear to misunderstand either existing legal requirements or the fact that an offering price disclosure would operate consistent with those requirements. The Commission's requirement simply requires dealers to disclose an offering price and does not alter the current status quo on pricing accuracy. To the extent there is a concern that requiring accurate pricing information limits dealers to advertising MSRP or forgoing advertising pricing information altogether, such concerns apply equally under current law—including in States with pricing disclosure requirements that resemble the Commission's offering price disclosure requirement. The Commission, however, has not been presented with evidence suggesting that dealers will not want to distinguish themselves from other dealers on price, and will instead default to advertising a price that is offered by all of their competitors.

Another concern raised by this same industry association commenter was that, by requiring an offering price ''in the Dealer's first response'' to a consumer communication that references a specific vehicle or a monetary amount or financing term for any vehicle, the requirement would prohibit dealers from explaining the offering price and why it is being provided, and that as a result, consumers may understand the offering price to be non-negotiable. Under § 463.4, however, dealers continue to be permitted to communicate accurate additional information, including the availability of discounts or the dealer's willingness to negotiate, as long as the offering price disclosure remains clear and conspicuous.

The same industry association commenter asserted that mandating the disclosure of the offering price in connection with ''any communication with a consumer'' would result in excessive and non-responsive disclosures. The commenter provided the example of a consumer who contacts a dealership to ask whether the dealership has ''a silver [Ford] F–150 in stock,'' arguing that the Commission's proposal would require the dealer to respond with offering price information for each of the numerous (in the commenter's example, 40) silver F–150 vehicles the dealer has in stock. To begin, if the entire communication simply asks, ''Do you have a silver Ford F–150 in stock?,'' it does not concern a ''specific vehicle''; it concerns a group of vehicles—silver Ford F–150s—and, under § 463.4, the dealer is not required to disclose an offering price, so long as the dealer's reply does not reference either (1) a specific vehicle or (2) a monetary amount or financing term for *any* vehicle, whether a specific vehicle or a group of vehicles.[301] If, however, the dealer chooses to respond by discussing a specific vehicle—whether by describing that vehicle, referring to a stock or VIN number, or using other means—the dealer is required to disclose the offering price for that specific vehicle. If the dealer chooses to respond by discussing several specific vehicles, the offering price disclosure requirement applies for each such vehicle. Finally, the offering price disclosure requirement applies if the dealer's response references a monetary amount or financing term, such as a down payment or monthly payment amount, for a specific vehicle or a group of vehicles. This requirement applies only to the dealer's first response regarding the specific vehicle. It does not apply to subsequent communications about that specific vehicle.

The failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available or end up paying more for a vehicle than they expected or being subject to hidden charges.

Buying or leasing a vehicle is time-consuming and often the most expensive purchase a consumer makes without knowing the actual price of the product at the outset. Consumers can spend hours driving to a dealership.[302] Once at the dealership, it can then take several hours to days to finalize a transaction [303] before the consumer learns the price of the vehicle. And many consumers never learn the true price at all; part of the finalization process includes signing dense paperwork, where information regarding the price of the vehicle and charges for

[299] *See* FTC Policy Statement on Deception, *supra* note 42, at 2, 5 (describing the Commission's ''net impression'' standard for determining the meaning of an advertisement).

[300] *Kraft, Inc.,* 114 F.T.C. 40, 120 (1991) (quoting *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)).

[301] *See Any* (def. 1), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/any* (defining ''any'' as ''one or some indiscriminately of whatever kind'').

[302] *See, e.g.,* Complaint ¶¶ 23–26, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships).

[303] *See, e.g.,* Auto Buyer Study, *supra* note 25, at 15 (noting that the purchase transactions in the FTC's qualitative study often took 5 hours or more to complete, with some extending over several days); *Cf.* 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 6 (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes, including 1 hour, 49 minutes visiting dealerships/sellers).

other items is easily obscured, especially if consumers are not provided with baseline price information around which to anchor the lengthy, dense discussions and process. When consumers are not provided with such price information, they are susceptible to hidden charges such as ''junk fees'' or unnecessary add-ons that can cost consumers thousands of dollars and significantly increase their overall expense.[304] These hidden charges substantially injure consumers by increasing their total cost as well as their debt burden in the many instances where vehicle purchases are financed.[305]

Moreover, the consumer injury caused by the lack of price information is not reasonably avoidable. The dealer has sole control over pricing information and the timing of when it is provided to consumers. Even if the consumer learns of the price of the vehicle before finalizing the transaction, the consumer has already spent time and effort traveling to the dealer, on the dealership lot, and in the financing office, and for many, the immediate need for the vehicle for work, school, childcare, groceries, medical visits, and other vital household reasons makes it infeasible to start the process anew at a different dealership. Further, during the lengthy vehicle-buying process and in complex, dense paperwork, it is especially easy to hide or alter price information or include hidden charges when consumers are not provided with baseline price information around which to anchor the discussion of vehicles, monetary amounts, or financing terms.[306]

The injury to consumers from a lack of price information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, upfront information about the offering price protects consumers from lost time and effort, supracompetitive prices, and unexpected charges while increasing price competition among dealers, who should be able to compete on truthful, standard terms. The costs of providing price information—which the dealer determines and can calculate upfront—are minimal for dealers that are already advertising a specific vehicle, monetary amount, or financing term, especially when compared to the injury to consumers.

Thus, the failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle is an unfair practice.

The Commission notes that § 463.4(a)(1) and (2) affects only dealers that are already advertising about specific vehicles or monetary amounts or financing terms; it does not affect businesses that do not expend funds on advertising specific vehicles, monetary amounts, or financing terms. The Commission will continue to monitor the market to assess whether this approach is sufficient to address the harms associated with a lack of price and charge information. If not, the Commission will revisit whether additional measures are necessary, such as requiring price information in all advertising, requiring total charge estimates, or prohibiting charges for additional items along with a vehicle sale.

Regarding deception, price is one of the most material pieces of information for a consumer in making an informed purchasing decision.[307] Yet, including as illustrated by the Commission's law enforcement efforts, it can be difficult for consumers to uncover the actual price for which a dealer will sell an advertised vehicle until visiting the dealership and spending hours on the lot. When an advertisement or other communication references a monetary amount or financing term, it is reasonable for a consumer to expect that those amounts and terms are available at other standard terms. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long financing term or an unexpectedly high interest rate that results in a higher price than standard terms would have, then the consumer is lured to the dealership based on a misimpression of what they reasonably expect the total price to be.

If a dealer advertises a specific vehicle, it is reasonable for a consumer to expect to learn the true offering price of the vehicle upon visiting the dealership. Consumers are misled when dealers misrepresent or otherwise obscure price information or charge for items beyond the advertised vehicle during the long and complex sales, financing, and leasing process.[308]

If consumers knew that the true price was beyond what was expected or that the prices and charges were for unwanted items, that would likely affect their choice to visit one dealership over another dealership. Thus, misleading consumers about price information is material. *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.'' (citing *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988));

[304] *See* Nat'l Consumer L. Ctr., ''Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing'' (2017), *https://www.nclc.org/wp-content/uploads/2022/09/auto_add_on_charts.pdf;* Complaint ¶¶ 25, 27–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging defendants charged thousands of consumers hundreds to thousands of dollars each for unauthorized add-ons, totaling in aggregate over $70 million since 2017); Complaint ¶¶ 59, 61, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unauthorized add-on charges costing thousands of dollars).

[305] According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed. *See* Melinda Zabritski, Experian Info. Sols., Inc., ''Automotive Industry Insights: Finance Market Report Q4 2020'' at 4, *https://www.autofinancenews.net/wp-content/uploads/2021/03/2020-Q4-Auto-Finance-News-Industry-Pulse.pdf.*

[306] *See, e.g.,* Complaint ¶¶ 17–19, 44, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (dealers inflated the car price on paperwork in the middle of the sale without the consumer's knowledge or authorization, a practice they internally referred to as adding ''air money''); Complaint ¶¶ 24–27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making it difficult to detect).

[307] *See, e.g., Fed. Trade Comm'n.* v. *Windward Mktg., Inc.,* 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997)) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[308] Consumers who expect particular prices, based on the MSRP or Kelley Blue Book, are also misled when true pricing information is not disclosed upfront. *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–1878 (''We ended up having to drive 3 hours to get the [vehicle we] wanted. Upon arriving to pickup the car we were told there was a 4300 increase over MSRP.''); Individual commenter, Doc. No. FTC–2022–0046–1690 (''It was only after five hours at the dealership that we discovered the dealer had added on a $3000 market adjustment and $3100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP.''). The average transaction price of a new vehicle exceeded the average manufacturer's suggested retail price (MSRP) for twenty consecutive months between 2021 and 2023. *See* Cox Auto., ''After Nearly Two Years, New-Vehicle Transaction Prices Fall Below Sticker Price in March, According to New Data from Kelley Blue Book'' (Apr. 11, 2023), *https://www.coxautoinc.com/market-insights/kbb-atp-march-2023/; see also* Edmunds, ''8 Out of 10 of Car Shoppers Paid Above Sticker Price for New Vehicles in January, According to Edmunds'' (Feb. 15, 2022), *https://www.edmunds.com/industry/press/8-out-of-10-of-car-shoppers-paid-above-sticker-price-for-new-vehicles-in-january-according-to-edmunds.html;* iSeeCars, ''10 New Cars Priced the Highest Over MSRP, Even as Peak Pricing Eases'' (Mar. 19, 2023), *https://www.yourerie.com/news/10-new-cars-priced-the-highest-over-msrp-even-as-peak-pricing-eases/* (finding the average new car price was 8.8% over MSRP).

Thompson Med. Co., Inc., 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').[309]

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose the offering price in an advertisement or other communication that references, expressly or by implication, a specific vehicle or any monetary amount or financing term for any vehicle.

Furthermore, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding costs or add-ons—by requiring consumers to be told the true price of the vehicle in advertisements and other communications. It also helps prevent dealers from failing to obtain the express, informed consent of consumers for charges, as addressed by § 463.5(c).[310] Thus, the Commission is requiring dealers to disclose a vehicle's offering price when advertising or otherwise communicating about a specific vehicle or monetary amount or financing term for any vehicle. This provision allows consumers to compare offers based on the same price terms and to select dealers that truly offer the lowest price rather than dealers that advertise deceptively low prices but charge more. When price information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered the comments that it received on this proposed provision, the Commission is finalizing the offering price provision at § 463.4(a) with modifications to capitalize the defined term ''Vehicle'' in its singular, plural, and possessive forms, to correspond to the revised definition at § 463.2(e), and to add language clarifying that the provision is also prescribed for the purpose of preventing unfair or deceptive acts or practices defined in this Rule. The Commission is finalizing the corresponding ''Offering Price'' and ''Government Charges'' definitions in § 463.2 largely as proposed, with modifications to the ''Offering Price'' definition to conform with the defined term ''Vehicle'' and to clarify that dealers may, but need not, exclude required government charges from a vehicle's offering price, and a typographical modification to the ''Government Charges'' definition to include a serial comma for consistency.

(b) Add-On List

The Commission's proposed add-on list disclosure provision (proposed § 463.4(b)) required the disclosure, both online and at each dealership, of a list of all optional add-ons for which the dealer charges consumers and the price of each such add-on.[311] As proposed, if the price of the add-on varies based on the specifics of the transaction, the add-on list would have to include the range the typical consumer will pay.[312] Due to space constraints, dealer advertisements presented not online but in another format—such as in print, radio, or television—would not be required to include the add-on list, disclosing instead the website, online service, or mobile application where consumers can access the add-on list.[313]

Many commenters, including consumer advocacy organizations, supported the proposal to require dealers to provide consumers with clear, accurate pricing information for add-on products or services altogether in one list. Some commenters raised concerns that, without significant modification, the Commission's proposal to allow for the disclosure of price range information where the price of an add-on varies based on the specifics of the transaction would allow for significant abuses, including by permitting dealers to disclose ranges so broad they would be meaningless. Such commenters urged the Commission to modify its definition of ''Add-on List'' to require, where a price range is listed for a given add-on, the add-on list further indicate the low, median, and high prices charged to consumers for each such add-on over the preceding two years; or that the Commission require dealers to create individualized add-on lists for each vehicle sold, containing one fixed, non-negotiable price for each add-on. Relatedly, other commenters, including industry organizations, expressed concerns regarding the add-on list proposal, including that the proposal to allow for price range information was vague or confusing, and that certain aspects of the proposed definition, including the scope of add-ons covered, as well as the requirement to keep such add-on lists updated, would impose extensive economic burdens.

After careful review of the comments, the Commission has determined not to finalize its proposed add-on list provision (proposed § 463.4(b)). Here, the Commission believes its proposal would benefit from further review and refinement. The Commission nevertheless emphasizes that, under existing law, dealers are prohibited from misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on, and from charging for add-ons without obtaining the express, informed consent of the consumer—conduct which the Final Rule prohibits as well, including in §§ 463.3(b) and § 463.5(c). The Commission also emphasizes that, in addition to the Rule's prohibitions, industry guidance and effective self-regulatory efforts can serve a role in helping prevent problematic dealer behavior in this area. The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to add-ons and will consider implementing additional measures in the future if it determines such measures are warranted to address deceptive or unfair acts or practices related to add-on products or services.

(c) Add-Ons Not Required

For optional add-on products or services, the Commission's proposed § 463.4(c) required dealers to disclose, when making any representation about

[309] Even if some consumers were not misled by the failure to disclose the offering price, to show deception under the FTC Act, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense. . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

[310] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[311] To the extent any add-on charges are required by a dealership, and thus are not optional, such charges would have to be included in the offering price, pursuant to §§ 463.2(k) and 463.4(a).

[312] *See* NPRM at 42044 (noting, in the definition of ''Add-on List'' at proposed § 463.2(b) that ''[i]f the Add-on price varies, the disclosure must include the price range the typical consumer will pay instead of the price''); *see also Fed. Trade Comm'n* v. *Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (''at the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant''); Complaint ¶¶ 28–50, *Fed. Trade Comm'n* v. Universal City Nissan, Inc., No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's ads list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); Complaint ¶¶ 8–10, Progressive Chevrolet Co., No. C–4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

[313] Working in tandem, proposed § 463.4(b)(1) and (2) would mean that dealers who engage in advertising and charge for optional add-ons must have a website, online service, or other mobile application by which to disclose an add-on list.

an optional add-on, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on. For the reasons discussed in the paragraphs that follow, the Commission is finalizing the required disclosure at § 463.4(c) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e). The Commission also is adding language to the end of § 463.4(c) clarifying that the requirements in § 463.4(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

A number of commenters, including a group of State attorneys general, supported this proposed requirement, contending that unscrupulous dealers have exploited the vehicle sales process to saddle consumers with unwanted add-on products or services, and that such a disclosure would importantly help consumers avoid discovering these additional charges only after completing the purchase, assenting to them because they believed the add-ons to be required in order to purchase the vehicle, or paying for them unknowingly because they never uncovered the charges. Many individual commenters also stressed the need for add-on disclosure requirements. For example:

- Salespeople such as myself are responsible for selling the car and all aftermarket/add-on products. This has put me in a unique position to see how these proposed regulations would impact automotive sales. I cannot stress enough my support for these new rules. . . . The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. The add-ons ''packed'' in the first payment often include an extended warranty, GAP insurance, tire and wheel protection, an oil change package, a theft recovery device, and sometimes more depending on the situation.[314]
- Car buying is one of the most miserable consumer experiences in existence. Frankly, I'm disappointed that this issue hasn't been addressed decades ago. It's well past time that the deceptive practices that car dealers use to manipulate and take advantage of customers is made illegal. What other business can legally lie about the price of the product that they sell, and slip extra unwanted products into the deal that they don't reveal and won't remove upon request? These practices are arcane and unfair, especially considering the absurd cost of automobiles today. I wholeheartedly approve of what the proposed rules are attempting to accomplish. Please do not allow a powerful lobbying group to limit or change good legislation that benefits tens of millions of Americans who currently dread the car buying experience for far more reasons than just price.[315]
- . . . I am not against business making a profit, in fact most Americans understand businesses need to make money too, however most dealers will not disclose additional costs to the purchaser until it is time to sign paperwork for purchase. Rather than simply being upfront with what their desired price is and how much they make from the sale rather they are fed lines about ''common practices'', [sic] ''these are normal fees'' or simply not being forthright about additional costs on items only installed on location at the dealerships to drive the price up. Even more insulting is when buyer[s] ask to have options removed from the vehicle dealers stall or flat out refuse to do so.[316]
- It is about time something like this is brought up. This will have no effect on the honest dealers out there. . . . This will really help the consumer. . . . We will be able to compare apples to apples. You won't show up at the dealership with the lowest price only to find out that they have all these other fees that make them the least desirable of the choices. Also, adding stuff like pinstriping for large fees will come to an end. . . . I have no problem with a dealer making money. They are a business and have overhead. I have a problem when they try [to] gloss over everything they are trying to charge you for. This ruling needs to take effect. Anyone posting against it is someone working for a dealer. Like I mentioned before, if you are doing everything on the up and up, not only do you get good reviews and repeat business, but this ruling will not even effect [sic] you.[317]
- I also agree that Enhanced Informed Consent in F & I office is necessary. One of my cohort was almost coerced into non-equivalent decision-making scenarios in the finance office with their car purchases. The finance officer flat out ask[ed] them, ''did you want the 2 year, 30[,000] mile extended warrant[y], or the 4 year 50[,000] mile extended warranty?'' The wife sat there and asked, ''I'm confused. Do I HAVE to pick one of those?'' Her husband said, ''No, he's trying to trick you into buying one. You don't need any at all.'' They then promptly threatened to walk out and the finance manager came out and did their paperwork without further conflict.[318]

Several commenters offered support while also proposing that the Commission adopt additional measures to further ensure that consumers understand that optional add-ons are not required. One dealership group, for example, commenting in support of disclosures that optional add-ons are not required, recommended that dealers be required to include signage on their websites and in their showrooms or on their sales desks that set out both components of the Commission's proposal: that add-ons are not required, and that consumers may purchase or lease the vehicle without add-ons. Other commenters, including a consumer protection agency and a consumer advocacy organization, suggested that the Commission modify the language in proposed § 463.4(c) to strike the ''if true'' language, asserting that all add-ons should be optional and not required to consummate the sale or lease of a vehicle. At least one individual commenter recommended that the Commission prohibit dealers from pre-installing add-ons.

In response to these comments, the Commission notes that, were it to require signage stating, generally, that add-ons are optional, or to strike the ''if true'' language from this disclosure, it would cause consumers to be presented with information that may not be accurate in all circumstances. Some add-ons might already be installed on the vehicle or otherwise required by the dealer. As explained in SBP III.D.2(a) with regard to § 463.4(a), charges for such add-ons must be included in the vehicle's offering price.[319] In such cases, representing that add-ons are categorically optional would mislead

[314] Individual commenter, Doc. No. FTC–2022–0046–3693.

[315] Individual commenter, Doc. No. FTC–2022–0046–5268.

[316] Individual commenter, Doc. No. FTC–2022–0046–1365.

[317] Individual commenter, Doc. No. FTC–2022–0046–9883; *see also* Individual commenter, Doc. No. FTC–2002–0046–9632 (''I was told that GAP insurance was required to be included. . . . I [later] contacted and asked for copies of my contracts. On September 5 [the dealer] sent me an email with a credit contract attached. I am including it here. It says my monthly payment is over $370. It also shows the cash price as close to $17,000.00. I can also see it says the GAP is optional. I never saw this contract. I never signed this contract.'').

[318] Individual commenter, Doc. No. FTC–2022–0046–6816.

[319] In such cases, however, § 463.4(a) of the Final Rule requires these non-optional add-ons to be included in a vehicle's offering price; if the dealer requires the consumer to pay for them, they are part of the full cash price for which a dealer will sell or finance the vehicle to any consumer. *See* SBP III.D.2(a).

the consumer. Relatedly, by requiring that charges for mandatory items be included in the vehicle's offering price, the Final Rule allows dealers to customize the vehicles they are selling while protecting consumers by requiring dealers to disclose the offering price for such customized vehicles. Accordingly, the Commission declines to prohibit the practice of pre-installing add-ons in this Final Rule, but will continue to monitor the market to determine whether pre-installed add-ons require further regulation. At the same time, the Commission emphasizes that the protections contemplated here and elsewhere in this Final Rule prohibit dealers from obscuring price information and whether an add-on is optional, and further require dealers to obtain the express, informed consent of the consumer to charge a consumer for any add-on.

Additionally, several commenters indicated their support for the Commission's proposal while also recommending that the Commission consider further steps to protect consumers from deceptive or unfair practices pertaining to the inclusion of add-ons in consumer vehicle sales or leases. Some commenters, including a group of State attorneys general and a dealership association, requested that the Commission require dealers to disclose any mandatory add-ons and whether those add-ons are required in order to obtain financing, including by requiring such disclosure in an addendum sticker affixed to the motor vehicle. In response, the Commission notes that other provisions of the Final Rule prohibit misconduct in this area, including by requiring, at § 463.4(a), that charges for such add-ons must be included in the vehicle's offering price. While consumers may benefit from repeated or additional disclosures, each additional disclosure requirement would increase both the cost to comply with the regulation and the risk of crowding out other important information. Given these risks, the Commission declines to include additional requirements regarding the content or form of its add-on disclosure at § 463.4(c). The Commission will continue to monitor the market to gather additional information on this issue and will consider whether to modify or expand this or other sections in the future based on stakeholder experience with this provision and whether it effectively halts unlawful conduct.

Other commenters, including consumer advocacy organizations and consumer attorneys and advocates, urged the Commission to adopt a thirty-day ''cooling-off'' period for the sale of vehicle-related add-ons, similar to that required by the Commission for door-to-door and other off-premises sales,[320] which would grant consumers time to review the paperwork after the transaction, and to cancel unexpected or otherwise unwanted add-ons for a full refund. As explained in greater detail in the discussion of § 463.5(c), in SBP III.E.2(c), the Commission also has determined not to include in this Final Rule a ''cooling-off'' period in which add-on products or services may be canceled. In this regard, the Commission would benefit from additional information, including the length of time needed for such ''cooling off'' rights to be effective. The Commission may consider revisiting this decision in the future based on actual stakeholder experience with the provisions of the Final Rule and whether they effectively halt unlawful conduct.

Other commenters presented questions or critiques regarding this proposed disclosure. As with the Commission's proposed disclosures generally, some commenters, including an industry association and a dealership association, contended that existing requirements in a number of States to disclose that add-ons are optional make Federal regulation in this area unnecessary or contradictory. As described in detail in SBP III.D.1, the Commission first observes that the functioning of such standards demonstrates the practicability of its proposed disclosure that add-ons are not required. To the extent a State requires additional disclosures regarding add-ons, nothing prevents dealers from providing those disclosures as well as those required under part 463 so long as the State disclosures are not inconsistent with those required under part 463. To the extent there is truly an inconsistency between this part and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of this part. Finally, a number of States do not have existing standards in this area; in such States, the Commission's disclosures operate as a key safeguard.

Commenters, including dealership associations, argued that dealers would develop and use an additional form to demonstrate compliance with this disclosure requirement, thereby burdening the vehicle sales and delivery process. The Commission begins by noting that any such steps are not required by part 463; on the contrary, the Commission structured this disclosure to provide dealers with flexibility, within the bounds of the law, to provide this essential information in a manner that is clear and conspicuous under the particular circumstances of their transactions. This requirement does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,[321] and for dealers already disclosing accurate add-on information, this provision requires no significant additional burden.

When making a representation about an add-on product or service, the failure to disclose that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true, is likely to cause substantial injury to consumers who end up paying more for a vehicle sales or lease transaction than they expected by being subject to charges of which they are not aware or which they believe are required because they were never told they could decline the charges.

Absent this information, consumers cannot reasonably avoid the injury of being charged for these products because they are not aware that they have an option to begin with. When consumers are presented with motor vehicle transaction documents that include a variety of charges, it is difficult to detect any charges that are added to the contract beyond those that are required or have been agreed upon, especially in a stack of lengthy, complex, highly technical, and often pre-populated documents, at the close of a long sales, financing or leasing process after an already-lengthy process of selecting the vehicle and negotiating over its price or payment terms. Consumers cannot reasonably avoid charges of which they are unaware, or regarding which they do not know they have a choice.

[320] *See* Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.

[321] *See, e.g.,* California Car Buyer's Bill of Rights, Cal. Civ. Code 2981 (requiring dealers to provide a written list of specified items purchased and their effect on monthly payments, including GAP, theft deterrent devices, and surface protection products); Minn. Stat. 59D.06(b) (requiring any person offering a GAP waiver to disclose that the waiver is not required for a consumer to buy or lease the vehicle); Wash. Rev. Code. 48.160.050(9) (mandating that GAP waivers disclose that ''neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the waiver.''); La. Stat. Ann. 32:1261(A)(2)(a) (declaring it unlawful for a dealer to require, as a condition of sale and delivery, for a consumer to purchase ''special features, appliances, accessories, or equipment not desired or requested by the purchaser.'').

The injury to consumers from a lack of information about add-on optionality is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, information about the optional nature of these products or services protects consumers from lost time and effort, supracompetitive transaction costs, and unexpected charges while increasing competition among dealers, who are able to compete on truthful, standard terms. Moreover, the cost of providing this threshold information is minimal, especially when compared to the injury to consumers, and providing such information is consistent with existing industry guidance.[322]

This provision addresses deceptive conduct as well. Throughout the lengthy vehicle sales, financing, or leasing process, dealers often discuss various different charges at various different times. Such charges include charges the government requires the consumers to pay and financing costs. Dealers then often present consumers a total amount to pay that differs from the advertised or sticker price. Given that some additional charges are required, if a dealer also discusses charges for items that are not required, such as optional add-ons, it is reasonable for consumers to believe that charges for such items are required. In the course of a lengthy transaction involving extensive negotiations, dealers can obscure such products and their associated charges in dense paperwork. Moreover, the omitted information is highly material: if consumers knew that a particular optional add-on was not required to purchase the vehicle, it would likely affect their choice about whether to purchase the add-on.[323]

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making a representation about an add-on product or service, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true. Further, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, or about any costs, limitations, benefits, or any other aspect of an add-on—by requiring consumers to be told whether represented add-ons are optional. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c).[324] Thus, the Commission is requiring dealers to disclose, when making representations about add-ons, that the add-ons are not required and the consumer can purchase or lease the vehicle without the add-ons, if true.

For the foregoing reasons, and having considered all of the comments that it received on this proposal, the Commission is finalizing the required disclosure at § 463.4(c) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle'' and clarifying that the requirements of § 463.4(c) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

(d) Total of Payments and Consideration for a Financed or Lease Transaction

Section 463.4(d) of the Commission's proposed rule required dealers, when making any representation about a monthly payment for any vehicle, to disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled. If the total amount disclosed assumes the consumer will provide consideration, the proposed rule required dealers to disclose the amount of consideration to be provided by the consumer. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e), and making the minor grammatical correction of replacing the semicolon and the word ''and'' at the end of § 463.4(d)(1) with a period. The Commission also is adding language to the end of § 463.4(d), at newly designated (d)(3), clarifying that the requirements in § 463.4(d) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

A number of commenters, including consumer advocacy organizations, supported this proposed requirement, contending it would provide essential information to the consumer while not contributing to information overload, and noting the information to be disclosed would have been calculated by the dealer in the process of determining the proposed monthly payment. Many individual commenters also stressed the need for the Commission's proposal:

- Small businesses are a cornerstone of our economy. Automotive dealers, like other retailers, deserve to make a reasonable profit in order to maintain their physical plants, to purchase inventory, and to pay their staff. That being said, some auto dealers have for years used misleading and often out-and-out deceptive sales tactics (*i.e.,* lies) to generate sales. . . . Sometimes the unwary consumer may not even realize that the actual price differs from the quoted price, because the automobile finance agent speaks only in terms of monthly payments rather than the total cost. The consumer may not even realize that he or she has been ''taken'' until a friend with an amortization table runs the numbers.[325]
- At most dealerships, including the one I work at, when a customer asks to see figures on a car after a test drive, management goes out of their way to make sure the customer only sees the monthly payment. The typical numbers presented to the customer initially show the price of the car, the trade-in value, the down payment, and the monthly payment options in bold numbers at the bottom. The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. . . . Compounding this issue of hidden add-ons is that salespeople are instructed to figure out the customer's budget beforehand (*e.g.,* $450 per month). If the monthly payment with the car and add-ons comes out to be less than $450 per month, management will often raise the price of the add-ons to get the payment to $450 or even slightly above.[326]
- I wholeheartedly support the proposed regulation changes for car dealerships and the car buying process.

[322] *See* Nat'l Auto. Dealers Ass'n et al., ''Voluntary Protection Products: A Model Dealership Policy'' 4 (2019), *https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy* (stating dealerships should ''prominently display to customers a poster stating that [add-on products or services] offered by the dealership are optional and are not required to purchase or lease a vehicle or obtain warranty coverage, financing, financing on particular terms, or any other product or service offered by the dealership. . . .'').

[323] *See, e.g., Fed. Trade Comm'n.* v. *Windward Mktg., Inc.*, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997)) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[324] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[325] Individual commenter, Doc. No. FTC–2022–0046–1216.

[326] Individual commenter, Doc. No. FTC–2022–0046–3693.

As an average consumer who has bought 3 vehicles with financing and 2 without, I can see the obvious benefit these proposed regulations would have on the car buying process. The vast quantities of paperwork and add [-]ons make it easy for car dealers to switch things around to their benefit. I had one dealership . . . change the term of my auto loan from 72 to 84 months in the middle of reprinting the final sales sheet because of another obvious error in the first copy. In the midst of all the distractions and misdirection going on, [I] didn't notice [']til[l] after the fact. I felt powerless and cheated. . . .[327]

- There is no reason that buying a car has to be a chore and so ambiguous on price. The dealer was also so twisted up on getting me to focus on the monthly payment and not the total price of the car and that is where they were able to sneak the price up. Practices like this are also why people have such a disdain for purchasing a new/used car.[328]
- I have experienced many of the ''typical'' tactics that one hears about when negotiati[ng] with an automobile dealership, like the salesperson always wanting to talk about the monthly payment and never the actual trade-in price and sales price. . . . I agree that the whole car buying process could be made easier and I see no reasons that any fair and honest car dealership would object to these proposed changes/rules as they, in my estimation are all things that a fair and honest car dealer should be doing anyway. The only car dealers that should be objecting to these new rules should be the unscrupulous dealers.[329]
- When buying a car dealers try to negotiate the monthly payment, so the actual total cost is hidden from the buyer until they get into the ''financing office'' where all kinds of unexpected add-ons are sprung on the consumer.[330]
- I am trying to buy a new car, from the factory, with no modifications or alterations, is it so much to ask for? The process of figuring out the price of the car is impossible. The sales people are all about the monthly payment, when I asked them what the car price is the answer is always what payment are you looking for.[331]
- They only want to gain the amount you can be ''comfortable'' on your monthly payment so that they can stretch out the term and hammer you with hidden fees and other expenses you won[']t be able to see right away.[332]
- Dealerships always want you to come in so they can manipulate you into a car you can[']t afford and pay for things you don't need by hiding them in a monthly payment.[333]
- If we had to do our grocery shopping the same way dealers want us to buy a car, most Americans would starve before sunset. ''What kind of monthly payment are you looking for in a banana?'' is a conversation I should never be forced to have. . . .[334]

One individual commenter requested that the Commission make clear that handwritten negotiation notes made by a dealer would trigger the requirement that this proposed disclosure be made in writing.[335] In response, the Commission affirms such representations have been made ''in writing,'' [336] and thus, where dealers represent a monthly payment in such notes, this provision requires them to provide the disclosures in § 463.4(d) in writing.

Other commenters, including industry associations and individual commenters, questioned whether the proposal would require a disclosure in every place a monthly payment appears on a dealer's website, or otherwise would be difficult or infeasible given the frequency with which dealers provide consumers with monthly payment information, suggesting that such a requirement could either overwhelm consumers or dissuade dealers from providing monthly payment information, or arguing [337] that the proposal overlapped with other laws such as the Truth in Lending Act or the Consumer Leasing Act. Regarding monthly payment amounts appearing more than once or in multiple places, the Commission notes that, as proposed, this section would require disclosure of the total purchase or lease amount for a vehicle including any assumed consumer-provided consideration, and only when making a representation about the vehicle's monthly payment amount; it would not require a complex or lengthy disclosure. Consumers shop for vehicles and interact with online interfaces, and other advertising in many different ways; thus, it is important for this simple disclosure to accompany a monthly payment representation however a consumer might encounter it. Moreover, the Commission has taken into account existing disclosure obligations.[338] Monthly payment amounts for motor vehicle sales or leases constitute so-called ''triggering terms'' under the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M. As such, dealers currently providing such information, including on their websites or other online interfaces, are bound by existing laws that require providing consumers with additional terms in a clear and conspicuous way: in the case of vehicle credit transaction offers, this includes the terms of repayment, which reflect the repayment obligations over the full term of the loan; [339] in the case of vehicle lease offers, this includes the number, amounts, and due dates or periods of scheduled payments under the lease.[340] The Commission's disclosure requirement takes into account these existing obligations, requiring, specifically: the total amount the consumer will pay to purchase or lease the vehicle at a represented monthly payment amount including any assumed consumer-provided consideration. Similarly, regarding the feasibility of providing this disclosure as often as dealers provide consumers with monthly payment information: once dealers choose to make a representation about a monthly payment, they are capable of disclosing a total of payments for the consumer based on the same inputs needed to arrive at that voluntary monthly payment representation.

The Commission further notes that, in the event a monthly payment is already being disclosed, the associated total of payment would be calculated with the same financing or leasing estimates used

[327] Individual commenter, Doc. No. FTC–2022–0046–5567.

[328] Individual commenter, Doc. No. FTC–2022–0046–2176.

[329] Individual commenter, Doc. No. FTC–2022–0046–4034.

[330] Individual commenter, Doc. No. FTC–2022–0046–4911.

[331] Individual commenter, Doc. No. FTC–2022–0046–5958.

[332] Individual commenter, Doc. No. FTC–2022–0046–8847.

[333] Individual commenter, Doc. No. FTC–2022–0046–6405.

[334] Individual commenter, Doc. No. FTC–2022–0046–3860.

[335] Individual commenter, Doc. No. FTC–2022–046–9469 at 6–7.

[336] *See, e.g., Writing,* Black's Law Dictionary (11th ed. 2019) (defining ''writing'' as ''[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids.''); *cf.* Fed. R. Evid. 1001(a) (defining ''writing'' as letters, words, numbers, or their equivalent set down in any form'').

[337] These association commenters made these contentions regarding the monthly payment disclosures at both § 463.4(d) and (e). The Commission responds to these contentions in this section.

[338] One industry commenter, in expressing concern that § 463.4(d) and (e) may conflict with Regulations Z and M, questioned whether the FTC coordinated with the Federal Reserve Board. Several Senators similarly questioned whether the FTC consulted with the Federal Reserve Board, CFPB, or other agencies. Although the Commission cannot comment on specific interactions, it coordinates regularly with other Federal agencies, including the Federal Reserve Board and the CFPB.

[339] *See* 12 CFR 1026.24(b), (d)(2)(ii).

[340] *See* 12 CFR 1013.7(b), (d)(2)(iii).

to calculate the monthly payment. Dealers already must be prepared to calculate such a total to satisfy their obligations under TILA, the CLA, or their implementing regulations.[341]

Regarding § 463.4(d)'s similarity to existing laws, as discussed previously, this provision is indeed consistent with other laws, and commenters have not indicated how providing truthful information about total payment amounts along with information they already provide about monthly payment amounts would unduly burden them or harm consumers, or how providing such information in writing before providing consumers with the contract, if they are already providing monthly payment information in writing prior to the contract, would do so.

Some dealership associations described certain elements of the proposal as vague or unclear, requesting that the Commission clarify its use of the term ''by implication'' with regard to a monthly payment, or alternatively, that the Commission omit the terms ''any'' (as it pertains to ''any representation''), ''by implication,'' and ''indirectly'' from the proposed disclosure provision.[342] Regarding the use of the term ''by implication'' with regard to a monthly payment, as discussed in the section-by-section analysis of § 463.3 in SBP III.C with respect to the prohibition on express or implied misrepresentations, the Commission notes that such language is consistent with longstanding law, and given that representations can mislead reasonable consumers even without making express claims, the provision could be rendered meaningless without it.[343] Variations of the phrase ''expressly or by implication'' appear frequently in existing Commission guides and regulations,[344] and implied claims are treated extensively in the longstanding FTC Policy Statement on Deception, which the Commission issued in 1983 to provide guidance to the public on the meaning of deception.[345] Furthermore, this language serves to help ensure that dealers may not avoid this disclosure requirement by making only implied reference to monthly payments, including by referring to a monthly payment amount that is not explicitly identified as such, or by referring to a regular periodic payment made on a different installment basis (*e.g.,* a biweekly payment) to indirectly illustrate a consumer's monthly payment obligations.

These same reasons also counsel against deleting the terms ''any'' and ''indirectly'' from this proposed disclosure provision. To begin, one dealership association commenter suggested deleting these terms from the regulatory text, but did not explain the nature of its specific concern regarding its use of the term ''any,'' instead claiming generally that the terms with which the commenter took issue were ''broad,'' ''vague,'' and ''imprecise.'' As proposed, the Commission's total payments disclosure would be required when a dealer makes ''any representation . . . about a monthly payment for any vehicle.'' These disclosure circumstances are markedly similar to those under Regulation Z and Regulation M: Regulation Z requires the disclosure of additional payment terms when ''any'' of a number of terms is set forth, including ''[t]he amount of *any* payment'';[346] Regulation M similarly requires the disclosure of additional terms when ''any'' of a number of items is stated, including ''[t]he amount of *any* payment.''[347] The use of the term ''any'' is consistent with existing law, and thus is not confusing or impracticable. Furthermore, as with representations made ''by implication,'' the Commission has a longstanding practice of regulating representations made ''indirectly'' in the same manner as those made directly,[348]

[341] As is currently the case under Federal law and the Final Rule, the terms must be the terms available to the typical consumer. *See, e.g., Fed. Trade Comm'n* v. *Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (''[A]t the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant.''). This is consistent with prior FTC enforcement actions. *See, e.g.,* Complaint ¶¶ 48–53, 82–84, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.*, No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's advertisements list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); Complaint ¶¶ 8–10, *Progressive Chevrolet Co.*, No. C–4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

[342] One commenter requested clarification or deletion of ''any,'' ''by implication'' and ''indirectly'' from § 463.4(c) and (e) for the same reasons it articulated with regard to § 463.4(d): that the terms are too vague. The explanation provided in the text pertains to these sections as well.

[343] The FTC Policy Statement on Deception and FTC cases make clear that both express and implied claims can be deceptive. *See, e.g., ECM Biofilms, Inc.* v. *Fed. Trade Comm'n,* 851 F.3d 599 (6th Cir. 2017) (affirming Commission's finding that an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC,* Doc. No. C–9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *generally aff'd by POM Wonderful, LLC* v. *Fed. Trade Comm'n,* 777 F.3d 478 (D.C. Cir. 2015) (finding that company's advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft advertisements juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk). Further, to be considered reasonable, the interpretation or reaction does not have to be the only one; when a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *See* FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

[344] *See, e.g.,* Telemarketing Sales Rule, 16 CFR 310.3(a)(2) (prohibiting ''[m]isrepresenting, directly or by implication, in the sale of goods or services'' a list of ten categories of material information); 16 CFR 310.2(o) (defining ''debt relief service'' as any program or service ''represented, directly or by implication, to renegotiate, settle, or in any way alter'' certain terms); 16 CFR 310.5(a)(2) (requiring telemarketers to keep records of certain prize and prize-recipient information ''for prizes that are represented, directly or by implication, to have a value of $25.00 or more''); Business Opportunity Rule, 16 CFR 437.1(c) (defining a ''(b)usiness opportunity'' as a commercial arrangement in which, among other criteria, ''[t]he seller, expressly or by implication, orally or in writing, represents that'' it will provide, *inter alia,* business locations, outlets, accounts, or customers); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.1(e) (defining ''(f)inancial performance representation'' as any representation to a prospective franchisee that states, ''expressly or by implication, a specific level or range'' of sales, income, or profits); Military Credit Monitoring Rule, 16 CFR 609.3(e) (describing as prohibited materials those that ''expressly or by implication'' represent certain ''interfering, detracting, inconsistent, and/or undermining'' information); Rules and Regulations Under Fur Products Labeling Act, 16 CFR 301.14 (requiring an ''unknown'' origin disclosure when ''no representations are made directly or by implication'' regarding the origin of used furs); 16 CFR 301.18 (regulating the ''passing off'' of domestic furs as imported by prohibiting labeling, invoicing, or advertising that ''represent[s] directly or by implication'' that such furs have been imported); 16 CFR 301.43 (regulating the use of deceptive trade or corporate names by prohibiting any ''representation which misrepresents directly or by implication'' certain information); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR 432.1(a) (defining the regulation's scope when certain amplifier features or characteristics are ''represented, either expressly or by implication, in connection with the advertising, sale, or offering for sale'').

[345] *See* FTC Policy Statement on Deception, *supra* note 42, at 2.

[346] 12 CFR 1026.24(d) (emphasis added).

[347] 12 CFR 1013.7(d) (emphasis added).

[348] *See, e.g.,* Business Opportunity Rule, 16 CFR 437.6 (prohibiting ''any seller, directly or indirectly through a third party'' from engaging in certain prohibited practices); Credit Practices Rule, 16 CFR 444.2 (prohibiting as unfair ''a lender or retail installment seller directly or indirectly'' taking or receiving certain obligations from a consumer); 16 CFR 444.3 (prohibiting as deceptive ''a lender or retail installment seller, directly or indirectly'' misrepresenting cosigner liability, and prohibiting as unfair ''a lender or retail installment seller, directly or indirectly'' obligating a cosigner under certain circumstances); 16 CFR 444.4 (prohibiting as unfair the act or practice of ''a creditor, directly or indirectly'' levying or collecting certain late charges); Telemarketing Sales Rule, 16 CFR 310.3(a)(3) (prohibiting as deceptive the act or practice of ''[c]ausing billing information to be submitted for payment, or collecting or attempting

Continued

and it does so to help ensure that its requirements are effective and not easily avoided. The Commission thus declines to modify their usage in § 463.4(d).

Some commenters, including a dealership association, questioned whether the disclosure requirement would require dealers to obtain individuals' consumer reports before providing monthly payment information. In response, the Commission notes that § 463.4(d) does not alter the status quo regarding the information a dealer must have in order to represent a monthly payment amount. As previously discussed, this provision does not require disclosure of a monthly payment; instead, if a dealer chooses to represent a monthly payment amount, § 463.4(d) requires a corresponding disclosure of ''the total amount the consumer will pay to purchase or lease the vehicle *at that monthly payment.*'' As previously explained in detail, dealers are capable of disclosing a total of payments for the consumer based on such voluntary monthly payment representations. Furthermore, to the extent a dealer may be providing consumers with estimated monthly payment information, the dealer may use the same assumptions used for estimating the monthly payment in order to determine the total of payments. Further, as is required under other law and this Rule, the dealer must refrain from deception, including by avoiding assumptions that the consumer would not reasonably expect or for which the consumer would not reasonably qualify.[349]

When making a representation, expressly or by implication, directly or indirectly, about a monthly payment for any vehicle, the failure to disclose the total amount the consumer will pay, inclusive of any consideration, to purchase or lease the vehicle at that monthly payment after making all payments as scheduled is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at reasonably expected terms; or who pay more for a vehicle sales or lease transaction than they expected by being subject to hidden charges or an unexpected down payment or trade-in requirement; or who are subject to the higher financing or leasing costs and greater risk of default associated with an unexpectedly lengthy loan or lease term. Moreover, when a consumer pays for his or her vehicle over a longer period of time, there is an increased likelihood that negative equity will result when the consumer needs or wants to purchase or lease another vehicle, because a vehicle's value tends to decline faster than the amount owed.[350] Longer motor vehicle financing term lengths also have higher rates of default, potentially posing greater risks to both borrowers and financing companies.[351] Even if a consumer eventually learns the true total payment, or later learns that the terms being discussed are based on a previously undisclosed requirement that the consumer provide consideration, such as a down payment, the consumer cannot recover the time spent pursuing the offer that the consumer had expected.

The injury caused by the failure to disclose the total amount and consideration is not reasonably avoidable. As the Commission has observed previously, withholding total payment information enables dealers to focus consumers on the monthly payment amount in isolation. Under such circumstances, dealers may add unwanted, undisclosed, or even fictitious add-on charges more easily, since consumers may not notice the relatively small changes an add-on charge makes when secreted within a monthly vehicle payment, despite the fact that such hidden charges can cost a consumer more than a thousand dollars over the course of an auto financing or lease term.[352] The absence of information concerning the total of payments—which is within the sole control of the dealership—also enables dealers to use claims regarding monthly payment amounts to falsely imply savings or parity between different offers where reduced monthly payments increase the total vehicle cost due to an increased payment term or annual percentage rate.

The injury to consumers from a lack of total payment information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, the burden of disclosing this information—which the dealer determines and can calculate upfront—is minimal for dealers who are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Regarding deception, as detailed in the NPRM and in this SBP, cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[353] Yet it can be difficult for consumers to uncover the actual costs, and their

to collect payment for goods or services or a charitable contribution, directly or indirectly'' without express verifiable authorization); 16 CFR 310.4(a)(7) (prohibiting as abusive the act or practice of ''[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor''); Mail, internet, or Telephone Order Merchandise Rule, 16 CFR 435.1(f) (defining ''Telephone'' as ''any direct or indirect use of the telephone to order merchandise. . . .''); Preservation of Consumers' Claims and Defenses, 16 CFR 433.2 (prohibiting as an unfair or deceptive act or practice ''for a seller, directly or indirectly'' to take or receive a consumer credit contract which does not contain the Commission's ''Holder Rule'' provision); Prohibition of Energy Market Manipulation Rule, 16 CFR 317.3 (declaring ''[i]t shall be unlawful for any person, directly or indirectly'' to engage in certain energy market manipulation practices); Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.7(i) (declaring that regulated persons may not ''report or threaten directly or indirectly to report adverse information'' on a consumer report under certain circumstances).

[349] Importantly, as is the case under current law, a dealer may not mislead the consumer about the likelihood of qualifying for any particular credit or leasing terms in the course of providing this disclosure. Generally speaking, such deception is less likely where the dealer communicates to the consumer any assumptions it may have made, along with the basis for any such assumptions, in a manner in which the consumer understands this information.

[350] Buckle Up, *supra* note 63, at 7.

[351] Consumer Fin. Prot. Bureau, ''Quarterly Consumer Credit Trends: Growth in Longer-Term Auto Loans'' 7–8 (Nov. 2017), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-trends_longer-term-auto-loans_2017Q2.pdf; see also* Zhengfeng Guo et al., Off. of the Comptroller of the Currency, ''A Puzzle in the Relation Between Risk and Pricing of Long-Term Auto Loans'' 2, 4–5, 20 (June 2020), *https://www.occ.gov/publications-and-resources/publications/economics/working-papers-banking-perf-reg/pub-econ-working-paper-puzzle-long-term-auto-loans.pdf* (finding motor vehicle financing with six-plus-year terms have higher default rates than shorter-term financing during each year of their lifetimes, after controlling for borrower and loan-level risk factors).

[352] *See* Auto Buyer Study, *supra* note 25, at 14 (''[T]he dealer can extend the maturity of the financing to reduce the effect of the add-on on the monthly payment, obscuring the total cost of the add-on''); Auto Buyer Study: Appendix, *supra* note 66, at 229, 233 (Study participant 457481) (dealership pitching add-ons at the end of the negotiation, and in terms of consumer's monthly price); Auto Buyer Study: Appendix, *supra* note 66, at 701 (Study participant 437175) (dealership pitching add-ons in terms of monthly price); *see also* Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.*, No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging dealership included deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 21–28, *Fed. Trade Comm'n* v. *Ramey Motors*, No. 1:14–cv–29603 (S.D. W. Va. Dec. 11, 2014) (alleging dealer emphasized attractive terms such as low monthly payments but concealed substantial cash down payments or trade-in requirements); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Billion Auto, Inc.*, No. 5:14–cv–04118–MWB (N.D. Iowa Dec. 11, 2014) (alleging dealer touted attractive terms such as low monthly payments but concealed significant extra costs).

[353] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)).

actual associated terms, for which a dealer will sell or lease an advertised vehicle until visiting the dealership and spending hours on the lot. When an advertisement or other communication references a monetary amount or financing term, it is reasonable for a consumer to expect that those amounts and terms are available for a vehicle at other standard terms, and, in the absence of information to the contrary, that no down payment or other consideration is required. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long financing term or unexpectedly high interest rate that results in a higher total payment than standard terms would have yielded, or based on an expected but undisclosed down payment or other consideration to be provided by the consumer, the consumer will be induced to visit the dealership based on a misimpression of what they reasonably expect the total payment to be.

If consumers knew that the true terms were beyond what was expected, or their transaction included charges for unwanted items, that would likely affect their choice to visit a particular dealership over another dealership. Thus, misleading consumers about cost information is material. A lack of total payment information therefore is likely to affect a consumer's decision to purchase or lease a particular vehicle and is material, and paying an increased total cost causes substantial consumer injury.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled, inclusive of assumed consideration. Further, this provision also addresses the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle—by requiring consumers to be provided with the total payment amount associated with any represented monthly payment amount. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as required by § 463.5(c).[354] To address these unfair or deceptive acts or practices, the Commission is requiring dealers to disclose, when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled, inclusive of assumed consideration. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered all of the comments that it received, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle,'' substituting a period for a semi-colon and the word ''and'' at the end of § 463.4(d)(1), and clarifying that the requirements of § 463.4(d) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

(e) Monthly Payments Comparison

Proposed § 463.4(e) required dealers, when making any comparison between payment options that includes discussion of a lower monthly payment, to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(e) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e). The Commission also is adding language to the end of § 463.4(e) clarifying that the requirements in § 463.4(e) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

A number of institutional commenters supported such a provision, emphasizing that it would provide an appropriate amount of helpful information and help make the true terms of a car deal much clearer to consumers. Many individual commenters also stressed the need for the Commission's proposal:

- My car buying experience involving dealers has include [sic] many of the issues identified, such as: . . . Negotiating a 4 year loan with a known loan payment (did math prior to final steps). Presented paperwork with a similar but lesser monthly payment. Dealer had changed terms to 5 year loan without open disclosure. Happy to hear, ''the bank gave you a better rate, you got a smaller payment,'' almost didn't catch what they'd done.[355]
- I have purchased about 10 new vehicles in my lifetime. . . . They prey on monthly payments as a tool, saying they can lower the monthly payment but not telling customers they added months or years to the term. Anything that forces them to be honest is a great justice for consumers! [356]
- Sometimes, when you are in negotiations with a car dealer, they engage in deceptive practices by lowering your monthly payment amount without telling you how they lowered it. They may have increased your down payment or increased your interest rate or increased your term of the loan. This can lead [t]o much higher costs for the consumer. I had reached an agreement with a dealer to lower my monthly payments, but what they didn't tell me until I got into the F & I manager's office is that my deal [was] for 6 years, not 4, and they increased my interest rate.[357]
- . . . I was quoted a payment at 72 months with adding aftermarket warranty but come to find out they extended my term to 76 months in order to meet what I wanted to pay monthly. I did not find this out until after I bought the car. Very dishonest dealership. This last minute bait and switch has to stop.[358]
- I purchased a truck from a Tennessee truck dealer. After agreeing on a monthly payment of $920 for 72 months, I travelled to the dealership to complete the purchase, but the finance office changed the terms to 84 months with the same monthly payment, effectively adding $11,000 to their profit! [359]
- I just want to walk in to a dealership, find a car that fits my needs and buy it. And what is up with these RIDUCULOUSLY [sic] long loan terms? 72 MONTHS? If someone cannot afford a car dealers shouldn't extend the loan, they should steer them to a more affordable car! [360]

The Commission received numerous comments relating to the scope and

[354] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[355] Individual commenter, Doc. No. FTC–2022–0046–0141.

[356] Individual commenter, Doc. No. FTC–2022–0046–0985.

[357] Individual commenter, Doc. No. FTC–2022–0046–1652.

[358] Individual commenter, Doc. No. FTC–2022–0046–7569.

[359] Individual commenter, Doc. No. FTC–2022–0046–0115.

[360] Individual commenter, Doc. No. FTC–2022–0046–0050.

terms of its proposed monthly payments comparison disclosure. A number of institutional and individual commenters urged the Commission to require that such disclosures uniformly be provided to consumers in writing. The Commission agrees with commenters that many monthly payment comparisons happen verbally, in the course of discussions with consumers. As proposed, the Commission's monthly payment comparison disclosure made clear that such discussions are covered, and that dealers would be required to inform consumers in the course of such discussions—''[w]hen making any comparison between payment options''—if a represented lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. The Commission believes there are significant consumer benefits when such disclosures are made verbally, close in time to when monthly payment options are discussed. Given that car-buying and leasing transactions are already lengthy and paperwork-heavy, the Commission believes it must be judicious with any additional written disclosure requirements to avoid crowding out other disclosures or other important information. Accordingly, the Commission has determined not to modify § 463.4(e) from its original proposal in order to mandate that the required disclosure always be made in writing. The Commission will continue to monitor the market for any further developments in this area and will consider whether to modify this or other Final Rule provisions in the future.

Some commenters, including consumer advocacy organizations, urged the Commission to adopt specific proposed language rather than a general disclosure requirement, or a requirement that this disclosure include the total amount the consumer will pay at the lower monthly payment under discussion. Regarding the proposal to require particular, uniform disclosure language, the Commission did not receive, in the course of public comment, evidence sufficient to conclude that uniform formatting for the delivery of such disclosures would be necessary to make them effective. The Commission currently lacks information to evaluate whether any particular form disclosure would effectively communicate the required information to consumers in a manner that in all circumstances obviates deceptive or unfair conduct. Moreover, regarding the proposal to require that the monthly payment comparison disclosure additionally require dealers to disclose the new total amount that the consumer will pay, the Commission emphasizes that part 463 will require such a disclosure without the need to modify this provision from the Commission's original proposal. As noted in the paragraph-by-paragraph analysis of § 463.4(d) in SBP III.D.2(d), the Commission is finalizing § 463.4(d), which requires dealers making any representation about a monthly payment for a vehicle to disclose the total amount the consumer will pay to purchase or lease the vehicle at a given monthly payment amount after making all payments as scheduled, inclusive of assumed consideration, largely as proposed. The monthly payment comparison discussions covered by § 463.4(e) are those that ''include[] discussion of a lower monthly payment.'' To the extent a dealer, in the course of such discussions, makes a representation ''about a monthly payment for any Vehicle,'' § 463.4(d) will require the dealer to disclose the total amount the consumer will pay at that monthly payment amount.

Comments, including those from a number of dealership associations [361] and an individual commenter, characterized the Commission's proposal as burdensome and likely to lead to excessive disclosures while providing little additional assistance to consumers. In response, the Commission emphasizes the streamlined nature of proposed § 463.4(e). In its proposal, the Commission refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information—that a given lower monthly payment will increase the total amount the consumer will pay—including so that dealers already conveying this information in a non-deceptive manner may continue to do so.

Thus, after careful review of the comments, the Commission has determined to finalize § 463.4(e) largely as proposed. When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the failure to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true, is likely to mislead consumers regarding the total terms associated with the lower monthly payment amount. When a dealer elects to compare between different monthly payment options, if the lower monthly payment would result in a higher total transaction cost, discussion of this fact is necessary to prevent the comparison from being misleading. Absent this information, it is reasonable for a consumer who is presented with a monthly payment comparison to expect that the lower monthly payment amount would correspond to lower total transaction cost. This is because the opposite can only be true if the dealer has created a so-called ''apples to oranges'' comparison, in which an undisclosed element of the transaction—such as the length of the payment term, or the existence of a balloon payment—has not been kept constant across the two monthly payment scenarios being compared. Under such circumstances, without providing the consumer with further information, the dealer's claims regarding monthly payment amounts falsely imply saving or parity between different offers where reduced monthly payments increase the total vehicle cost. Thus, where a lower monthly payment amount represents a more expensive transaction, the dealer must, at a minimum, disclose this simple but counterintuitive fact to not deceive consumers.[362]

Furthermore, as explained in the NPRM and in the paragraph-by-paragraph discussion of § 463.4(d) in SBP III.D.2(d), cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[363]

Regarding unfairness, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the failure to disclose that the lower monthly payment will increase the total

[361] As previously indicated, some such association commenters contended generally that the proposed total of payments disclosures at § 463.4(d) and (e) overlapped with the Truth in Lending Act or other laws. The Commission responds to this point in the context of the discussion of § 463.4(d), in SBP III.D.2(d).

[362] Depending on the circumstances, a dealer may need to take additional measures, such as disclosing the specific basis for any increase in total costs, or amount of any such increase, in order to avoid deceiving consumers.

[363] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

amount the consumer will pay to purchase or lease the vehicle, if true, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at the total payment amount they expect; or who pay more for a vehicle sales or lease transaction than they expected by being subject to hidden charges or an unexpected down payment or trade-in requirement; or who are subject to the higher financing costs and greater risk of default associated with an unexpectedly lengthy loan term.

Furthermore, the injury caused by withholding this information is not reasonably avoidable by consumers. During negotiations, if dealers agree to a lower monthly payment, consumers have no reason to expect that this apparent ''concession'' in fact means an increased total vehicle cost due to an increased payment term or annual percentage rate. Under such circumstances, dealers can also add unwanted, undisclosed, or even fictitious add-on charges more easily, by increasing the payment term enough that including add-on charges would still result in a lower monthly payment as a ''concession'' to the consumer. The injury to consumers from a lack of price information is not outweighed by any benefits to consumers or competition from withholding this basic information. Instead, information about increased cost protects consumers from lost time and effort, and unexpected charges while increasing competition among dealers, who would be able to compete on truthful, standard terms. The costs of stating that the total payment has increased—which the dealer determines and can calculate upfront—are minimal for dealers that are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. Further, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle—by requiring consumers to be given accurate information that the total payment will increase when presented with a lower monthly payment. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c), including charges relating to the financing or lease of a vehicle.[364] Thus, the Commission is requiring dealers to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered all of the comments that it received on this proposed provision, the Commission is finalizing the required disclosure at § 463.4(e) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle'' additional language clarifying that the requirements in § 463.4(e) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

E. § 463.5: Dealer Charges for Add-Ons and Other Items

1. Overview

Proposed § 463.5 prohibited motor vehicle dealers from charging for add-on products or services from which the consumer would not benefit; from charging consumers for undisclosed or unselected add-ons unless certain requirements were met; and from charging for any item unless the dealer obtains the express, informed consent of the consumer for the item.

In response to the NPRM, various stakeholder groups and individuals submitted comments regarding these proposed provisions. Among these were comments in favor of the provisions; comments that urged the Commission to include additional restrictions on add-on charges; and comments questioning or recommending against the proposed provisions.

After careful consideration of the comments, the Commission has determined to finalize § 463.5(a) and (c) without substantive modification and has determined not to finalize § 463.5(b) regarding undisclosed or unselected add-ons. The Commission also is making minor textual edits to the introductory language in § 463.5 for clarity and consistency: substituting ''Federal Trade Commission Act'' for ''FTC Act''; adding ''Covered'' to ''Motor Vehicle Dealer'' to conform with the defined term at § 463.2(f) (''`Covered Motor Vehicle Dealer' or `Dealer' ''), and capitalizing ''Vehicles'' to conform with the defined term at § 463.2(e) (''`Covered Motor Vehicle' or `Vehicle' '').

In the following analysis, the Commission examines each proposed provision in § 463.5; the substantive comments relating to each provision; responses to these comments; and the Commission's final determination with regard to each proposed provision.

2. Paragraph-by-Paragraph Analysis of § 463.5

(a) Add-Ons That Provide No Benefit

Section 463.5(a) of the proposed rule prohibited motor vehicle dealers from charging for add-ons if the consumer would not benefit from such an add-on, including a pair of enumerated examples. For the following reasons, the Commission is finalizing this provision largely as proposed, with modifications to correct a misplaced hyphen; add the word ''that'' before ''are duplicative of warranty coverage''; and capitalize the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e). The Commission also is adding language to the end of § 463.5(a), at newly designated (a)(3), clarifying that the requirements in § 463.5(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.'' Relatedly, the Commission is finalizing the definition of the term ''GAP Agreement,'' which is referenced in this provision and defined in § 463.2(h) of the Final Rule, substantively as proposed, with minor modifications to correct a misplaced period, substitute ''Vehicle'' for both ''vehicle'' and ''motor vehicle'' to conform with the revised definition at § 463.2(e), and remove an extraneous term—''insured's''—without changing the definition's operation.

Many commenters, including a number of industry participants and associations, stated that products that provide no benefit to the consumer should not be sold in connection with the sale or financing of vehicles. Many commenters that supported the

[364] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

provision stated, *inter alia,* that the examples the Commission enumerated in this paragraph were obvious [365] and particularly helpful for less-experienced buyers who may be led to believe that a particular product or service would be beneficial.[366] Some individual commenters, for instance, noted that they had no way to confirm whether the ''nitrogen-filled'' tires they purchased with their vehicle actually had more nitrogen than naturally exists in the air, even though they were told the purchase of this service was mandatory.[367] At least one individual commenter described requesting to see the nitrogen tank after such a purchase and being denied by the dealer.

Examples of public comments about add-ons include the following:

- I would argue that this does not go far enough but it [is] a good start. As someone who is trying to purchase a new vehicle, there is a[n] endless supply of ''perk packages'' or ''Family deals'' that I ''must purchase'' if I would like to acquire a car from a dealer. These include a variety of dubious products such as insurance policies that pay out $3,500 if your car is stolen (and can't be found) in the first 90 days of ownership, if your car is totaled by your insurance company in the first 90 days they'll pay $3,500. Nitrogen in the tires (A $196 value). Vin Etching on the windows, plastic stickers on the door handles to prevent scratches. These items are a requirement to bundle with the vehicle and a deal that provides ''over $7,000 in value'' for $2,995. These tricks ignore the obvious, such as your car can not be both stolen (unrecovered) AND totaled so it's impossible to collect on both policies so the cumulative ''value'' of this package is overstated.[368]
- One of the latest scams is to force you to buy a $1,000 gps unit so they can recover the car if you miss payments. This shouldn't be allowed.[369]
- Second vehicle I purchased had a $1,650 ''protection pkg'' plus the usual nitrogen in the tires BS. This time I asked to be shown the nitrogen tank they fill the tires with, they refused saying due to insurance rules customers aren't allowed in the shop. I asked them to take off the paint and fabric protection charge also, they declined at first until I reminded them they just got the vehicle the night before and there was still plastic factory coverings on the seats and strips of plastic on the vehicles body protecting certain areas. This time they mumbled some excuse about the addendum added to the price is put on the vehicle as soon as it arrives and they hadn't had ''time'' to apply all the overpriced add[-]ons.[370]
- I'm a former carsalesperson [sic]. . . . Dealers should be banned from selling . . . special paints to protect from rust . . . . No coatings are added.[371]
- I worked at a Dodge/Ram dealership for three years at the make ready (carwash) department. When new vehicles arrived their tires were rarely deflated and then filled with nitrogen. It is my understanding that the manufacture initially paid for the nitrogen fill and the customer was later charged.[372]
- [O]ne of my previous purchases almost ended . . . with GAP that was so unnecessary, the lender called us a few days later after we already had the car and told us we'd be experiencing a lower monthly payment unless we wanted the price of the product back in a check because of the price we negotiated and the sizable down payment, it was impossible for GAP to ever be required.[373]

A number of individual commenters indicated they did not consider nitrogen tires a valuable purchase and expressed no desire to purchase them. Many commented that, when they informed their respective dealers that they did not want these add-ons, the dealers would represent, *inter alia,* that nitrogen tires were required by law, that their insurance premium would increase without the add-on, that new foreign vehicles coming into the country must have nitrogen-filled tires under the law, or that the consumer needed to purchase nitrogen tires to meet fuel economy standards.

Other commenters supported this proposed provision while also recommending that the Commission broaden its scope to prohibit the sale of add-on products or services that provide only ''minimal'' benefit to consumers.[374] One such commenter, for instance, suggested the provision be expanded to prohibit dealers from charging for an add-on unless it provides a ''substantial, material benefit'' to consumers.[375] Another commenter contended that there are a number of add-ons not meeting such standards being sold in connection with the sale or financing of vehicles, including future servicing packages for vehicle tune-ups and oil changes that are sold to remote or out-of-State consumers who are exceedingly unlikely to return to the dealership for such services; tracking devices that are used almost exclusively for electronic repossession; and ''vendor's single interest'' or ''VSI'' insurance, which protects the financing entity, but not the consumer, in the event that the vehicle is damaged or destroyed.[376]

The Commission acknowledges the considerable consumer harm that results from the sale of such add-ons and notes that several provisions in the Rule it is finalizing will address misconduct related to these and other add-ons, including many of the practices described by those commenters recommending further action. For example, to the extent that dealers make misrepresentations about any benefit of an add-on, such conduct would violate § 463.3(b) of the Final Rule. Thus, were a dealer, for instance, to promote the sale of an add-on—such as a tracking device that is used almost exclusively for electronic repossession—based on its supposed benefit to the consumer, when the product primarily benefits another party, such conduct would violate the Rule even if the product otherwise provides an ancillary or marginal benefit to consumers. And if the add-on provided no benefit to the consumer and only a benefit to another party, § 463.5(a) would prohibit the dealer from charging the consumer for it. Further, to the extent that dealers charge for add-ons without express, informed consumer consent for the charge, such conduct would violate § 463.5(c).

The Commission recognizes that there may be significant consumer benefits from implementing additional restrictions on the sale of add-on products or services. However, without additional information on costs and benefits to consumers or competition associated with such restrictions, the Commission has determined not to implement such restrictions in this Final Rule. The Commission will continue to monitor the motor vehicle

[365] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–1608 at 6.

[366] *See, e.g.,* Comment of 18 State Att'ys Gen., Doc No. FTC–2022–0046–8062 at 9.

[367] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–0565.

[368] Individual commenter, No. FTC–2002–0046–0565.

[369] Individual commenter, No. FTC–2002–0046–4552.

[370] Individual commenter, Doc. No. FTC–2022–0046–0854.

[371] Individual commenter, Doc. No. FTC–2022–0046–1393.

[372] Individual commenter, Doc. No. FTC–2022–0046–5493.

[373] Individual commenter, Doc. No. FTC–2022–0046–6816.

[374] *See, e.g.,* Legal Aid Just. Ctr., Doc. No. FTC–2022–0046–7833 at 3.

[375] Comment of Legal Action Chi., Doc. No. FTC–2022–0046–8097 at 10.

[376] *See also* Consumer Fin. Prot. Bureau, ''What Is Vendor's Single Interest (VSI) insurance?'' (Aug. 16, 2016), *https://www.consumerfinance.gov/ask-cfpb/what-is-vendors-single-interest-vsi-insurance-en-731/.*

marketplace to gather additional information on this issue and will consider whether to modify or expand § 463.5(a) in the future, including on the basis of stakeholder experience with this provision and whether it effectively addresses unlawful conduct.

Commenters also urged the Commission to adopt a number of additional measures regarding the sale of such add-ons. A consumer advocacy organization, for instance, proposed that the Commission require dealers to list coverage limitations for add-ons that may overlap with a vehicle's warranty coverage, observing that consumers commonly are not aware of important limitations until the add-on, such as a warranty or service contract, is needed, and only then does the consumer learn the add-on does not provide the anticipated benefits. A State consumer protection agency recommended that the Commission require affirmative disclosures for the sale of add-ons that may provide only ''nominal'' benefit, offering a list of what they characterized as such products for the Commission to consider in conjunction with this recommendation.

In response, the Commission notes that other provisions in part 463 address misconduct relating to these issues, including by prohibiting misrepresentations regarding material information about add-ons, by requiring disclosures about optional add-ons, and by requiring dealers to obtain the express, informed consent of the consumer for add-on charges. Thus, misrepresenting the coverage limitations of an add-on; making representations regarding an optional add-on without disclosing that it is not required and that the consumer can purchase or lease the vehicle without the add-on; and charging for an add-on under false pretenses or without the consumer's express, informed consent would violate other provisions the Commission is finalizing. The Commission is concerned that requiring additional disclosures may have the effect of reducing the saliency of key information in what is already a lengthy, paperwork-heavy transaction. Accordingly, the Commission has determined not to adopt additional such disclosure measures in this Final Rule.

In addition, at least one consumer protection agency commenter asked the Commission to consider deeming it an unfair or deceptive act or practice to sell any add-on product for a price greater than the value of the product itself. The Commission declines to restrict the sale of add-on products at a price higher than the value of the product itself, absent additional information, including information regarding the costs and benefits to consumers and competition of such a restriction.[377]

A number of industry association commenters claimed the provision was vague and requested the Commission set forth how to calculate the loan-to-value (''LTV'') ratio at which a GAP agreement would be non-beneficial, given that there could be fluctuation of the vehicle value in the future. Some suggested that the Commission adopt a presumption or safe harbor that dealers complying with an LTV calculation set by the Commission be deemed in compliance with the portion of the proposal related to GAP agreements.

Other industry association commenters argued against adopting a set LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, claiming that the vehicle financing entity is best positioned to determine whether such an add-on would be beneficial. Relatedly, some industry association commenters contended that certain GAP agreements sold on a low-LTV loan, or that limit benefits based on a consumer's LTV ratio, could still provide additional benefits.

A financing association commenter contended that any final rule should not create rules around the calculation of the LTV ratio. Another financing group proposed that the Commission require dealers to provide disclosures that would inform consumers of any potential value gap between a vehicle's purchase price and its appraised value.

With regard to establishing LTV ratio parameters for the sale of GAP agreements, without further information from commenters regarding the costs and benefits of establishing a particular LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, or a particular method for calculating the LTV ratio, and given the Commission's previously stated information saliency concerns about finalizing additional disclosures in an already lengthy transaction, the Commission has determined not to establish in this Final Rule a particular numeric threshold or calculation regarding the sale of GAP agreements to consumers, or to require additional associated disclosures. Regarding the benefits of certain GAP agreements, this provision restricts sales of GAP agreements where the consumer would not benefit. If there are benefits to the consumer, dealers must abide by other provisions in the Final Rule, including the requirements that the dealer represents the extent of those benefits accurately (§ 463.3(b)) and obtains express, informed consent from the consumer for the charges for this item (§ 463.5(c)).

The Commission also received some industry association comments claiming that each State imposes differing requirements as to coverage, disclosures, exceptions, and product terms of GAP agreements. One such commenter asked for guidance on how a bright-line, State-law rule on LTV ratios would interact with the FTC's proposal. Another such commenter requested the FTC reconcile different State-law approaches to the sale of GAP agreements, particularly regarding how this proposed provision would interact with a State law that, according to the commenter, only requires a dealer to have a reasonable belief that the customer may be eligible for a benefit. In response, the Final Rule does not disturb State law unless it is inconsistent with part 463, and then only to the extent of the inconsistency. Where, for example, State laws restrict the sale of GAP agreements if the LTV ratio for the transaction is below a certain threshold, or require that dealers have a ''reasonable belief'' that the GAP agreement would benefit the consumer, dealers in that State can, and must, comply with the State law and with the Rule. Pursuant to such State law, dealers would be prohibited from selling the product if the LTV ratio is below the established threshold or if they do not reasonably believe the GAP agreement would benefit the consumer and, pursuant to the Final Rule, if the LTV ratio would result in the consumer not benefitting financially. To the extent there is an actual conflict between the Commission's Final Rule and a State law—and the Commission is skeptical that there is such a State law that explicitly allows for the sale of a product that does not benefit the consumer—the Commission refers commenters to § 463.9, which sets forth the Rule's relation to State laws.

With respect to the proposed definition of ''GAP Agreement,'' an industry association commenter contended that the phrase ''the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss'' meant the value of the vehicle at some point in the future, and asserted that future vehicle values cannot be accurately determined at the

[377] One consumer attorney commenter requested that the Commission clarify that warranty disclaimers are not a valid defense to common law fraud and statutory consumer fraud, and that, if fraud is proven, warranty disclaimers are not an allowable defense to UCC actions. In response, the Commission notes that none of the provisions the Commission is finalizing state that warranty disclaimers are a defense to common law fraud or in UCC actions.

time of sale. The proposed definition, however, did not prescribe how dealers must calculate a vehicle's cash value; rather, it explains that the term ''GAP Agreement'' means an agreement to indemnify a vehicle purchaser for any difference between such value, however determined, in the event of an unrecovered theft or total loss, and the amount owed, regardless of what that difference may be. Upon examination of this phrase, however, the Commission has determined to remove the term ''insured's'' because it is extraneous and does not affect the operation of this definition: with or without the term, the phrase describes the manner in which a qualifying GAP agreement determines the amount to indemnify a vehicle purchaser or lessee. In context in this definition, it is clear without the term ''insured's'' that the applicable ''Vehicle'' is the one covered by the GAP agreement. Omitting this unnecessary term thus avoids confusion without substantively changing this definition.

One industry association commenter argued that reference to ''GAP insurance'' should be removed from the definition of ''GAP Agreement'' because of the McCarran-Ferguson Act's reverse-preemption of certain Federal laws that ''invalidate, impair, or supersede'' State laws enacted ''for the purpose of regulating the business of insurance.'' [378] As previously discussed with regard to the definition of ''Add-on,'' however, commenters have provided no evidence that the proposed or Final Rule would invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance. Rather than affecting any State's regulation of insurance, the Final Rule prohibits dealers from making misrepresentations regarding add-ons, from failing to disclose when add-ons are not required, and from charging for add-ons that provide no benefit or for which the consumer has not provided express, informed consent. The Commission therefore finalizes the definition of ''GAP Agreement'' largely as proposed in its NPRM with minor modifications to correct a misplaced period, substitute ''Vehicle'' for both ''vehicle'' and ''motor vehicle'' to conform with the revised definition at § 463.2(e), and remove an extraneous term—''insured's''—without changing the definition's operation.

While acknowledging that products or services that provide no benefit to consumers should not be sold, commenters including an industry association also argued that the Commission's proposed provision was vague and required more research. Some industry association commenters expressed concern regarding how the Commission would determine whether an item would not benefit the consumer. In response, the Commission provides the following information. Proposed § 463.5(a) included enumerated examples of add-ons from which consumers would not benefit: (1) nitrogen-filled tires that contain no more nitrogen than normally found in the air, and (2) products or services that do not provide coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle, including a GAP agreement if the consumer's vehicle or neighborhood is excluded from coverage or the LTV ratio would result in the consumer not benefitting financially.[379] As these examples illustrate, determining that a consumer would not benefit from an add-on involves analyzing objective standards under the circumstances, such as whether the add-on provides benefits; whether the consumer is eligible to use the add-on; whether the add-on's coverage excludes the vehicle at issue; and whether the add-on is incompatible with the vehicle at issue. Thus, additional examples of add-ons that would be prohibited by this provision include the following: purported rust-proofing add-ons that do not actually prevent rust; purported theft-prevention or theft-deterrent add-ons that do not prevent or deter theft; and add-ons that the vehicle itself cannot support, including engine oil-change services for a vehicle, such as an electric vehicle, that does not use engine oil, or software or audio subscription services for a vehicle that cannot support the software or utilize the subscription.[380]

One association commenter argued that the phrase ''nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air'' in proposed § 463.5(a)(1) would create a standard with which it may be impossible to comply because ''no individual set of tires could have a higher total quantity of nitrogen than that in 'the air' that stretches around the planet.'' [381] This commenter requested that the Commission clarify to avoid this possible reading. Here, the Commission notes that the phrase does not prohibit such tires if they do not contain a ''higher total quantity of nitrogen than that in the air''; instead, charging for a nitrogen-filled tire would fail by this standard if it contains ''no more nitrogen than'' the proportion that ''naturally exists in the air.''

One industry association commenter requested more explanation from the Commission regarding what would be considered ''duplicative of warranty coverage'' under proposed § 463.5(a)(2), while another contended that vehicle service contracts that overlap with a manufacturer's warranty may still provide additional, beneficial coverage, such as after the manufacturer's warranty expires. In response, the Commission notes that this provision prohibits the sale of warranties that are duplicative. A dealer may offer a warranty add-on that has some overlap in coverage with existing warranty coverage for the vehicle, but the add-on must provide additional protection. Moreover, other provisions of the Final Rule address misconduct relating to warranties, including by prohibiting misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of the warranty product or service. For example, under the Final Rule, a dealer may not mislead a consumer as to the benefits or conditions of the warranty, including amount or length of coverage (§ 463.3(b)). In addition, under § 463.5(c), the dealer must obtain the express, informed consent of the consumer for the charge for the warranty (§ 463.5(c)).

Other commenters, including an industry association, asserted that this proposed provision would cause dealers to stop offering beneficial products or services. The Commission notes that its proposal did not require such a result and emphasizes that this provision would prevent charges to consumers for products or services that provide them

[378] 15 U.S.C. 1012(b).

[379] See Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 19, Summer 2019'' 3–4 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (finding instances in which auto lenders sold ''a GAP product to consumers whose low LTV meant that they would not benefit from the product'').

[380] *See, e.g.,* Shannon Osaka, ''Electric vehicles are hitting a road block: Car dealers,'' Wash. Post (Nov. 9, 2023), *https://www.washingtonpost.com/climate-solutions/2023/11/09/car-dealerships-ev-sales* (describing a dealership salesperson offering an electric vehicle-buyer a plan for oil changes and an extended warranty for a gas-powered car); *see also* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 24, Summer 2021'' 3–4 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf* (finding servicers added and maintained unnecessary collateral protection insurance (CPI) when consumers had adequate insurance and thus the CPI provided no benefit to the consumers, and also when consumers' vehicles had been repossessed even though no actual insurance protection was provided after repossession).

[381] Comment of Competitive Enter. Inst., Doc. No. FTC–2022–0046–7670 at 6.

no benefit. To the extent that a prohibition against charging consumers for items that provide no benefit to the consumer may cause some dealers to discontinue offering beneficial products, consumers would be free to instead visit other dealerships or to seek the same or similar offerings from other providers. Dealers, of course, continue to be free under the Final Rule to offer beneficial add-ons to consumers—consistent with existing law and with other provisions of this Rule.

Some commenters, including industry associations and a dealership association, raised concerns about compliance administrability for this proposed provision in the case of products attached to a vehicle by manufacturers that may provide no benefit, questioning whether, if this proposal went into effect, dealers would be prohibited from charging for such products. In response, the Commission refers commenters to the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' in § 463.2(a). Notably, ''Add-on'' is defined, in relevant part, as any ''product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer . . .'' Thus, if an add-on product or service is installed on the vehicle by the motor vehicle manufacturer, it falls outside the scope of this definition, and concomitantly, outside the scope of the provision at § 463.5(a). Nonetheless, other provisions in the Final Rule address misconduct relating to this issue. For instance, as examined in additional detail in the discussion of § 463.4, in SBP III.D, the offering price for the vehicle would be required to incorporate the charges for any such items if the dealer requires the consumer to pay for them. In addition, as described in additional detail in the discussion of § 463.5(c), in SBP III.E.2(c), a dealer may not charge for any such item unless the dealer obtains the express, informed consent of the consumer for the charge.

Another industry association commenter incorrectly stated that this provision was beyond the FTC's authority and correctly noted that the Commission has the authority to see that products are marketed and advertised fairly and honestly. As the commenter acknowledged, the Commission has the authority to address unfair and deceptive conduct; that is precisely what this provision does. Dealerships charging consumers for add-ons from which the consumers would not benefit is both a deceptive and unfair act or practice in violation of the FTC Act, as discussed in the following paragraphs. To address this deception or unfairness, the Commission is finalizing this provision with minor modifications, including one to correct a typographical error in the placement of a hyphen in a phrase in proposed § 463.5(a)(1). In the NPRM, the relevant phrase appeared as, ''(1) Nitrogen-filled tire related-products or services''; in the Final Rule, the corrected phrase will now read as follows: ''(1) Nitrogen-filled tire-related products or services.'' For clarity, the Commission is also adding the word ''that'' before ''are duplicative of warranty coverage;'' capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e); and adding language clarifying that the requirements of § 463.5(a) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.''

Dealerships charging consumers for add-ons from which the consumers would not benefit involves deceptive conduct. When a dealer charges consumers for add-ons that would not benefit the consumers, the dealer either (1) discusses the add-on charges or (2) is silent about these items. In the first scenario, if a dealer discusses add-on charges, consumers typically would not agree to pay such charges for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would in fact be beneficial to them. Thus, the dealer would be misleading consumers, even in the event the dealer subsequently provides a disclaimer indicating the add-on would not benefit the consumer.[382] In the second scenario, it is reasonable for consumers to believe that the terms they have agreed to are what was negotiated, and do not include additional charges for optional, undisclosed items—particularly items that would not benefit the consumer. If a dealer charges consumers for such items under such circumstances, the dealer is misleading the consumer. Misleading consumers about cost information is material.[383] If consumers knew that a dealership was charging them for items from which they would not benefit, such knowledge likely would affect their commercial choices, including whether to continue with, or ultimately consummate, the vehicle sale or financing transaction.[384]

Such charges are also unfair. When charges for any add-on accompany the already lengthy and complex car-buying process, it is difficult to obtain consent that is truly express and informed.[385] Rather than prohibiting all such charges or taking other measures, as specifically contemplated in the NPRM,[386] however, this provision focuses on charges for add-ons that would not benefit the consumer. Charges for add-ons that would not benefit the consumer can cost consumers thousands of dollars and significantly increase the overall cost to the consumer in the transaction, including by increasing the amount financed and total of payments, thereby increasing the risk the consumer will ultimately default on repayment

[382] *Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F. 2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'').

[383] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Ltd.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[384] Even under a hypothetical scenario wherein a consumer understood an add-on would not benefit them but wanted to pay extra for the add-on anyway, in the case of an act or practice challenged by the agency as deceptive or unfair, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense . . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

[385] *See, e.g.,* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 19, Summer 2019'' 3–4 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (describing findings, from supervisory examinations, of lenders selling GAP agreements to consumers whose low LTV meant that they would not benefit from the product: ''By purchasing a product they would not benefit from, consumers demonstrated that they lacked an understanding of a material aspect of the product. The lenders had sufficient information to know that these consumers would not benefit from the product. These sales show that the lenders took unreasonable advantage of the consumers' lack of understanding of the material risks, costs, or conditions of the product.'').

[386] *See, e.g.,* NPRM at 42030 (Question 33) (''In particular, the Commission is contemplating whether any final Rule should restrict dealers from selling add-ons (other than those already installed on the vehicle) in the same transaction, or on the same day, the vehicle is sold or leased.''); *id.* (Question 38) (discussing proposed § 463.5(c) and asking ''Does the proposal provide a meaningful way to obtain consent in an already disclosure-heavy transaction? If it would result in too many disclosures, what other measures could be taken to protect consumers from unauthorized charges? '').

obligations.[387] This injury is not reasonably avoidable by consumers when dealers are silent about such charges and simply include them in dense, lengthy contracts, as explained in detail in SBP II.B.2.[388] If a dealer instead describes what the charges are for, such a description either deceptively states or implies that the add-on would benefit the consumer, or acknowledges the add-on would not benefit the consumer, the latter of which would create ''contradictory double meanings'' [389] and, if discovered, would still result in the dealer wasting the consumers' time.[390] Further, there are no benefits to consumers or to competition from charging consumers for add-ons that would not benefit them. Moreover, charging for non-beneficial products is inconsistent with industry guidance,[391] and dealerships that profit from such sales place dealerships that do not at a competitive disadvantage. Thus, it is an unfair or deceptive act or practice for dealers, in connection with the sale or financing of vehicles, to charge for an add-on product or service if the consumer would not benefit from such an add-on product or service. This provision also serves to prevent misrepresentations prohibited by § 463.3 of the Final Rule, including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs, limitation, benefit, or other aspect of an add-on. This provision further helps prevent dealers from failing to obtain express, informed consent for charges, as prohibited by § 463.5(c).[392]

(b) Undisclosed or Unselected Add-Ons

The Commission's proposed provisions relating to undisclosed or unselected add-on products or services, at § 463.5(b), prohibited dealers from charging for optional add-ons before undertaking certain measures. Specifically, proposed § 463.5(b)(1) prohibited dealers from charging for optional add-ons unless the dealers disclosed, and offered to consummate the transaction for, the cash price at which a consumer may purchase the vehicle without such add-ons. This proposed provision also required the consumer to decline to purchase the vehicle for the cash price without the add-on by means of a written declination, with date and time recorded, and signed by the consumer and a manager of the motor vehicle dealer. The proposed requirements of § 463.5(b)(1) applied before the dealer referenced any aspect of financing for a specific vehicle, aside from the offering price, or before consummating a non-financed sale. Proposed § 463.5(b)(2) required similar steps before charging for any optional add-on in a financed transaction, including that the dealer disclose, and offer to consummate the transaction for, a vehicle's cash price without optional add-ons plus the finance charge for such transaction, separately itemizing the components of the offer. This proposed provision also required a written, dated, time-stamped, and signed declination. Finally, proposed § 463.5(b)(3) required dealers to disclose the cost of the transaction, whether financed or not, without any optional add-ons, as well as the charges for the optional add-ons selected by the consumer, separately itemized. Each proposed provision required clear and conspicuous disclosure of specific information relating to optional add-ons and their associated costs.

As discussed in the following paragraphs, the Commission has determined not to finalize the proposed provisions at § 463.5(b) regarding undisclosed or unselected add-ons. Many commenters described the likely benefits of such proposed provisions, and a number of commenters indicated how such provisions would be feasible, including by reference to similar disclosure regimes already in effect at the State or local level. Commenters also credited the Commission's goals for such provisions.

However, other commenters opposed these proposed provisions, contending they would be burdensome and time-consuming. Others similarly expressed concern that, given the duration, complexity, and paperwork-heavy nature of motor vehicle sales and financing transactions, these provisions would not effectively resolve the problem of add-ons being sold without express, informed consumer consent.[393]

Having considered the comments, the Commission declines to include in this Final Rule the proposed provisions relating to undisclosed or unselected add-on products or services at § 463.5(b). The Commission notes that various commenters were concerned about the extent to which this proposal would add documents and time to the transaction. If finalized, this would have been the sole provision in the Final Rule that affirmatively requires the dealer and consumer, in all circumstances, to view and sign additional documentation during the purchase, finance, or lease process, in what is already a document-heavy, time-consuming, and complicated transaction. The Commission further notes that, as a matter of existing law, dealers are already prohibited from engaging in misrepresentations regarding add-ons and from charging for add-ons without express, informed consent—conduct which the Final Rule prohibits as well. Accordingly, the Commission has determined not to include this provision in its Final Rule.

The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to unselected or undisclosed add-ons, and will consider implementing additional measures in the future if it determines such measures are necessary to address deceptive or unfair practices relating to add-ons.

[387] *See, e.g.,* Complaint ¶¶ 25–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[388] *See, e.g.,* Auto Buyer Study, supra note 25, at 13–15, 17–18.

[389] *See Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F. 2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'').

[390] Even in the hypothetical scenario where some consumers could have avoided the injury because they understood that an add-on would not benefit them but wanted to pay extra for the add-on anyway, the dealer's conduct in selling non-beneficial add-ons would still be unfair because it substantially injures other consumers who do not wish to pay for items that would not benefit them and, as discussed in the SBP text, cannot reasonably avoid the harm, and no countervailing benefits outweigh the costs. *See FTC* v. *Amazon.com, Inc.,* 2016 U.S. Dist. LEXIS 55569, *15, *18–21 (W.D. Wash. Apr. 26, 2016) (finding unfairness even though some consumers could have avoided the charge). Additionally, consumers who truly wish to purchase add-ons that do not benefit them may still be able to do so directly from the add-on provider.

[391] See Nat'l Auto. Dealers Ass'n et al., ''Voluntary Protection Products: A Model Dealership Policy'' 5 (2019), *https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy* (explaining that when determining which voluntary protection products to offer to customers, ''the dealership should have confidence in the value that the product offers to customers,'' including that the dealership should understand ''whether its coverage is already provided by another product being purchased by the customer,'' and stating ''[i]t is essential that customers have a clearly defined path to receiving such benefits.'').

[392] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[393] *See, e.g.,* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 30–31. Instead, advocates recommended that the Commission require a cooling-off period for add-ons, similar to that required by the Commission for door-to-door and other off-premises sales, which would grant consumers time to review the paperwork after the transaction, and to cancel unexpected or otherwise unwanted add-ons for a full refund. *Id.* This comment is addressed when discussing § 463.5(c) in SBP III.E.2(c).

(c) Any Item Without Express, Informed Consent

Section 463.5(c) of the proposed rule prohibited motor vehicle dealers, in connection with the sale or financing of vehicles, from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge. Upon careful review and consideration of the comments, the Commission is finalizing this provision with one modification from its original proposal: the addition of language to the end of § 463.5(c) clarifying that the requirements in § 463.5(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.'' In addition, the Commission is finalizing the corresponding definition of ''Express, Informed Consent,'' now at § 463.2(g).

Many commenters favored the proposed provision and expressed the need for such a provision. For example:

- In one instance a salesman who appeared busy and trying to help me efficiently navigate the process rushed me to sign a small paper, ''just sign this quickly and we'll be on our way,'' I was told, without disclosure that they were selling me something that I did not want. I found it later and felt cheated.[394]
- They made me sign the sales bill on an electronic device, but the finance guy never pointed to me any number I was getting charge[d] for, and never pointed to me the total amount I was getting billed for. He seem[ed] to be in a hurry and he even told me he had people waiting for him to see. I think it was all planned to push the buyer to blindly sign the bill of sale without explaining anything because he was scrolling the electronic pages in a hurry and going straight to the sign box line. I thought I signed the agreed amount, I trust them, but, instead, they charge me for things I never agreed on. I went back to the dealer in less than 48 hours when I discovered the fraud and asked them to remove the extra fees they charged me for, they refused and they forced me to pay for it, I asked them and requested them to take the car back, they refused it again, at the end, they gave me a little bit of a discount, but, not compared to what I got charged for. . . .[395]
- I am an attorney in private practice in NY representing consumers for 33 years. It never ceases to amaze me how car dealers defraud honest trusting consumers substantial sums of money through various common deceptive and fraudulent practices ranging from altering documents, concealing documents, having consumers sign blank documents, lying about the material terms of the deal, altering the prices, adding on other contracts or items never discussed and selling vehicles with undisclosed damages and defects.[396]
- I have worked in the automotive business for many year[s]. I realize there are plenty of dealers around the US that have deceptive business practices, however this isn't the case for all dealers. I believe there can be laws that can be put in place to help prevent dealers from adding additional backend products without consent or knowledge.[397]

Others supported the proposed provision and urged the Commission to include additional measures, such as a thirty-day ''cooling-off'' period within which consumers would be able to receive a full refund for any add-ons. A number of commenters, including consumer advocacy organizations, contended that such an additional time frame to review, and potentially cancel, any add-ons would counter the high-pressure, confusing environment of the dealership F&I office and undermine any efforts to misrepresent add-on charges and coverage. Such commenters also indicated that such a provision would allow consumers the opportunity to compare prices and providers, and ultimately help increase competition in the marketplace. A few individual commenters requested that the Commission provide a cooling-off period not only for add-ons, but for the full vehicle purchase, and a prohibition on charging non-refundable deposits.

The Commission agrees that a ''cooling off'' provision could offer consumers additional protection from unwanted add-ons; however, additional information would assist the Commission in evaluating the potential benefits of such a provision. Such information might include, for example, what length a cooling-off period would need to be in order to offer adequate protection to consumers and to competition, or how consumers would most effectively be made aware of such a cooling-off period in the course of the complicated, lengthy, and document-heavy vehicle sale or financing transaction. Such information would be particularly relevant given that, in the Commission's law enforcement experience, consumers have paid unauthorized charges on years-long contracts without learning of the charges.[398] Accordingly, the Commission will continue to monitor the market to determine whether, after adoption of this Rule, it appears that a cooling-off period or other measures would be warranted.

Other commenters, including consumer advocacy organizations, emphasized the importance of having disclosures and other documents available in the language used to negotiate the sale or lease. Here, the Commission notes that a dealer does not obtain the express, informed consent of the consumer if the consumer's assent to a charge is ambiguous or based on a disclosure the consumer does not easily understand.[399] Thus, if a dealer uses one language during negotiations and a different language in its contracts, and the consumer does not understand and assent to the charges, the dealer is violating § 463.5(c). Furthermore, the Commission notes that the definition of ''Express, Informed Consent'' it is finalizing at § 463.2(g) requires, *inter alia,* a clear and conspicuous disclosure of what the charge is for and the amount of the charge, and the Commission's definition of ''Clear(ly) and Conspicuous(ly),'' at § 463.2(d)(5), requires disclosures to appear ''in each language in which the representation that requires the disclosure appears.''

Other commenters, including a consumer advocacy organization and a consumer protection agency, recommended the Commission prescribe additional requirements for obtaining express, informed consent for charges, such as boxes for signatures and date-and-time recordings, and a requirement that dealers comply with the E-Sign Act. Other commenters also discussed obtaining consent through electronic signatures. Commenters including consumer advocacy organizations, for instance, reported cases wherein documents that were signed and supposedly provided electronically to consumers, were never actually delivered to the consumer, or delivered days later. According to these commenters, some consumers would sign on a small signature pad where they could not see the terms of the document being signed. Other practitioner commenters reported that

[394] Individual commenter, Doc. No. FTC–2022–0046–0794.

[395] Individual commenter, Doc. No. FTC–2022–0046–0671.

[396] Individual commenter, Doc. No. FTC–2022–0046–0073.

[397] Individual commenter, Doc. No. FTC–2022–0046–9917.

[398] *See* discussion in SBP II.B.2.

[399] *See* § 463.2(g) (defining ''Express, Informed Consent'' to include an affirmative act communicating ''unambiguous assent to be charged''); § 463.2(d) (defining ''Clear(ly) and Conspicuous(ly)'' to include a manner that is ''easily understandable'').

consumers' electronic signatures were applied to contracts with very different terms from what the consumers believed they were accepting. An individual commenter recommended that dealers be required to provide paper documents where requested and consumers be allowed to consent on paper documents only, noting that elderly consumers or those for whom English is a second language may have difficulty with electronic signatures. Another individual commenter expressed the view that anyone needing assistance understanding the sales price or disclosures should be provided independent legal counsel at the dealership's expense.

While the Commission agrees that additional measures to promote express, informed consent could reduce the incidence of unauthorized charges and aid with enforcement efforts, the Commission has determined not to include in this Final Rule provisions that would require new forms during the vehicle sale or financing transaction. This way, law-abiding dealers would not have to change their practices for obtaining express, informed consent. Thus, the Commission declines to add further requirements, including those involving signature boxes or date-and-time recordings. Regarding the E-Sign Act, nothing in the Rule modifies compliance obligations under this Act. Instead, the Final Rule requires that, regardless of whether any given signature may have been obtained through electronic or other means, the dealer must obtain the express, informed consent of the consumer to any item for which the dealer charges the consumer. Furthermore, the Commission notes that a dealer has not obtained express, informed consent if a dealer has consumers sign an electronic keypad without seeing and understanding the terms, or applies their electronic signatures on contracts with terms different from those to which the consumer agreed.[400] In such circumstances, the consumer has not demonstrated informed consent, or unambiguous assent to be charged, including because the signatures are not in close proximity to clear and conspicuous disclosures regarding the charges.

Other commenters, including industry and dealership associations, claimed that the Commission did not provide enough information regarding what would constitute express, informed consent to charges, contending that additional detail was needed, or that the provision and associated definition of ''Express, Informed Consent'' were too vague. The Commission notes, however, that the phrase ''Express, Informed Consent'' is consistent with existing legal standards.[401] Commission enforcement actions over the years have challenged as deceptive or unfair the failure to get express, informed consent to charges, including in actions involving motor vehicle dealers and others:

- Rushing consumers through stacks of auto paperwork more than 60 pages deep and requiring over a dozen signatures, where the paperwork included charges for unwanted add-ons.[402]
- Double charging certain fees without consumers' knowledge or consent in highly technical documents presented at the close of a long financing process after an already lengthy process of selecting a vehicle and negotiating over its price.[403]
- Presenting consumers with preprinted sales and financing forms that included add-ons consumers had not requested, and rushing consumers through the closing process while directing them where to sign forms, including forms that were blank.[404]
- Charging consumers more for a product or service than they agreed to pay.[405]
- Charging consumers for more products than they requested.[406]
- Cramming charges onto consumers' bills for services that the consumers did not request without the consumers' knowledge or consent.[407]

Courts have found the failure to obtain express, informed consent to be a violation of the FTC Act.[408] Other statutes and rules enforced by the Commission include express, informed consent requirements for consumer purchases,[409] and similar provisions have appeared in Commission orders resolving charges that motor vehicle dealers or other sellers have levied unauthorized charges on consumers.[410] In short, the prohibition in § 463.5(c) against charging consumers for products or services without their express, informed consent, and the corresponding definition of ''Express, Informed Consent'' in § 463.2(g) are consistent with existing law in articulating what motor vehicle dealers must do—and already should be doing.

The Commission further notes that the proposed definition of ''Express, Informed Consent'' provided information regarding what was required by § 463.5(c): an affirmative act by the consumer communicating unambiguous assent to be charged, made after receiving and in close proximity to a clear and conspicuous disclosure, in writing, and also orally for in-person transactions, of the following: (1) what the charge is for; and (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. As is evident from this language, there

[400] *See* § 463.2(g) (defining ''Express, Informed Consent'' to include requiring clear and conspicuous disclosures of what the charge is for and the amount of the charge).

[401] *See, e.g., Fed. Trade Comm'n* v. *Amazon.com, Inc.,* 71 F. Supp. 3d 1158, 1163 (W.D. Wash. 2014).

[402] Complaint ¶¶ 24–25, 29–49, 76, *Fed. Trade Comm'n* v. *North Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[403] Complaint ¶¶ 17–19, 44, *Fed. Trade Comm'n* v. *Liberty Chevrolet,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020).

[404] Complaint ¶¶ 59–64, 91, *Fed. Trade Comm'n* v. *Universal City Nissan,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016).

[405] *See, e.g.,* Complaint ¶¶ 29, 47, *Fed. Trade Comm'n* v. *Yellowstone Cap. LLC,* No. 1:20–cv–06023–LAK (S.D.N.Y. Aug. 3, 2020).

[406] *See, e.g.,* Complaint ¶¶ 11–14, 21, *Bionatrol Health, LLC,* No. C–4733 (F.T.C. Mar. 5, 2021).

[407] *See, e.g.,* Complaint ¶¶ 8–9, 42, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967–JLR (W.D. Wash. July 1, 2014); Complaint ¶¶ 9, 49, *Fed. Trade Comm'n* v. *AT&T Mobility, LLC,* No. 1:14–cv–03227–HLM (N.D. Ga. Oct. 8, 2014).

[408] *See, e.g., Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1333–38 (N.D. Ga. 2022); *Fed. Trade Comm'n* v. *Amazon.com, Inc.,* No. C14–1038–JCC, 2016 WL 10654030, at *8 (W.D. Wash. July 22, 2016); *Fed. Trade Comm'n* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975, 1005 (N.D. Cal. 2010), *aff'd,* 475 F. App'x 106 (9th Cir. 2012).

[409] 15 U.S.C. 8402(a)(2), 8403(2) (Restore Online Shoppers' Confidence Act); 16 CFR 310.4(a)(7) (Telemarketing Sales Rule).

[410] The Commission has required express, informed consent provisions in orders against motor vehicle dealers and others. *See* Stipulated Order at Art. IV, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–02670–TDC (D. Md. Oct. 18, 2022); Stipulated Order at Art. II, *Fed. Trade Comm'n* v. *North Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) Stipulated Order at Art. II, *Fed. Trade Comm'n* v. *Liberty Chevrolet,* No. 1:20–cv–03945 (S.D.N.Y. May 22, 2020); Stipulated Order at Art. III, *Fed. Trade Comm'n* v. *Consumer Portfolio Servs.,* No. 14–cv–00819 (C.D. Cal. June 11, 2014). Similarly, the Commission has required such provisions in orders in other contexts. *See, e.g.,* Stipulated Order at Art. III, *Fed. Trade Comm'n* v. *Yellowstone Cap. LLC,* No. 1:20–cv–06023–LAK (S.D.N.Y. May 4, 2021); Stipulated Order at Art. IV, *Fed. Trade Comm'n* v. *Prog. Leasing,* No. 1:20–cv–1668–JPB (N.D. Ga. Apr. 22, 2020); Decision and Order at Art. VI, *Bionatrol Health, LLC,* No. C–4733 (F.T.C. Mar. 5, 2021); Stipulated Order at Art. I.E, *Fed. Trade Comm'n* v. *BunZai Media Grp., Inc.,* No. CV 15–4527–GW (PLAx) (C.D. Cal. June 27, 2018); Stipulated Order at Art. I, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967–JLR (W.D. Wash. Dec. 19, 2014); Stipulated Order at Art. I, *Fed. Trade Comm'n* v. *AT&T Mobility, LLC,* No. 1:14–cv–03227–HLM (N.D. Ga. Oct. 8, 2014); Decision and Order at Art. I, *Google, Inc.,* No. C–4499 (F.T.C. Dec. 2, 2014); Consent Order, *Apple Inc.,* No. C–4444 (F.T.C. Mar. 27, 2014); *cf. Fed. Trade Comm'n* v. *Kennedy,* 574 F. Supp. 2d 714, 720–21 (S.D. Tex. 2008) (consumers charged without express, informed consent for web services could not reasonably avoid harm when told that websites were ''free'').

must be an affirmative act that itself conveys the consumer's unambiguous assent to the specific charge: it must clearly and expressly communicate both that the consumer has been *informed* about the charge and *consents* to the charge. This act cannot be susceptible to alternative interpretations, *i.e.,* that the consumer meant to communicate something other than the consumer's authorization to be charged for the specific add-on or other item in question. For example, a consumer might ask, ''how much would it cost to get the car with [a specific add-on]?'' Such a statement does not convey unambiguous assent to be charged for the mentioned add-on; rather, it could merely convey curiosity, interest, or a desire to evaluate options. Similarly, if a consumer responds to a salesperson's description of an add-on by saying ''OK,'' this response may merely confirm that the consumer had heard or understood information and does not indicate the consumer's unambiguous assent to purchase, let alone be charged for, such an item.

Relatedly, some commenters, including dealership associations, suggested that the addition, by the consumer, of a signature or set of initials, accompanied by a corresponding date can be partial evidence of an affirmative, or ''Express,'' act. The Commission notes that the extent to which these, or other, acts indicate ''Express, Informed Consent'' depends on circumstances and context. A consumer signing a lengthy document with pre-checked boxes does not, by itself, demonstrate express, informed consent. This is particularly so at the end of an hours-long transaction, at which point actions that, under other circumstances, may indicate assent are increasingly less likely to do so unambiguously, given that at the close of a transaction, consumers expect to be finalizing previously agreed-upon terms instead of discussing new products or services hours into the deal. For express, informed consent to be effective, the consumer must understand what a charge is for and the amount of the charge, including all costs and fees over the length of the payment period. A signed and dated document would not satisfy the requirement for express, informed consent, for example, if the consumer was directed to sign the final page of a contract or an electronic signature pad and the signed and dated document did not reflect the terms to which the consumer had agreed. In such cases, the signed and dated document does not represent the consumer's unambiguous assent to be charged, made after receiving, and in close proximity to, a clear and conspicuous disclosure of what the charges are for and the amount of the charges.

Some industry association commenters argued that the proposed definition was too prescriptive, and would require, for instance, video records to demonstrate compliance, or that the proposed language was overreaching, and requiring express, informed consent for every item on a contract would be complicated and time-consuming. The Commission notes again that, under current law, dealerships are already required to obtain consumers' express, informed consent to charges. If dealers are already obtaining such consent, as is required by law, they need not take additional steps, such as by using a separate disclosure form or videos, or by spending additional time during the transaction to comply with this provision.

A dealership association commenter requested examples of recordkeeping and best practices evidencing oral disclosures that would satisfy the requirement to obtain express, informed consent. The express, informed consent requirement and definition require the disclosure to be made in *writing* in addition to orally for in-person transactions. Furthermore, under other provisions of the Rule, such as the definition of ''Clear(ly) and Conspicuous(ly)'' at § 463.2(d)(7), dealers are prohibited from contradicting information that is required to be disclosed; thus, for example, dealers' oral representations must be consistent with the written disclosure required for obtaining express, informed consent. Best practices for satisfying the requirement to obtain express, informed consent include presenting key information and finalizing actual terms early in the transaction—for example, by including full cost information, such as estimated taxes, costs of any selections made by the consumer, and any other components of cost, on dealer websites—and maintaining records that this was done. The Commission notes that, as a transaction progresses, consumers expect to be finalizing previously agreed-upon terms instead of discussing new charges and new products or services. In lieu of finalizing additional formal mandates in the Rule regarding recordkeeping and best practices evidencing express, informed consent, the Commission recognizes that industry members and other stakeholders will have significant room to develop self-regulatory programs and guidance tailoring these and other topics to the specifics of their business operations.

Some dealership association commenters expressed concern that such a provision would be inconsistent with State laws and would complicate the car buying experience. While the Commission is not aware of any laws that allow dealers to charge consumers without their express, informed consent, and thus is not aware of any inconsistences with this provision, § 463.9 of the Final Rule specifies what dealers must do in the case of actual conflicts with State law. State laws may provide more or less specific requirements—including requirements that provide greater protection—as long as they do not conflict with the Final Rule, as set forth in § 463.9. The Commission also notes that to the extent there is overlap with existing law, there is no evidence that duplicative prohibitions against deceptive and unfair conduct, including prohibitions against charging consumers without express, informed consent, have harmed consumers or competition.

Commenters, including an industry association, inquired whether the term ''item,'' as used in this proposed provision, differed from the term ''Add-on Product or Service'' defined in § 463.2 of the Commission's proposal. The industry association also argued that requiring express, informed consent is beyond what is required under the Truth in Lending Act. The Commission responds as follows: Consistent with its plain meaning, the term ''item'' is broader than, and thereby encompasses, the term ''Add-on Product(s) or Service(s),'' which is limited by its definition in § 463.2 of the Final Rule.[411] As proposed, § 463.5 addressed ''Dealer Charges for Add-ons and *Other Items*.''[412] It did so in recognition of the fact that add-ons are one type of ''item,'' but that ''*Other Items*'' for which a dealer might charge exist as well. Thus, as proposed, § 463.5 applied to charges generally, whether such charges were for an add-on or for another item. As previously discussed, charging consumers without their express, informed consent to the charge has long been an unfair or deceptive practice under the FTC Act. This has been the case regardless of what the charge is for. Accordingly, dealers already should be obtaining consumers' express, informed

[411] *See* NPRM at 42046. The term ''item'' includes ''a distinct part in an enumeration, account, or series'' as well as ''a separate piece of news or information.'' *See Item* (defs. 1, 3), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/item* (last visited Sept. 14, 2023).

[412] *See* NPRM at 42046 (emphasis added).

consent for charges, whether it is for an Add-on or any other item, regardless of what may be required under other laws.

Commenters, including this same industry association commenter, also questioned how a dealership would calculate ''the amount of the charge . . . with and without the product or service'' as would be required under proposed § 463.2(g)(2), as well as how this proposed provision would work in a non-financed transaction.[413] Conversely, an individual commenter stated that current F&I practices already routinely disclose the proposed charges with and without the product or service. The Commission notes that its proposed definition of ''Express, Informed Consent'' plainly required disclosure of the ''amount of the charge, including, if the product is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service.'' [414] The amount the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. In the event the charge is for an optional product or service, the amount the dealer will charge the consumer without the product or service is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate as such. Regarding non-financed transactions, as with a financed transaction, the amount the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. If the period of repayment is such that full payment is due upon receipt of the vehicle, the amount required to be disclosed is the total charge for that product or service to be paid upon receipt of the vehicle. The amount the dealer will charge the consumer without the product or service, if it is optional, is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate such. Sharing this basic information with consumers—how much they will pay for the item and how much they will pay without it—addresses practices, such as hiding add-on charges, misrepresenting whether such charges are required in connection with the vehicle sale or financing transaction, or misrepresenting how such charges influence the total of payments for the transaction.

An industry association comment stated that, were the Commission's proposal to become final, the Commission would be able to obtain monetary relief from dealers for harmed consumers, and argued that Holder Rule protections for such consumers thus would be unnecessary.[415] Accordingly, it urged the Commission to modify its proposal to include a safe harbor for contract assignees, which it argued would be incapable of detecting deficiencies in sale or lease transactions, such as dealer misrepresentations or a lack of consumer consent, unless those deficiencies were apparent from the face of the contract. Here, the Commission emphasizes that no provision of the Final Rule changes the status quo regarding the responsibilities of assignees or other subsequent holders of motor vehicle financing under the Holder Rule. The Commission did not include, when enacting the Holder Rule, a safe harbor from liability for claims or defenses based on their capability of detection by such assignees or other subsequent holders, and the Commission does not believe on the basis of comments received in the course of this rulemaking that such a change would be warranted as a consequence of finalizing this Rule. The Holder Rule provides important protections for harmed consumers, even when there is law that allows the Commission or other law enforcers to obtain remedies for harmed consumers, including where the consumers are seeking recourse from, or defending themselves against, parties that have not been the subject of law enforcement actions.[416] Furthermore, while the Commission understands that dealers are often in the best position to ensure they have, in the first instance, obtained a consumer's express, informed consent for charges, there are steps an assignee or other subsequent holder of the consumer credit contract, such as a third-party financing entity, can take to address concerns about contracts obtained without express, informed consent. For example, if a financing entity receives complaints from consumers or others that specific charges were obtained without authorization or sees that charges for a particular item are occurring substantially more frequently at a given dealership than at others, the financing company can take steps to make sure the dealer is obtaining express, informed consent. Further, if a financing entity is concerned that a dealership may be acting in violation of the Final Rule, it may arrange its business relationships accordingly, including by altering or withdrawing its business from the dealership.[417]

Another industry association commenter asked for clarification regarding the extent to which particular rules are necessary to obtain customer authorization for charges, thus reflecting what is already necessary under State or Federal law, as opposed to preventative measures that the Commission otherwise deems necessary. The Commission notes that this provision is consistent with the requirements of the FTC Act, which already prohibits charging consumers without express, informed consent, and is needed to address unfair and deceptive conduct. As the Commission set forth in its NPRM, the length and complexity of motor vehicle transactions has created an environment rife with deceptive and unfair conduct. Consumer complaints and the Commission's extensive law enforcement experience, among other sources, indicate that some dealers have added thousands of dollars in unauthorized charges to motor vehicle transactions, including for add-ons consumers had already rejected.[418] Such issues are exacerbated when, for example, preprinted dealer contracts automatically include charges for optional add-ons that the consumer has not selected; when dealers rush consumers through stacks of paperwork with buried charges after a lengthy process; when dealers misinform consumers that the documents they are signing represent agreed-upon terms; or when dealers ask consumers to sign blank documents.

Charging consumers without their express, informed consent causes substantial injury to consumers in the amount of the unauthorized charge. This injury is not reasonably avoidable when dealers do not clearly and conspicuously disclose to the consumer what the charge is for and the amount of the charge, since this information is within the unilateral control of the

[413] This commenter also contended that this provision would result in many disclosures when combined with proposed § 463.5(b). Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 98–99. As discussed previously, the Commission declines to finalize proposed § 463.5(b).

[414] *See* NPRM at 42045.

[415] *See* Holder Rule, 16 CFR 433.2.

[416] *See* Holder Rule, 16 CFR 433.2; *see also* Fed. Trade Comm'n, Advisory Opinion Regarding F.T.C. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 3, 2012), *https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf* (last visited Dec. 5, 2023).

[417] *See* Complaint ¶¶ 29–32, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18-cv-08176–DJH (D. Ariz. July 31, 2018) (alleging a financing entity ceased business with Tate's Auto Center after concerns about loan falsification and substantial losses).

[418] *See* SBP II.B.2.

dealer. There are no countervailing benefits to consumers or to competition that outweigh this injury. To the contrary, if all dealers obtained express, informed consent to charges, they would not lose business to dealers who do not do so.

Charging for an item without obtaining the consumer's express, informed consent is also a deceptive practice under section 5 of the FTC Act.[419] When a dealer presents a consumer with whom the dealer has negotiated a finalized sale or financing contract, the dealer is representing that the contract includes only charges that were negotiated and to which the consumer agreed. If the dealer failed to obtain the consumer's express, informed consent, however, such a representation is false or misleading. It is also material: if consumers knew that they had not, in fact, authorized a charge that the dealer nonetheless included in their sales or financing contract, this information likely would have affected the consumers' willingness to continue to engage with the dealership, as well as consumers' willingness to select and pay for any such item. The express, informed consent requirement also serves to prevent the misrepresentations prohibited by § 463.3 of the Final Rule—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs, limitation, benefit, or other aspect of an add-on.[420] The requirement also serves to prevent violations of the disclosure requirements in § 463.4 and the prohibition against charging for non-beneficial add-ons in § 463.5(a). By operation of the definition of ''Express, Informed Consent'' at § 463.2(g), this requirement reduces the likelihood that dealers will fail to disclose what a given charge is for and the amount of the charge including all fees and costs to be charged to the consumer over the period of repayment with and without the charged item, thereby making the disclosures of information required by § 463.4 more likely. The same is true regarding the requirements of § 463.5(a): the requirement that dealers obtain informed and unambiguous assent to be charged for each product or service makes it less likely that dealers will charge consumers for items from which they would not benefit; consumers typically do not provide informed, unambiguous assent to be charged for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would be beneficial.

Thus, the Commission has determined to finalize proposed § 463.5(c), prohibiting dealers from charging a consumer for any item unless the dealer obtains the express, informed consent of the consumer for the charge, with the addition of language clarifying that the requirements in § 463.5(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.'' In addition, the Commission has determined to finalize its definition of ''Express, Informed Consent,'' now at § 463.2(g), substantively as proposed.

F. § 463.6: Recordkeeping

Proposed § 463.6 required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including those in five enumerated paragraphs. This proposed section further provided that dealers may retain such records in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business, and that failure to keep all required records required will be a violation of the Rule. As examined in additional detail in the following analysis, several commenters supported the proposal; several urged the Commission to adopt broader recordkeeping requirements; and several other commenters argued that the proposed requirements were too broad. After careful consideration, the Commission has determined to adopt these recordkeeping requirements largely as proposed, with two conforming modifications to remove references to proposed provisions not adopted in the Final Rule; one typographical modification to include a serial comma for consistency; and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f) by replacing ''Motor Vehicle Dealer'' with ''Covered Motor Vehicle Dealer'' or ''Dealer,'' replacing ''Motor Vehicle'' with ''Vehicle,'' and capitalizing ''vehicle.'' In the following paragraphs, the Commission discusses each proposed recordkeeping requirement, the comments the Commission received on each such requirement as well as the Commission's responses to such comments, and the provisions the Commission is finalizing.

Section 463.6(a) of the proposed rule required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including (1) copies of materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a motor vehicle that the dealer disseminated during the relevant time period; (2) copies of all materially different add-on lists and all documents describing such products or services that are offered to consumers; (3) copies of all purchase orders; financing and lease documents with the dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the dealer and any consumer who signs a purchase order or financing or lease contract with the dealer; (4) records demonstrating that add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP agreements, and calculations of loan-to-value ratios in contracts including GAP agreements; and (5) copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to add-ons, and inquiries and responses about vehicles referenced in § 463.4.

Proposed § 463.6(b) provided that a motor vehicle dealer may keep the required records ''in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business.'' This proposed paragraph also specified that failure to keep all records required under paragraph (a) of this section would be a violation of the Final Rule.

Many commenters, including State regulators, legal aid groups, consumer advocacy organizations, and individual commenters, endorsed the Commission's proposed rule generally, without criticism of its proposed recordkeeping requirements. In addition, one such association commenter expressly stated that it supported each of the proposed recordkeeping provisions, explaining that these proposed provisions were needed to address ''bait and switch'' tactics, provide evidence of whether required disclosures are made, and identify consumers harmed by illegal

[419] *See, e.g., Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1334–39 (N.D. Ga. Aug. 9, 2022); *Fed. Trade Comm'n* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975, 1001–03 (N.D. Cal. Sept. 21, 2010).

[420] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

practices.[421] Here, the Commission notes that record retention requirements are necessary to preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission to enforce its Rule by enabling it to ascertain whether dealers are complying with its requirements; to identify persons who are involved in any challenged practices; and to identify consumers who may have been injured. Such requirements are particularly important in the case of complicated, lengthy, and document-heavy vehicle sale or financing transactions, in which law violations may be more difficult for consumers and others to detect. Indeed, the Commission routinely includes recordkeeping requirements in its rules.[422]

Several commenters, including consumer advocacy organizations, consumer protection agencies, a group of State attorneys general, and individual commenters, urged the Commission to consider expanding the proposed twenty-four-month record retention period, noting that the contract period for most retail installment contracts is much longer than twenty-four months, and that State limitations periods for claims relating to the subject matter of the Commission's proposed rule often extend well beyond this proposed timeframe. Numerous such commenters, for instance, recommended a record retention period of the longer of seven years or the length of the consumer's financing contract.

The Commission understands that there would be benefits to a longer period, especially given that vehicle financing repayment terms are often far longer than twenty-four months, and that many dealers likely already maintain, in the ordinary course of business, the types of records set forth in proposed § 463.6. The Commission, however, is also mindful that other commenters raised concerns about the costs associated with record retention, including costs that would increase with any extension of the retention period. Rather than limiting the types of records to be maintained, and thus hampering the Commission's ability to ensure compliance with the Final Rule, the Commission has determined to adopt a retention period that is shorter than the time period of many motor vehicle financing contracts, in order to minimize burdens. In the event the Commission subsequently determines that a twenty-four-month retention period is insufficient to ensure compliance with this Rule, the Commission may consider other measures in the future.

In addition, a number of commenters, including consumer advocacy organizations, recommended additional provisions, including an explicit requirement to retain language-translated versions of required records, and a requirement to make retained records available to consumers upon request. Regarding language-translated versions of required records, § 463.6(a)(3), (a)(4), and (a)(5) require dealers to retain copies of ''all'' listed records, while § 463.6(a)(1) mandates that dealers retain ''Materially different'' copies of records. Thus, for the records listed in § 463.6(a)(3), (a)(4), and (a)(5), any translations are required to be retained; in the case of § 463.4(a)(1), the Rule requires materially different translations to be maintained.[423] The Commission therefore has determined not to add to the recordkeeping section of the Rule a standalone requirement to retain translated versions. The Commission will continue to monitor the marketplace to determine whether additional action or protections are warranted.

The Commission also declines to include in this Final Rule an additional requirement that dealers provide retained records to consumers upon request. Such a requirement may be beneficial; however, it is not clear to what extent dealers currently refuse to provide consumers with such records, and there is insufficient information in the rulemaking record to assess the impact of—or need for—such a modification of the existing requirement to retain and preserve materials in the Rule. The Commission will continue to monitor the motor vehicle marketplace, including issues relating to information access, to determine whether additional action or protections are warranted.

Other commenters—particularly auto industry participants—objected to the proposed recordkeeping requirements.[424] Several such commenters contended that the proposed requirements were new obligations that went beyond specific State recordkeeping requirements. Some dealership associations argued that existing State recordkeeping requirements are sufficient and that a Commission rule was unnecessary. One such commenter argued that the existence of overlapping, but different, State and Federal standards may make compliance difficult for motor vehicle dealers.

In response, the Commission notes that the recordkeeping requirement is necessary to ensure motor vehicle dealer compliance with the Final Rule, and therefore may have different requirements than State standards. To provide dealers with flexibility and to minimize burden, however, the proposed rule permitted dealers to retain records ''in any legible form,'' including ''the same manner, format, or place'' in which records are kept in the ordinary course of business. To the extent dealers have fashioned their ordinary record retention practices around State recordkeeping standards, the proposed rule thus allowed for record retention in the form required by State recordkeeping standards. Additionally, as discussed in the following paragraphs, the Commission is not finalizing recordkeeping requirements that dealers maintain Add-on Lists and Cash Price without Optional Add-ons disclosures and declinations, further reducing burdens.

One industry association commenter suggested that this requirement would increase risks of identity theft and raise privacy concerns. The Commission notes that many dealers already have obligations to retain customer records under State law.[425] Dealers are required to have systems in place to protect this information, given that the failure to adequately protect such information violates existing law, including section 5 of the FTC Act and the Commission's Standards for Safeguarding Customer Information, also known as the

[421] Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 48–49; *see also* Comment of N.Y.C. Dep't of Consumer and Worker Prot., Doc. No. FTC–2022–0046–7564 at 6 (noting retention requirements are vital to investigations, particularly with respect to mandatory disclosures).

[422] *See, e.g.,* Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7.

[423] *See* § 463.2(j).

[424] One industry commentor questioned the utility of records in FTC actions. This commenter also stated that the FTC is not a supervisory agency and thus should not be seeking to create a records inspection scheme. As noted previously, recordkeeping requirements are necessary here to prevent unfair and deceptive practices by mandating preservation of written materials that reflect dealer transactions and to enable effective enforcement of the Rule. The Commission has the authority to prescribe rules for the purpose of preventing unfair or deceptive acts or practices. *See* 15 U.S.C. 57a(a)(1)(B). The Commission routinely includes recordkeeping requirements in rules, *see, e.g.,* Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7, and courts have ordered companies to maintain records in FTC orders, *see, e.g.,* Final Judgment at 20–21, *Fed. Trade Comm'n* v. *Elegant Sols., Inc.,* No. 8:19–cv–01333–JVS–KES (C.D. Cal., July 17, 2020); Order for Permanent Injunction and Monetary Judgment at 27–28, *Fed. Trade Comm'n.* v. *Consumer Defense, LLC,* No. 2:18–cv–00030–JCM–BNW (D. Nev. Dec. 5, 2019).

[425] *See, e.g.,* Va. Code sec. 46.2–1529 (requiring retention for five years of ''all dealer records'' regarding, among other things, vehicle purchases, sales, trades, and transfers of ownership).

Safeguards Rule.[426] Thus, to the extent the Final Rule requires dealers to collect personal information beyond that which they are already collecting, they should already have systems in place to protect such information.

Some commenters raised concerns about the requirement in proposed § 463.6(a)(1) to preserve, *inter alia,* materially different advertisements, sales scripts, and marketing materials. One such dealership association commenter argued that dealers should not be required to retain sales scripts, training materials, and marketing materials, while another dealership association commenter argued that dealers should not be required to maintain advertisements, positing that these materials are publicly available and could be requested from advertisers as concerns arise with respect to particular ads. Commenters including two dealership organizations argued that digital advertisements would be difficult to retain, with one such commenter urging the Commission to adopt an approach that would permit dealers to retain a representative example of a vehicle advertisement and the underlying data used to populate vehicle ads. The other such commenter suggested that the proposed recordkeeping requirement could be unduly burdensome because ''all materials'' related to its online inventory ''could be deemed some version of materially different advertisements and marketing materials regarding price or financing of a motor vehicle.'' Another dealership organization commenter raised a similar concern about website listings and questioned whether the term ''advertisement'' includes television ads and email campaigns.

After considering these comments, the Commission has determined that the proposed recordkeeping requirements in § 463.6(a)(1) strike an appropriate balance by requiring the retention of materials needed to enable effective enforcement while only requiring such records to be retained for twenty-four months and in any legible form. Advertisements and marketing materials regarding the price, financing, or lease of a motor vehicle are critical to determining compliance with virtually every provision in the Final Rule, as they are often consumers' first contact in the vehicle-buying or -leasing process, and often contain key representations about pricing, payments, and other terms. Scripts and training materials are important evidence of a dealer's compliance program regarding the Final Rule's requirements, including of the information and instructions that dealership staff are given with respect to the areas that are addressed by the Final Rule. Furthermore, regarding the contention that advertisements are available publicly or could be requested separately, a core purpose of the recordkeeping requirement is to ensure that disseminated representations are preserved for a sufficient period of time to allow for compliance concerns to be addressed. A compliance regime that, contrary to the Commission's proposal, allowed the destruction of advertisements after they have been publicly presented, or that requires the Commission to try to obtain materials from advertisers or third parties, would not serve this purpose.

With respect to the scope of advertisements that must be retained, the recordkeeping requirement does not differ with respect to the form of the advertisement, since the same enforcement concerns are raised regardless of whether an ad is presented in digital, hardcopy, email, audio, televised, or other format. The recordkeeping requirement does not require all advertisements to be retained, however, as § 463.6(a)(1) specifically includes the proviso that ''a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different.'' Regarding the commenter's proposal to allow dealers to retain a ''representative'' example of an advertisement with digital data that can recreate different versions of the advertisement, this provision, as proposed, permitted dealers to preserve typical examples of advertisements in this manner so long as such records are already kept in in the ordinary course of business, capture all differences that would be material to consumers, and accurately show how the offers have been presented to consumers. Materially different website listings, television advertisements, and email campaigns must be preserved, consistent with the plain meaning of the terms used in the section.

With respect to proposed § 463.6(a)(2)'s requirement to maintain copies of all materially different add-on lists, an industry association commenter contended that retaining materially different add-on lists would be difficult, given the scope of the term ''Add-on'' and the consequent size of the list as well as its dynamic nature. One dealership association commenter argued that the proposed requirement to retain add-on lists was unnecessary, contending that concerns could be addressed as they arise, and requesting to replace this proposed requirement with a requirement to retain a master copy of each insurance product, service contract, or other add-on in the dealer's general business file. After carefully considering the comments, the Commission has determined not to finalize the proposed requirement at § 463.4(b) to disclose an add-on list, and consequently will not be finalizing the proposed requirement at § 463.6(a)(2) that dealers retain materially different add-on lists.

Several commenters, including industry associations, argued that certain of the proposed requirements to preserve written material, including written communications under proposed § 463.6(a)(3) and written consumer complaints, and inquiries and responses about vehicles referenced in § 463.4, under proposed § 463.6(a)(5), would be unduly burdensome. Generally, these commenters contended that the various ways consumers may communicate with dealers—including chat features on a dealer's website, emails and text messages with salespersons, and social media posts—would require the development of new and onerous preservation systems. A dealership organization commenter raised concerns about retaining text messages and emails, contending that salespeople may use their personal phones and email addresses, even if the dealership has policies against such use. One industry association commenter argued that third parties might have records related to add-ons and that this provision should only apply to ''complaints'' relating to add-ons instead of ''inquiries'' relating to add-ons. One dealership association commenter argued that dealers should not be required to retain consumer complaints, contending it should be the businesses' decision whether to maintain such materials, and also arguing that the Rule should not require, under proposed § 463.6(a)(4), the preservation of materials such as pricing options presented to consumers, contending that such materials should be limited to the two parties to the agreement.

After considering these comments, the Commission has determined to finalize requirements to retain written materials

[426] 15 U.S.C. 45; 16 CFR 314; *see also* Decision and Order, *LightYear Dealer Techs., LLC,* No. C–4687 (F.T.C. Sept. 3, 2019) (consent order); FTC Business Guidance, ''FTC Safeguards Rule: What Your Business Needs to Know,'' *https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know* (last visited Dec. 5, 2023).

under § 463.6(a)(3), (4), and (5), with a limiting modification to § 463.6(a)(4). These requirements are necessary to address unfair and deceptive practices by mandating that dealers preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission in its enforcement of the Rule.[427] Such materials are particularly important given that the vast majority of consumers do not file a complaint, and with hidden charges, many consumers never know about the illegal conduct in the first place.[428] For instance, as explained in SBP II.B, a survey of one dealership group's customers showed that 83% of the respondents were subject to the dealer's unlawful practices related to add-ons. This equals 16,848 consumers—far more than the 391 complaints received against the dealer over the time period covered by the survey.

To minimize burden, as previously noted, the retention requirements are for a period of twenty-four months. Further, as stated previously, § 463.6(b) permits dealers to retain records ''in any legible form,'' which could, for example, include using the backup and export features that already exist in many social media services, email platforms, chat platforms, and text systems, instead of creating entirely new systems. Regarding dealers that use third parties to administer add-ons, commenters did not explain why they cannot access records related to add-ons from these parties.[429] Further, altering the language in the provision to apply to ''complaints'' rather than ''inquiries'' related to add-ons could invite arguments that consumer statements, such as, ''Why was I charged for this add-on that I did not know about?'' are not ''complaints,'' but simply ''inquiries.'' With respect to the use of salespeople's personal devices to conduct motor vehicle dealer activities, including the sale, financing, or leasing of vehicles, as with any business, dealers should ensure that their employees are communicating with consumers through appropriate channels that can be monitored and controlled by the dealership.

Some commenters, including an industry association and a dealership organization, also raised concerns about how to determine what would constitute ''written consumer complaints'' under proposed § 463.6(a)(5). For purposes of the Rule, the Commission refers commenters to the plain meaning of the terms used in the phrase, which terms are commonly used and understood.[430]

Two industry association commenters argued that the proposed requirement to retain written communications would be particularly burdensome for recreational vehicle dealers, contending that that this was particularly so given that many RV dealers are small businesses. In response, the Commission notes that, as explained in the paragraph-by-paragraph analysis of § 463.2(e) and (f) in SBP III.B.2(e) and (f), it has determined not to finalize the Rule with respect to dealers predominantly engaged in the sale, leasing, or servicing of RVs, but it will continue to monitor the marketplace to determine whether modifications or revisions may be warranted in the future.

Finally, one industry association commenter argued that the proposed recordkeeping requirements and costs were unwarranted given that the Commission has brought an average of fewer than four enforcement actions a year against motor vehicle dealers in the past decade. In response, the Commission notes that its experience indicates that the number of enforcement actions is not remotely reflective of the total violations of law in the auto marketplace. To uncover misconduct and bring actions, law enforcement agencies and officials often rely on complaints from affected parties. As previously discussed, however, consumer complaints typically represent just the ''tip of the iceberg'' in terms of actual violations, and the vast majority of consumers who are subjected to unlawful practices in this area may not realize they are being victimized.[431] Further, the Commission has limited law enforcement resources and jurisdiction over a broad range of commerce.[432] The number of actions it brings relating to motor vehicle dealers—as with actions in any area—is necessarily limited by these resource constraints, even when there are ongoing, chronic problems that cause substantial consumer harm. Despite these constraints, the Commission and its law enforcement partners have taken significant action aimed at addressing unfair and deceptive practices in the motor vehicle marketplace, as explained in SBP II.C. Given that problems with bait-and-switch advertising, add-ons, and other aspects of vehicle-buying and -leasing have continued to be a source of consumer harm despite this action, additional measures are warranted. And the Commission has taken steps to minimize burden, including by declining to finalize the add-on list disclosure requirements in proposed § 463.4(b), as well as the itemized disclosures required in proposed § 463.5(b) and their corresponding proposed recordkeeping requirements. Moreover, the recordkeeping provisions permit dealers to retain records in any legible form, providing a flexible standard that permits the use of ordinary and standard forms of data and document retention.

The Commission adopts in the Final Rule recordkeeping requirements largely as they were set forth in the proposed rule, with two substantive modifications. After careful consideration, the Commission is removing the requirements to retain copies of add-on lists required by proposed § 463.6(a)(2) and records showing compliance with the cash price without optional add-ons disclosures and declinations required by proposed § 463.6(a)(4). These changes will reduce record creation and retention burdens for dealers. As previously described, the Final Rule also contains one typographical modification of adding a serial comma and conforming edits for consistency with the defined terms in § 463.2(e) and (f).

The Commission adopts these recordkeeping requirements to promote effective and efficient enforcement of the Rule, thereby deterring and preventing deception and unfairness. As discussed throughout this SBP, the rulemaking record, including the

[427] As noted previously, a dealership association commenter argued that dealers should not be required to preserve complaints and certain add-on materials, contending that it should be a business decision whether to retain such records. The Commission declines to substantively modify these requirements from the Commission's original proposal, given the importance of these materials in ensuring compliance with the other requirements of the Rule.

[428] *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm).

[429] This is consistent with the Commission's prior enforcement order practice. *See, e.g.,* Stipulated Order at 25, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (requiring retention of ''records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response'').

[430] The term ''written'' means ''made or done in writing.'' *See Written,* Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/written* (last visited Dec. 5, 2023). The term ''consumer'' includes ''one that utilizes economic goods.'' *See Consumer* (def. a), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/consumer* (last visited Dec. 5, 2023). The term ''complaint'' includes an ''expression of grief, pain, or dissatisfaction,'' ''something that is the cause or subject of protest or outcry,'' and ''a formal allegation against a party.'' *See Complaint* (defs. 1, 2a, 3), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/complaint* (last visited Dec. 5, 2023).

[431] *See* SBP II.B.

[432] *See* 15 U.S.C. 45(a).

Commission's law enforcement experience, indicates that there are chronic problems confronting consumers in the motor vehicle sales, financing, and leasing process, which include advertising misrepresentations and unlawful practices related to add-ons and hidden charges.[433] The recordkeeping requirements in the Final Rule will assist the Commission in investigating and prosecuting law violations and help the Commission identify injured consumers for paying consumer redress. The recordkeeping requirements are flexible, allowing dealers to retain materials in any legible form, and are limited to a period of twenty-four months from the date the record is created. The recordkeeping requirements are consistent with, and similar to, the recordkeeping requirements in other Commission rules, as tailored to individual industries and markets.[434]

G. § 463.7: Waiver Not Permitted

Proposed § 463.7 prohibited waiver of the requirements of the Final Rule by providing that it constituted a violation of the Rule ''for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under'' the Rule. Comments that addressed this proposed provision generally either supported it or expressed no opinion on it. Comments in support noted that the provision would help provide consistency in the protection it would provide to consumers and emphasized that it would prohibit unscrupulous dealers from causing consumers to sign away their rights. This proposed provision was modeled on a similar provision in the Mortgage Assistance Relief Services (''MARS'') Rule, which was originally promulgated by the Commission and subsequently republished by the CFPB.[435] Moreover, at least one State has a similar waiver provision in its rule covering motor vehicle dealer practices.[436] The Commission concludes that this provision is necessary to prevent circumvention of the Rule, and, after review of the comments, adopts this prohibition as it was originally proposed.

H. § 463.8: Severability

Proposed § 463.8 provided that the provisions of the Final Rule ''are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.'' This proposed provision was modeled on similar provisions in other rules, including the Commission's Telemarketing Sales Rule and the MARS Rule.[437] A number of commenters, including dealership associations, raised general concerns that the proposed provisions may be too integrated with each other for severability to be possible. Such commenters, however, did not provide examples of any such instances wherein they believed certain provisions could not remain in effect if other provisions were stayed or determined to be invalid. Upon consideration of the comments, the Commission concludes that severability is possible in the event any provision is stayed or determined to be invalid. The Rule the Commission is finalizing includes prohibitions against misrepresentations regarding material information (§ 463.3), required disclosures (§ 463.4), and prohibitions against charging for add-ons that provide no benefit or any item without express, informed consent (§ 463.5)—each of which dealers are capable of abiding by independently, as well as by the provisions that independently support their operation, including Authority (§ 463.1), Definitions (§ 463.2), Recordkeeping (§ 463.6), Waiver not permitted (§ 463.7), and Relation to State laws (§ 463.9). Thus, the Commission has determined to adopt this provision in the Final Rule as it was originally proposed.

I. § 463.9: Relation to State Laws

Proposed § 463.9 provided that the Rule does not supersede, alter, or affect ''any other State statute, regulation, order, or interpretation relating to Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with'' the Rule, ''and then only to the extent of the inconsistency.'' Proposed § 463.9 further provided that, for purposes of this provision, a State statute, regulation, order, or interpretation is not ''inconsistent'' if the protection such statute, regulation, order, or interpretation affords any consumer ''is greater than the protection provided under'' the Rule. After carefully considering the comments, the Commission adopts § 463.9 largely as proposed in the Final Rule.

Numerous State regulator commenters contended that the proposed rule would create a uniform baseline of protection that would complement State standards. A comment from a group of eighteen State attorneys general contended that many of the Proposed rule's requirements were similar to, or the same as, requirements that currently exist under State laws or regulations, and highlighted the benefit to law enforcement from establishing a consistent Federal baseline while providing States with flexibility to impose heightened consumer protections.[438]

One municipal licensing entity commenter that expressed general support of the Commission's proposed rule also posited that the Commission should broaden proposed § 463.9 to expressly include municipalities. With respect to the applicability of the provision to municipalities, the Commission notes that State political subdivisions exercise delegated power of their State, and as such, § 463.9 applies to municipal standards as well.[439]

Other commenters, including dealership associations, referred generally to potential conflicts between the Commission's proposed rule and State laws, but such commenters typically did not point to any specific purported conflicts with State law. To the extent some such commenters argued that certain proposed provisions would conflict with State laws, such arguments are addressed in the SBP's corresponding paragraph-by-paragraph analysis of the relevant Rule provision. Generally, the Commission is not aware of State laws that allow dealers to make misrepresentations regarding material information; prohibit the disclosure of

[433] Some enforcement actions have specifically alleged that a defendant failed to maintain documents required under a prior order with the FTC. Complaint ¶¶ 42–45, *Fed. Trade Comm'n* v. *Norm Reeves, Inc.,* No. 8:17–cv–01942 (C.D. Cal. Nov. 3, 2017) (alleging dealer failed to keep records of previous advertisements needed to demonstrate compliance with prior order); Complaint ¶¶ 32–35, *Fed. Trade Comm'n* v. *New World Auto Imports, Inc.,* No. 3:16–cv–22401 at (N.D. Tex. Aug. 18, 2016) (same).

[434] *See, e.g.,* 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling Rule).

[435] *See* MARS Rule (Regulation O), 12 CFR 1015.8, previously published by the Commission at 16 CFR 322.1.

[436] *See, e.g.,* Wis. Admin. Code Trans. 139.09 (similar waiver prohibition clause in Wisconsin's Motor Vehicle Trade Practices rule).

[437] *See* MARS Rule, 16 CFR 322.8 (Commission Rule), 12 CFR 1015.11 (CFPB Rule); Telemarketing Sales Rule, 16 CFR 310.9.

[438] Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 11.

[439] *See City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424, 433 (2002) (''The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'') (quoting *Wis. Pub. Intervenor* v. *Mortier,* 501 U.S. 597, 607–08 (1991)).

accurate information regarding a vehicle's offering price, optional vehicle add-ons, or total payment information; or permit dealers to charge consumers for add-ons that provide no benefit to the consumer or to charge for items without consumers' express, informed consent. To the extent there truly are conflicts, as discussed in the following paragraphs, § 463.9 establishes the framework for addressing any such inconsistencies.

Commenters including dealership associations also argued that existing State standards are sufficient and identified State requirements that the commenters argued would be redundant with, or superior to, one or more provisions in the Commission's proposed rule. To the extent the Rule prohibits conduct that is already prohibited by State laws, the Commission has not seen evidence that State and Federal standards prohibiting the same misconduct has harmed consumers or competition. Moreover, such overlap is indicative of dealers' ability to comply with the relevant provisions in the Rule. To the extent State laws have additional requirements that provide greater protections or are not otherwise inconsistent with part 463, dealers must continue to follow those laws.

Several dealership association commenters expressed concern regarding how to determine whether a State statute, regulation, order, or interpretation affords ''greater protection'' than a provision in the Commission's proposed rule. One such commenter, for example, raised concerns that proposed § 463.5(a) may conflict with a pending California bill that would prohibit the sale of GAP when a vehicle has less than a 70% loan-to-value ratio. An industry association commenter claimed that the Commission's proposed definitions of ''Dealer or Motor Vehicle Dealer'' would conflict with analogous State definitions. In response, the Commission emphasizes that § 463.9 would be triggered only if there were an actual inconsistency between State law and the Final Rule, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. The commenter examples did not present any such inconsistencies because it is possible to comply with both the cited State law examples and with the Final Rule. For instance, a dealer operating in a State that prohibits the sale of a GAP agreement when a vehicle transaction involves a loan-to-value ratio below 70% would need to abide by the ratio set forth by State law and also by the Rule's prohibition against charging for the product if the consumer would not benefit from it. Similarly, notwithstanding a commenter's claims that the proposed rule's definition of ''Dealer or Motor Vehicle Dealer'' would conflict with analogous State standards, the commenter did not identify any actual conflicts; nevertheless, to the extent State and Federal standards cover independent areas or actors, each actor must comply with the standards—whether State, Federal, or both—under which the actor is covered.[440] Further discussion of how State laws interact with specific sections of the Rule are explained in the corresponding section-by-section analysis for the relevant sections.

Some such commenters also questioned whether more coordination with States and Federal agencies was needed, without explaining what coordination was needed. In any event, the Commission coordinates regularly with States and Federal counterparts.

Many commenters' concerns focused on the written disclosures proposed in § 463.5(b), which the Commission has determined not to include in this Final Rule. For instance, a substantial number of commenters, including industry associations, argued that proposed § 463.5(b) would have created different Federal and State requirements for written disclosures that would result in duplicative paperwork. A dealership association specifically argued that proposed § 463.5(b) may have conflicted with a State pre-contract disclosure requirement pertaining to six categories of add-ons because it would have required an additional disclosure about a broader category of add-ons. An industry association similarly pointed to this State's pre-contract disclosure requirement as a reason that additional disclosures under this Rule, including those required by proposed § 463.5(b), could result in consumer confusion. At least four commenters, including industry associations and a dealership organization, argued that the proposed rule's requirement under § 463.5(b) to create new documentation may conflict with the ''single document'' requirements, in effect in many States, which mandate that the entire motor vehicle sale, financing, or lease agreement—including any add-on products or services—be within one document. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the written disclosures requirement under this provision.

After carefully considering the comments regarding proposed § 463.9, the Commission is finalizing this section largely as proposed, with one minor modification: the Commission is adding ''Covered'' to the term ''Motor Vehicle Dealer'' in § 463.9(a) to conform with the revised definition in § 463.2(f). Section 463.9 provides a uniform floor of protection with the Commission's Final Rule, while also permitting States to enact stronger protections, using a standard that has been applied in other laws and regulations for several decades.[441] This provision is necessary to address unfair and deceptive practices and to enable the Commission to enforce the Rule.

IV. Effective Date

The Final Rule becomes effective on July 30, 2024. One industry association commenter objected that the NPRM did not include an effective date or inquire into the timing for feasibly implementing the Rule. Another such commenter requested at least 18 months for stakeholders to prepare for Rule compliance, but did not explain why it would take 18 months to refrain from conduct that is already illegal, such as making misrepresentations. Rules are generally required to be published 30 to 60 days before their effective date, though in some circumstances, agencies may cite good cause for the rule to become effective sooner than 30 days from publication.[442] Given the significant harm to consumers and law-abiding dealers from deceptive or unfair acts or practices; and the fact that, for dealers already complying with the law, compliance with the Rule the Commission is finalizing should not be onerous; the NPRM did not propose or contemplate any additional delay. Nevertheless, after a review of comments, the Commission is providing dealers until July 30, 2024 to make

[440] *See, e.g., Pirouzian* v. *SLM Corp.,* 396 F. Supp. 2d 1124, 1131 (S.D. Cal. 2005) (reasoning that the more inclusive definition of ''debt collector'' under California law is not ''inconsistent'' with the Fair Debt Collection Practices Act because by ''enlarging the pool of entities who can be sued'' the State law offered greater protection).

[441] *See, e.g.,* 10 U.S.C. 987(d)(1) (Military Lending Act); 15 U.S.C. 1692n (Fair Debt Collection Practices Act); 12 CFR 1006.104 (Regulation F); 15 U.S.C. 1693q (Electronic Funds Transfer Act); *see also* 21 U.S.C. 387p(a)(1) (Family Smoking Prevention and Tobacco Control Act).

[442] *See* 5 U.S.C. 553(d) (requiring publication of a substantive APA rule ''not less than 30 days before its effective date'' except ''as otherwise provided by the agency for good cause found and published with the rule''). Significant rules defined by Executive Order 12866 and major rules defined by the Small Business Regulatory Enforcement Fairness Act are required to have a 60-day delayed effective date. *See* E.O. 12866, 58 FR 51735 (Oct. 4, 1993); 5 U.S.C. 801(a)(3)).

changes to their operations, if needed, in light of the Rule's requirements.

V. Paperwork Reduction Act

On July 13, 2022, the Commission submitted the NPRM and an accompanying Supporting Statement to the Office of Management and Budget (''OMB'') for review under the Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501–3521. On July 29, 2022, OMB directed the Commission to resubmit its request when the proposed rule was finalized.[443]

The Commission is now submitting the Final Rule and a Supplemental Supporting Statement to OMB. The disclosure and recordkeeping requirements of the Rule constitute ''collection[s] of information'' for purposes of the PRA.[444] The associated burden analysis follows.[445]

In the NPRM, the Commission provided estimates and solicited comments regarding the proposed rule, including regarding (1) the proposed add-on list disclosure requirement; (2) the proposed cash price without optional add-ons disclosure requirement; (3) other proposed provisions prohibiting certain misrepresentations and requiring certain disclosures; (4) the proposed recordkeeping provisions; and (5) estimated capital and other non-labor costs. As previously discussed, after carefully reviewing the comments, the Commission has made certain changes to the relevant provisions in the Final Rule. Specifically, the Commission has determined not to finalize requirements, pursuant to proposed § 463.4(b), that dealers disclose an add-on list or, pursuant to proposed § 463.5(b), that dealers refrain from charging for optional add-ons unless enumerated requirements relating to the vehicle's cash price without optional add-ons are met.

In the NPRM, the Commission estimated that the disclosure and recordkeeping requirements would impact approximately 46,525 franchise, new motor vehicle and independent/used motor vehicle dealers in the U.S.[446] In the NPRM, the Commission explained that this figure was exclusive to automobile dealers, and invited comments regarding market information for dealers of other types of motor vehicles, such as boats, RVs, and motorcycles.[447] In response, one industry association commenter noted the absence of such other motor vehicle dealers from the Commission's estimate. Another commenter also noted the absence of such dealers in the estimate and argued that the Commission's estimate also erroneously included independent used motor dealers which the commenter contended do not perform any servicing work, but stated that the Commission's estimate was fairly accurate numerically. As discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), the Commission has determined to expressly exclude ''Recreational boats and marine equipment,'' ''Motorcycles, scooters, and electric bicycles,'' ''Motor homes, recreational vehicle trailers, and slide-in campers,'' and ''Golf carts'' from the Final Rule's definition of ''Covered Motor Vehicle.'' Further, as examined in the paragraph-by-paragraph analysis of § 463.2(f) in SBP III.B.2(f), the plain meaning of the term ''servicing'' covers activities that are undertaken by independent used car dealers.[448] Thus, the Commission bases its estimate of the entities covered by the Final Rule on the same North American Industry Classification System (''NAICS'')[449] categories—''new car dealers'' and ''used car dealers''—as it did in the NPRM.[450] As with other figures in this section, the NAICS data assembled by the U.S. Census Bureau have been revised since the publication of the Commission's NPRM with more recent data. Based on these revisions, the Commission now estimates that the Final Rule's disclosure and recordkeeping requirements will impact approximately 47,271 franchise, new motor vehicle and independent/used motor vehicle dealers in the United States.[451]

The estimated overall annual hours burden for the Final Rule's collections of information is 1,595,085 hours. The estimated overall annual labor cost for the Final Rule's collections of information is $51,904,537. The estimated overall annual capital and other non-labor cost for the Final Rule's collections of information is $14,181,300.

A. Add-On List Disclosures

Section 463.4(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to disclose clearly and conspicuously in advertisements and on any website, online service, or mobile application through which they market motor vehicles, and at any dealership, an itemized add-on list of such products

[443] OMB assigned the rulemaking control number 3084–0172 for PRA review purposes.

[444] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[445] One commenter suggested the FTC did not comply with several provisions of the PRA, specifically those contained in 5 CFR 1320.5(a)(1)(iv), 1320.8(d)(1), 1320.11(a), 1320.11(b), and 1320.11(d). The commenter does not explain the basis for the purported deficiencies. These provisions generally relate to the submission of a collection of information to OMB, and solicitation and consideration of public comments. The FTC has complied with these provisions. The FTC submitted an Information Collection Request to Office of Management and Budget on July 13, 2022, concurrently with publication of the NPRM, in accordance with 5 CFR 1320.11(b). *See* Motor Vehicle Dealers Trade Regulation Rule, ICR 202202–3084–001, OMB 3084–0172, *https://omb.report/icr/202202-3084-001*. Because the FTC complied with this requirement, the collection of information proposed in the NPRM is not, as the commenter contends, subject to disapproval under 5 CFR 1320.11(d).

The Commission also did not violate 5 CFR 1320.5(a)(1)(iv) and 1320.11(a), providing for comments to be submitted to OMB, as the commenter contends. Those provisions are limited by 5 CFR 1320.8(d)(3), which provides that the agency need not direct comments to OMB ''if the agency provides notice and comment through the notice of proposed rulemaking . . . for the same purposes as are listed under'' 5 CFR 1320.8(d)(1). The Commission solicited comments in the NPRM on the subjects enumerated in 5 CFR 1320.8(d)(1), *see* NPRM at 42028–31, 42035–43, and it was not necessary for the Commission to also direct those same comments to OMB. The Commission thus did not violate 5 CFR 1320.5(a)(iv) or 1320.11(a).

Further, contrary to the commenter's assertion, the Commission demonstrated throughout the NPRM that the information collection-related requirements it embodies are necessary, offer utility and public benefit, and minimize burdens. *See, e.g.,* NPRM at 42027, 42043. Moreover, the Commission requested comments on the necessity, utility, benefits, and burdens of the proposed rule, *see* NPRM at 42028–31, 42035–43, and has further taken into consideration and addressed comments in this SBP.

[446] NPRM at 42031.

[447] NPRM at 42031 n.154, 42036.

[448] *See also* Used Car Rule, 81 FR at 81668 (noting that the term ''servicing'' used in this same context ''captures activities undertaken by essentially all used car dealers,'' including by preparing vehicles for sale by addressing any obvious mechanical problems and by undertaking the general industry practice of appearance reconditioning).

[449] NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. North American Industry Classification System, U.S. Census Bureau, *https://www.census.gov/naics/*.

[450] U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019,'' *https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES~001,LFO~001* (listing 21,427 establishments for ''new car dealers,'' NAICS code 44111, and 25,098 establishments for ''used car dealers,'' NAICS code 44112). *See* NPRM at 42031.

[451] U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001* (listing 21,622 establishments for ''new car dealers,'' NAICS code 44111, and 25,649 establishments for ''used car dealers,'' NAICS code 44112).

or services and their prices. In the NPRM, the Commission estimated costs for the add-on list disclosure and solicited comments on its burden analysis.[452] One industry association made several arguments, including that the Commission underestimated the time and resources required because an add-on list can be lengthy, vary by vehicle and over time, and require working with several third parties. This commenter also argued that periodic revision of such lists would take more than the estimated one hour of clerical time per dealer, per year. The commenter, however, did not offer any specific estimates for such periodic revision activities.

As explained in the section-by-section analysis of § 463.4 in SBP III.D.2, after careful consideration, the Commission has determined not to finalize its proposed add-on list provision at § 463.4(b).

B. Disclosures Relating to Cash Price Without Optional Add-Ons

Section 463.5(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to provide certain itemized disclosures regarding pricing and cost information without such add-ons. In response to the Commission's estimates with respect to this proposed provision, one industry association argued that the Commission did not provide adequate explanation of the assumptions it used to arrive at its cost estimates for this proposed provision, and contended that the Commission underestimated the costs associated with developing, printing, and presenting the proposed disclosures. This commenter also contended that the proposed requirement would have required significant training costs; that multiple forms would have been required for each motor vehicle transaction; and that aspects of the required disclosures would be duplicative of information already provided by dealerships in the ordinary course of business. The commenter estimated that developing a disclosure form for this proposed provision would cost dealers at least $750 and suggested that other attendant costs would be in the hundreds of millions or billions of dollars, without explaining how it arrived at such estimated figures.

As explained in the section-by-section analysis of § 463.5 in SBP III.E, after careful consideration, the Commission has determined not to include in this Final Rule the itemized disclosure provisions at proposed § 463.5(b). The Commission notes that imposing unauthorized charges—including charges buried in lengthy contracts or included in contracts that consumers are rushed through—is a violation of both the Final Rule's § 463.5(c) and of the FTC Act. The Commission will continue to monitor the market to determine whether additional steps are warranted to combat unauthorized charges for add-ons or other items in the motor vehicle marketplace.

C. Prohibited Misrepresentations and Required Disclosures

Section 463.3 of the Final Rule prohibits dealers from making any misrepresentation regarding material information about the categories enumerated in the section.

The provisions in this section have been adopted largely without modification from the NPRM, wherein the Commission estimated that any additional costs associated with the proposed misrepresentation prohibitions would be *de minimis*.[453] One industry association commenter argued that a bar on misrepresentations in the Final Rule would require increased training and compliance costs and result in longer transaction times and costs related to working with vehicle manufacturers about online advertisements. This section, however, does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance,[454] refraining from making misrepresentations does not require additional training or compliance costs or transaction time. The Commission therefore affirms its prior estimate that any additional costs associated with the prohibitions in § 463.3 against making misrepresentations would be *de minimis*.

Section 463.4(a) of the Final Rule requires dealers to clearly and conspicuously disclose a vehicle's offering price in advertisements and other communications that reference a specific vehicle, or any monetary amount or financing term for any vehicle. ''Offering Price'' is defined in § 463.2(k) of the Rule as ''the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.'' The information required by § 463.4(a) is necessary to address unfair or deceptive conduct associated with the failure to provide such price information and unfairly charging unexpected prices or for hidden items that can add hundreds or thousands of dollars to a vehicle sale.[455]

This provision is being adopted largely as proposed.[456] In response to the NPRM, one industry association commenter claimed there would be an average of three offering price disclosures per transaction, since, according to the commenter, consumers, on average discuss three specific motor vehicles per transaction. This commenter also contended that the number of required offering price disclosures would obligate dealers to incur additional training costs. As the Commission explained in its NPRM, vehicle pricing activities and representations are usually and customarily performed by dealers in the course of their regular business activities. While this provision may increase the importance of those activities, or alter when in the course of business they are undertaken, the Commission estimates that any additional attendant costs are *de minimis*.[457]

Section 463.4(d) of the Final Rule require dealers, when making any representation about a monthly payment for any vehicle, to disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all

[452] NPRM at 42032–33, 40235, 42040.

[453] NPRM at 42033, 42039.

[454] The Commission produced and considered alternative cost estimate scenarios for the Rule provisions in its preliminary regulatory analysis, *see* NPRM at 42036–44, and its final regulatory analysis in section VII. The Commission also invited comments on the accuracy of its PRA burden estimates, including the validity of the methodology and assumptions used, *see* NPRM at 42035. The Commission provides a single estimate per Rule provision for this separate Paperwork Reduction Act burden analysis in conformity with the PRA. *See* 44 U.S.C. 3506(c)(1)(A)(iv) (providing, for each collection of information, including those arising from rules published as final rules in the **Federal Register**, that agencies shall conduct a review that includes ''a specific, objectively supported estimate of burden'').

[455] Some commenters suggested that providing an Offering Price may be difficult due to pricing changes over time. As explained in SBP III.D.2(a), limited-time offers should be clearly disclosed as such. Advertising prices without disclosing material limitations that would mislead consumers is a deceptive or unfair practice.

[456] As stated in SBP III.B.2(k) and SBP III.D.2(a), the Commission is finalizing this Offering Price definition at § 463.2(k) largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a vehicle's offering price. In addition, this definition in the Final Rule substitutes ''Vehicle'' for ''motor vehicle'' to clarify that the term is consistent with the revised definition of '''Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also added language to the end of § 463.4(a) clarifying that the requirements in § 463.4(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and § 463.5(c).''

[457] *See* NPRM at 42033, 42039–40.

payments as scheduled, as well as the amount of consideration to be provided by the consumer if the total amount disclosed assumes the consumer will provide consideration. Section 463.4(e) of the Final Rule requires dealers, when making any comparison between payment options that includes discussion of a lower monthly payment to disclose, if true, that a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle.

These provisions have been adopted largely as proposed.[458] In response to the Commission's estimates with respect to these proposed provisions, one commenter raised concerns that these disclosures would intrude on existing disclosures, and that any associated paperwork burden would be confusing, duplicative, and unnecessary. The commenter also argued that these disclosures would add time to the transaction process and require additional staff training. No commenters provided alternative estimates of the costs associated with this provision.

Failing to disclose information about the total of payments for a vehicle when representing monthly payment information is deceptive or unfair, as set forth in SBP III.D.2(d). Dealers already generate the required information during the normal course of business, and disclosing this total of payments information provides consumers with fundamental information that is readily available to the dealer when making representations regarding monthly payments, at which time such disclosures are required. Nevertheless, there may be upfront labor costs associated with developing procedures to provide these disclosures consistently at the appropriate point in the transaction and with training employees. The Commission estimates such upfront costs as follows: 8 compliance manager hours per dealer on implementing a template disclosure script that contains the required information and on ensuring sales staff consistently deliver the disclosure at an appropriate time during the transaction, for an upfront hours burden of 378,168 (8 hours × 47,271). Applying labor cost-rates of $31.21 per hour yields $11,802,623.28 ($31.21 × 378,168 hours).[459] After a review of comments, the Commission is adding ongoing training costs. Specifically, the Commission estimates annual ongoing costs of 1 hour of training time for sales and related employees per year, for an annual hours burden of 417,110 (1 hour × 417,110 sales and related employees). Applying labor cost-rates of $29.43 per hour, the total estimated ongoing labor cost burden is $12,275,547.30 across the industry (417,110 sales and related employees × 1 hour × $29.43).

Further, § 463.4(c) of the Final Rule requires dealers that sell optional add-on products or services to disclose to consumers that these add-ons are not required, and that the consumer can purchase or lease the vehicle without these add-ons. This requirement has been adopted largely as proposed, and is necessary to address deceptive and unfair practices regarding these products or services, including misrepresentations that these products are required when they are not, and charging consumers for such products without the consumers' express, informed consent.[460] It requires a simple disclosure of information that is known to the dealer, and the Commission anticipates that the information collection burdens associated with this requirement is *de minimis.*[461]

Similarly, § 463.5(c) of the Final Rule requires dealers to refrain from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge.[462] In response to the Commission's estimates with respect to these proposed provisions, some commenters generally discussed burdens, as addressed in the section-by-section analysis in SBP III, that they contended would accompany this proposed provision, but none provided sufficient detail for cost estimates. The Commission notes that this provision addresses the unfair or deceptive practice of charging consumers for items they do not know about or to which they have not agreed, or in amounts beyond those to which the consumer has agreed. As dealers must currently have policies in place to prevent charges without consent in order to comply with current law, the Commission anticipates that any burdens associated with this provision will be *de minimis.*[463]

D. Recordkeeping

Section 463.6 of the Final Rule requires dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Rule, including with its disclosure requirements. This provision has been adopted with revisions to account for other changes in the Final Rule, as explained in SBP III.F.[464] These recordkeeping provisions are necessary to promote effective and efficient enforcement of the Rule, thereby deterring dealers from engaging in deceptive or unfair acts or practices.

In the NPRM, the Commission provided cost estimates and solicited comment on its recordkeeping burden analysis.[465] The Commission anticipated that dealers would incur certain incremental costs related to: (i) recordkeeping systems; and (ii) calculations of loan-to-value ratios for contracts with GAP agreements.

Several commenters, including industry associations, dealership organizations, and a dealership

[458] These provisions in the Final Rule capitalize the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also substituted a period for a semi-colon and the word ''and'' at the end of § 463.4(d)(1), and added language to the end of § 463.4(d) and (e) clarifying that the requirements in these paragraphs ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and § 463.5(c).''

[459] The estimates throughout this section have been updated with more recent data since the publication of the NPRM. Labor rates are based on new data from the Bureau of Labor Statistics. See U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.* The number of dealerships has been updated to reflect new data from Census County Business Patterns. See U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.*

[460] This provision in the Final Rule capitalizes the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also added language to the end of § 463.4(c) clarifying that the requirements in this paragraph ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and § 463.5(c).''

[461] As with § 463.3, § 463.5(a) does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance policies, or to take steps to document compliance with § 463.5(a), any such additional measures are not required by this provision.

[462] *See* SBP III.E.2(c).

[463] In its NPRM, the Commission noted that it anticipated this section would require dealers to provide readily available information to consumers in direct communications with customers, and that dealers complying with existing law have policies in place to prevent charges without consent, thereby estimating minimal additional resulting costs. *See* NRPM at 42033, 42036–44. The Commission did not receive comments discussing attendant burdens in sufficient detail for revised cost estimates, and thus affirms its prior estimate regarding additional costs associated with § 463.5(c).

[464] The Final Rule also contains one typographical modification to § 463.6—adding a serial comma—and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f).

[465] NPRM at 42033–34, 42043.

association, generally contended that the Commission underestimated the burdens of compliance relating to the changes dealers would need to make to their existing recordkeeping systems. These commenters, however, did not provide the Commission with alternative estimates regarding such burdens. As explained in the section-by-section analysis of the Recordkeeping section, § 463.6, in SBP III.F, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, and place as they may already keep such records in the ordinary course of business. The Commission nonetheless has determined, in response to comments, to revise its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule, and, as provided in the capital and other non-labor costs discussion in the following paragraphs, the Commission is adding an estimate of incremental additional storage costs to its estimate.

Further, the Commission notes that its initial recordkeeping cost estimates were based on a proposal that required records regarding add-on list disclosures and cash price without optional add-on disclosures—records that the Rule the Commission is finalizing does not require dealers to retain. Given that the Commission is not finalizing these additional record-related requirements, the estimates provided in its NPRM may overestimate attendant costs resulting from the Rule's recordkeeping requirements. Notwithstanding this possibility, the Commission maintains its prior calculations of the time required to modify existing recordkeeping systems.[466] The Commission anticipates that it will take covered motor vehicle dealers approximately 15 hours to modify their existing recordkeeping systems to retain the required records for the 24-month period specified in the Rule. This yields a general recordkeeping burden of 709,065 hours annually (47,271 motor vehicle dealers × 15 hours per year).

The Commission anticipates that programming, administrative, compliance, and clerical staff are likely to perform the tasks necessary to comply with the recordkeeping requirements in § 463.6 of its Rule. In particular, the Commission estimates this 15-hour per-dealer labor hours burden to design, implement, or update systems for record storage and create the templates necessary to accommodate retention of all relevant materials, as follows: 8 hours of time for a programmer, at a cost-rate of $40.24 per hour; 5 hours of additional clerical staff work, at a cost-rate of $20.16 per hour; 1 hour of sales manager review, at a cost-rate of $80.19 per hour; and 1 hour of review by a compliance officer, at a cost-rate of $31.21 per hour.[467] Applying these cost-rates to the estimated per-dealer hours burden described previously, the total estimated initial labor cost burden is $534.12 per average dealership (($40.24 per hour × 8 hours) + ($20.16 per hour × 5 hours) + ($80.19 per hour × 1 hour) + ($31.21 per hour × 1 hour)), totaling $25,248,386.52 across the industry ($534.12 per average dealership × 47,271 dealerships).

The Commission also received comments regarding its cost estimates relating to the records of loan-to-value ratios for transactions that include GAP agreement sales. One industry association commenter argued that this recordkeeping requirement would also require additional training, that creating a loan-to-value calculator template for GAP agreements would be difficult given the variation of loan-to-value ratios, and that this recordkeeping requirement would lengthen the time to conduct vehicle sale or financing transactions.[468] No commenter provided alternative estimates of the costs associated with the Commission's proposed recordkeeping requirements.

As explained in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission is not mandating a particular LTV threshold or method of calculation, but rather requiring that dealers not charge a consumer for GAP agreements or other products or services if the consumer would not benefit from the product or service. The Commission anticipates that, to the extent dealers do not currently retain any materials used to make such an assessment, dealers may incur certain additional costs. Specifically, the Commission anticipates that dealers will expend one minute per sales or financing transaction for a salesperson to perform the calculation contemplated by this requirement, at a cost rate of $28.41 per hour. The Commission estimates that covered motor vehicle dealers sell approximately 31,562,959 vehicles each year, and that approximately 17% of such sales include GAP agreements, for an estimated total of 5,444,502 covered vehicle sales.[469] While the number of motor vehicles sold will vary by dealership, this yields an average sales volume of 115 sales transactions per average dealership per year that include a GAP agreement (5,444,502 covered vehicle sales/47,271 dealerships). This yields an estimated annual hours burden for all dealers of 90,742 hours (5,444,502 covered transactions × 1/60 hours). Applying the associated labor rates yields an estimated annual labor cost for all dealers of $2,577,980.22 (90,742 hours × $28.41 per hour).

E. Capital and Other Non-Labor Costs

The Commission anticipates that the Final Rule will impose limited capital and non-labor costs. The Commission presented estimates in the NPRM with respect to such costs and solicited comments on its burden analysis. Here, the Commission discusses its estimates for the capital and non-labor costs associated with the Rule's disclosure and recordkeeping requirements. While some commenters generally discussed burdens that they contended would accompany these proposed provisions, none provided any alternative cost estimates regarding capital and other non-labor costs.[470]

1. Disclosures

The Commission anticipates that the Rule's disclosure requirements will impose *de minimis* capital and other non-labor costs. As the Commission noted in the NPRM, dealers already have in place existing systems for providing sales- and contract-related disclosures to buyers and lessees, as well as to consumers seeking information during the vehicle-shopping process.[471] While the Final Rule's disclosure requirements may result in limited additions to the

[466] In its NPRM, the Commission estimated costs to create and implement a loan-to-value calculation process. NPRM at 42034. Such costs are already accounted for in the Commission's estimates for the time required to modify existing recordkeeping systems, and thus are not separately itemized here.

[467] Applicable wage rates are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.*

[468] These arguments are addressed in the section-by-section analysis of § 463.5. *See* SBP III.E.

[469] In response to comments, the Commission has revised the number of transactions across the industry from the NPRM to exclude private party and fleet transactions. The estimated percentage of sales including GAP agreements is derived from data provided by an industry commenter. Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12.

[470] One commenter claimed generally that the Commission underestimated these costs, referring to arguments the commenter made with respect to the Commission's burden analysis of specific disclosure and recordkeeping provisions. The Commission has responded to those arguments in the foregoing analysis, with the exception of recordkeeping storage costs, which are addressed in the following discussion.

[471] NPRM at 42034.

information that must be provided during the transaction process, depending on a dealer's current business operations, the Commission anticipates that these changes will not require substantial investments in new systems.[472] Further, many dealers may elect to furnish some disclosures electronically, further reducing total costs.[473]

The Commission previously estimated non-labor costs for providing disclosures in written or electronic form. This estimate was based on proposed § 463.5(b), which required written disclosures in all transactions in which dealers charge for optional add-ons. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the proposed provision at § 463.5(b). While some commenters generally discussed burden with respect to disclosure requirements being finalized by the Commission, no commenter estimated non-labor costs associated with such requirements. The Commission estimates that the non-labor costs related to disclosures, which relate to fundamental information (the vehicle offering price, that optional add-ons are not required, and regarding the total amount to purchase or lease the vehicle), will be *de minimis.*

2. Recordkeeping

In the NPRM, the Commission observed that dealers already have in place existing recordkeeping systems for the storage of documentation they would retain in the ordinary course of business irrespective of the Rule's requirements.[474] Commenters including industry associations, a dealership organization, and a dealership association argued that the Commission underestimated the burdens associated with the Commission's proposed requirements to retain written communications, as well as the need to develop new systems to capture these materials. The Commission disagrees that the recordkeeping requirements in § 463.6 mandate the creation of new recordkeeping systems. As explained in the section-by-section analysis of § 463.6, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, or place as they may already keep such records in the ordinary course of business.

The Commission is, however, revising its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule to add such recordkeeping storage costs to its estimate. The Commission previously noted, and continues to believe, that dealers that store records in hard copy are unlikely to require extensive additional storage for physical document retention, and, due to the low cost of electronic storage options, that expanding electronic storage capacity would impose minimal costs.[475] The Commission also invited comments on estimated storage costs; while some commenters generally discussed burdens, as addressed in the section-by-section analysis of the recordkeeping requirements in § 463.6, that they contended would accompany the proposed provisions, the Commission did not receive any comments that provided estimates. The Commission nevertheless has conducted additional research, and now estimates that each dealer will need to spend approximately $300 per year in investment in additional IT systems and hardware for additional storage (either on premises or electronically) to retain records, the annual cost for which would be $14,181,300 for all covered dealers ($300 × 47,271 covered dealers).[476]

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[477] requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') and Final Regulatory Flexibility Analysis (''FRFA'') of any rule subject to notice-and-comment requirements,[478] unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[479] In the NPRM, the Commission provided an IRFA, stated its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered.[480] In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press releases, social media posts, and blog articles directed toward businesses and consumers, as well as through other outreach,[481] in keeping with the Commission's history of small business guidance and outreach.[482]

The Commission thereafter received over 27,000 public comments, many of which identified themselves as being from small dealers, industry associations that represent small dealers, and employees of small dealers.[483] The Commission greatly

[472] *Id.*

[473] *Id.*

[474] *Id.*

[475] NPRM at 42034–35.

[476] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

[477] *See* Public Law 104–121 (1996).

[478] 5 U.S.C. 603(a), 604(a).

[479] 5 U.S.C. 605(b).

[480] NPRM at 42035.

[481] *See, e.g.,* Press Release, Fed. Trade Comm'n, ''FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers'' (June 23, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers;* Lesley Fair, ''Proposed FTC Rule Looks Under the Hood at the Car Buying Process,'' Fed. Trade Comm'n Business Blog (June 23, 2022), *https://www.ftc.gov/business-guidance/blog/2022/06/proposed-ftc-rule-looks-under-hood-car-buying-process;* Alan S. Kaplinsky, A Close Look at The Federal Trade Commission's Proposed Rule for Motor Vehicle Dealers, with Special Guests Sanya Shahrasbi and Daniel Dwyer, Staff Attorneys, FTC Bureau of Consumer Protection, Division of Financial Practices, Consumer Finance Monitor (Aug. 11, 2022), *https://www.ballardspahr.com/Insights/Blogs/2022/08/Podcast-The-FTCs-Proposed-Rule-Motor-Vehicle-Dealer-Guests-Sanya-Shahrasbi-and-Daniel-Dwyer.*

[482] Each year since FY2002, the Small Business Administration's Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See* U.S. Small Business Administration, ''2013–2020 SBA Nat'l Ombudsman's Ann. Reps. to Cong.,'' *https://www.sba.gov/document/report—national-ombudsmans-annual-reports-congress* (providing reports from FY2013–FY2020); Letter from Joseph J. Simons, Chairman of the Federal Trade Commission, to Senator James Risch, Chairman of the Committee on Small Business and Entrepreneurship, U.S. Senate, and to Congressman Steve Chabot, Chairman of the Committee on Small Business, U.S. House of Representatives, *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/tenth_section_212_report_to_congress_july_2016-june_2017_1_0.pdf* (citing Commission's ''A'' rating for ''Compliance Assistance'' by the National Ombudsman from FY2002–FY2016).

[483] The Commission received 27,349 comment submissions filed in response to its NPRM. *See* Gen. Servs. Admin., Doc. No. FTC–2022–0046–0001, Proposed Rule, Motor Vehicle Dealers Trade Regulation Rule (July 13, 2022), *https://www.regulations.gov/document/FTC-2022-0046-0001* (noting comments received). To facilitate public access, 11,232 such comments have been posted publicly at *www.regulations.gov. Id.* (noting posted comments). Posted comment counts reflect the number of comments that the agency has posted to *Regulations.gov* to be publicly viewable. Agencies may choose to redact or withhold certain

Continued

appreciates, and thoroughly considered, the feedback it received from such stakeholders in developing the Final Rule; made changes from the proposed rule in response to such feedback; and will continue to engage with stakeholders moving forward to facilitate implementation of the Rule.

As previously discussed, after reviewing comments, the Commission has determined, as an alternative to finalizing the proposed rule in its entirety, to finalize a Rule that does not contain the proposed add-on list disclosure requirements at § 463.4(b), or the proposed disclosures and declinations pertaining to a vehicle's cash price without optional add-ons at § 463.5(b). Furthermore, as discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), in response to public comments and after careful consideration, the Commission has determined to exclude recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the Rule's definition of ''Covered Motor Vehicle.'' After careful consideration of the comments and following its determination not to finalize the proposed rule in its entirety, the Commission is certifying that the Final Rule will not have a significant economic impact on a substantial number of small entities. In the following paragraphs, the Commission discusses comments from the public, as well as from the U.S. Small Business Administration Office of Advocacy (''SBA Advocacy''), and the reasons for the Commission's conclusion that the Rule will not have a significant economic impact on a substantial number of small entities.[484] Given, however, that the Commission believes that the vast majority of covered entities are small entities and provided an IRFA in the NPRM, in the interest of thoroughness, the Commission has also performed an FRFA, as described in SBP VI.B.2.

A. Significant Impact Analysis

1. Comments on Significant Impact

In the NPRM, the Commission stated its belief that the proposed rule would not have a significant economic impact on a substantial number of small entities, and invited comments.[485] Several commenters, including industry associations and a dealership association, generally argued that the Rule would impose substantial economic burdens on small entities, and some suggested that small entities may be disproportionately burdened by the Rule given limited legal and compliance staff. No commenters provided comprehensive alternative empirical cost or revenue data that could be used to put costs in context. Commenters, including an industry association and SBA Advocacy, argued that the Commission did not provide a sufficient factual basis for, or analysis of, the effects on small entities, and that the proposed rule would be unduly burdensome for smaller motor vehicle dealers.[486] The comment from SBA Advocacy further argued that the Commission provided no information about the economic impact of the proposed rule on small entities, but noted that if the total estimated cost of $1,360,694,552 were divided by the number of dealers estimated in the NPRM (46,525), the cost would be roughly $29,000 per such dealer.[487] The comment from SBA Advocacy also argued that the Commission failed to include familiarization and training costs or costs that the Commission could not quantify, such as investments in additional IT systems and hardware.[488]

The Commission has considered these comments carefully and has taken them into account in setting forth the factual basis for the certification in SBP VI.A.2, including by modifying its analysis to add an estimate of familiarization and training costs in response to such concerns.[489] The Commission notes, as

submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, *https://regulations.gov/faq.*

[484] The Office of Advocacy has emphasized that, while it is housed within SBA, it is an independent, stand-alone office that has its own statutory charter, leadership structure, and appropriations account. SBA Advocacy, ''Background Paper: Office of Advocacy 2017–2020'' 111–19 (Jan. 2021), *https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf; see also* 15 U.S.C. 634a through 634g. SBA Advocacy's Chief Counsel is appointed from civilian life by the President, with the advice and consent of the Senate, and most of SBA Advocacy's professionals serve at the pleasure of the Chief Counsel. 15 U.S.C. 634a, 634d(1) (empowering Chief Counsel for Advocacy to employ and fix the compensation of additional staff personnel); SBA Advocacy, ''Background Paper: Office of Advocacy 2017–2020'' 95 (Jan. 2021), *https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf.* SBA Advocacy does not circulate its work for clearance with the SBA Administrator, OMB, or any other Federal agency prior to publication. 15 U.S.C. 634f.

[485] An industry association commenter argued that the Commission did not make a formal section 605(b) certification, publish the certification in the **Federal Register**, or provide the certification to the Chief Counsel for Advocacy of the Small Business Administration. This comment misunderstands the RFA. The RFA does not require certification when a rule is proposed. *See* 5 U.S.C. 605(b) (providing that the head of the agency may make the certification ''at the time of publication of the final rule''). The Commission's NPRM stated its belief that the proposal would not have a significant economic impact on a substantial number of small entities, invited comment on this issue, and also provided an IRFA. The Commission has carefully reviewed the SBA's and others' comments, is making changes to the proposal, and is now publishing the Final Rule and making a formal certification, as is required by the RFA.

Although the Commission included the NPRM in its Fall 2022 Regulatory Agenda, and explained in its NPRM that the proposed rulemaking was not included in the Commission's Spring 2022 Regulatory Agenda because the Commission first considered the NPRM after the publication deadline for the Regulatory Agenda, *see* NPRM at 42031 n.153, the same commenter argued that the RFA and Executive Order 12866 required the Commission to include it in earlier Regulatory Agendas. As an initial matter, Executive Order 12866 does not apply to independent agencies such as the FTC. Regardless, as discussed in SBP II.C, Commission has engaged in a sustained effort over many years to engage with consumer and dealer groups, and other stakeholders, regarding the issues addressed in the Rule. *See supra* note 90. Neither the RFA nor Executive Order 12866 precludes the Commission from promulgating the Rule regardless of whether it was included in an earlier Regulatory Agenda (or even arguably could have been). Section 602(d) of the RFA explicitly provides that ''[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda.'' *See Coastal Conservation Ass'n* v. *Locke,* No. 2:09–CV–641–FTM–29, 2011 WL 4530631, at *38 (M.D. Fla. Aug. 16, 2011), *report & recommendation adopted sub nom. Coastal Conservation Ass'n* v. *Blank,* No. 2:09–CV–641–FTM–29, 2011 WL 4530544 (M.D. Fla. Sept. 29, 2011) (denying request for injunction based on allegation of noncompliance with 5 U.S.C. 602(d)). Similarly, Executive Order 12866 explicitly provides that it ''does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States,'' let alone one that would preclude adoption of the Rule. *See* E.O. 12866, 58 FR 51735, 51744 (Sept. 30, 1993); *see also Trawler Diane Marie, Inc.* v. *Brown,* 918 F. Supp. 921, 932 (E.D.N.C. 1995), *aff'd sub nom. Trawler Diane Marie, Inc.* v. *Kantor,* 91 F.3d 134 (4th Cir. 1996) (denying request to invalidate regulation based on allegation of noncompliance with Executive Order 12866).

[486] *See* Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[487] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[488] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[489] After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to store the records the Rule requires them to maintain. Based on a review of the transaction records the Commission has received from dealers through investigations, this amount is likely to be more than sufficient. Commission review suggests that a typical vehicle transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. The Commission estimates that the $300 annual amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission

SBA Advocacy did in its comment, that the NPRM estimated a total cost for the proposed rule of $1,360,694,552. This estimate was for costs over a ten-year time period. Thus, dividing this estimate by the number of affected dealers estimated in the NPRM yields a cost of roughly $29,000 per dealer over a ten-year period—or approximately $2,900 per year per dealer.[490] This figure—$2,900—is slightly more than the average gross profit described in the NPRM for a single vehicle sale by a new vehicle dealer, and less than half of the average gross profit described in the NPRM for a single vehicle sale by an independent used vehicle dealer.[491]

After carefully reviewing the comments, the Commission does not conclude that the Final Rule will impose a significant economic burden on a substantial number of smaller entities.[492] As described in SBP VI.A.2(b), the estimated economic impact of the Final Rule, controlling for firm size based on available census data, is less than or equal to 0.27% of annual sales, 1.49% of the gross margin, and 4.12% of the gross margin minus operating expense for dealerships of all sizes.[493] The Commission further notes that, in response to comments from SBA Advocacy and others, the Paperwork Reduction Act analysis incorporates additional estimates for training and storage costs beyond those estimated in the NPRM.

2. Certification of the Final Rule

The Commission hereby certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

As an initial matter, the Commission believes that a substantial number of small entities are covered by the Rule. New vehicle dealers (NAICS code 44111) are classified as small entities if they have an average of 200 or fewer employees, and used car dealers (NAICS code 44112) are classified as small entities if they have average annual revenues of $30.5 million or less.[494] Census data indicate that the vast majority of dealers classified into these NAICS codes are small entities.[495] There are approximately 47,271 covered dealers in the United States, of which over 93% have fewer than 100 employees. Thus, while the Commission cannot determine the precise number of small entities affected by the Rule, census data suggest that the vast majority of covered dealers are small entities.

The Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities. The Commission has analyzed the costs of the Rule (1) based on industry averages and (2) accounting for dealer size based on the number of employees. Under either measure, the Rule will not have a significant economic impact on a substantial number of small entities.

(a) Industry Averages

The Commission estimates a total cost for the Final Rule, at the scenario reflecting the Commission's highest cost estimates, of $1.075 billion to $1.270 billion over a ten-year period.[496] Using the highest end of this highest-cost scenario, the Rule will have an estimated cost of $1.270 billion over ten years using a 3% discount rate. This translates to an average estimated per-year cost of $127 million ($1.270 billion × 0.1). Census data show that, in 2021, automobile dealers had annual sales of $1.265 trillion, gross margin of $226.118 billion,[497] and gross margin minus operating expenses of $81.850 billion. Discounting these numbers over a 10-year period using a 3% discount rate equates to average annual sales of $1.079 trillion, gross margin of $192.883 billion, and gross margin minus operating expenses of $69.820 billion. The estimated yearly cost of the Rule therefore is approximately 0.01% of annual sales ($127 million/$1.079 trillion), 0.07% of gross margin ($127 million/$192.883 billion), and 0.18% of gross margin minus operating expenses ($127 million/$69.820 billion) across the industry.[498]

(b) Dealer Size Based on the Number of Employees

In addition to considering industry averages, the Commission has analyzed the cost of the Rule accounting for dealer size based on the number of employees. Certain costs are fixed (*i.e.,* remain the same regardless of the number of employees) while other costs scale with dealer size. We consider both

anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

[490] NPRM at 42013.

[491] As noted in the NPRM, new vehicle dealers averaged a gross profit of about $2,444 per new vehicle, and about $2,675 per used vehicle, and independent used vehicle dealerships had an average gross profit of more than $6,000 per vehicle. *See* NPRM at 42014 (citing Nat'l Auto Dealers Ass'n, ''Average Dealership Profile'' 1 (2020), *https://www.nada.org/media/4136/download?attachment* [*http://web.archive.org/web/20220623204158/https://www.nada.org/media/4136/download?attachment*] (June 23, 2022) and Nat'l Indep. Auto Dealers Ass'n, ''NIADA Used Car Industry Report 2020'' at 21).

[492] Notably, while many industry commenters claimed that the burden of the Rule would be substantial, none provided data on revenue or profit.

[493] U.S. Census Bureau, ''Annual Retail Trade Survey: 2021'' (Dec. 15, 2022), *https://www.census.gov/data/tables/2021/econ/arts/annual-report.html.* Gross margin minus operating expenses was determined by deducting total 2021 operating expenses ($144,268 million) from 2021 gross margin ($226,118 million). Gross margin represents total sales less the cost of goods sold. Operating expenses include but are not limited to annual payroll, commissions, data processing, equipment, advertising, lease and rental payments, utilities, and repair and maintenance. *See Glossary,* U.S. Census Bureau, *https://www.census.gov/glossary* (last visited Dec. 5, 2023). Note that the operating expenses amount may include some costs—such as payments for deceptive advertising or commissions earned on unauthorized charges—that are not legitimate expenses. If these were excluded, the gross margin minus operating cost figures would be even lower than those described in the text.

[494] *See* North American Industry Classification System, U.S. Census Bureau, *https://www.census.gov/naics/.* These standards are determined by the Small Business Size Standards component of the NAICS, which is available at *https://www.sba.gov/document/support-table-size-standards.*

[495] The census report does not provide sufficient detail to provide a precise numerical estimate of the number of small entities covered by the Rule. The census data provide the number of dealers with fewer than 250 employees, and also provide revenue and gross margin figures for the motor vehicle dealers industry, without further breakdown. For that reason, the census data do not provide sufficient information to calculate the specific number of dealers that are small entities. Nor did commenters provide comprehensive alternative firm size data.

[496] The $1.075 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($246 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($406 million), prohibitions on misrepresentations ($130 million), and recordkeeping requirements ($248 million), using a 7% discount rate. The $1.270 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($296 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($475 million), prohibitions on misrepresentations ($157 million), and recordkeeping requirements ($296 million), using a 3% discount rate.

[497] U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Sales'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/sales.xlsx* (showing $1,264,635 million in estimated annual sales in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Gross Margin'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/gm.xlsx* (showing $226,118 million in estimated annual gross margin in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Total Operating Expenses'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/exp.xlsx* (showing $144,268 million in estimated annual operating expenses in 2021 for automobile dealers, NAICS code 4411).

[498] The calculations in this analysis were performed using unrounded inputs in order to maintain accuracy. Nevertheless, for ease of reference, such inputs have been rounded where they are described in the text.

(1) first-year compliance costs and (2) costs in subsequent years.

(1) First-year compliance costs. First-year compliance costs are the sum of: (1) upfront fixed costs; (2) one year of annual ongoing costs that are fixed; and (3) one year of annual ongoing costs that scale.

The Commission estimates the upfront fixed costs per dealer under the highest-cost scenario as follows: $963.44 to update policies and procedures to provide the offering price disclosure required by § 463.4(a) ((8 estimated pricing hours [499] × $80.19 per hour) + (8 estimated programming hours × $40.24 per hour)); $249.68 to design disclosures required by § 463.4(d) and (e) and inform associates of their obligations to provide these disclosures (8 estimated compliance manager hours × $31.21 per hour); $1,783.56 to cull add-ons with no consumer benefit from offerings, develop policies regarding when certain add-ons may or may not be sold, and create nonmandatory disclosures, in response to the requirements of § 463.5 ((16 estimated compliance manager hours × $31.21 per hour) + (12 estimated sales manager hours × $80.19 per hour) + (8 estimated programmer hours × $40.24 per hour)); and $534.12 to upgrade recordkeeping systems and create the templates necessary to accommodate retention of all relevant material under § 463.6 ((8 estimated programmer hours × $40.24 per hour) + (5 estimated clerical hours × $20.16 per hour) + (1 estimated sales manager hour × $80.19 per hour) + (1 estimated compliance manager hour × $31.21 per hour)). These figures total $3,530.80 per dealer.[500]

The Commission estimates the annual fixed ongoing costs per dealer for the first year under the highest-cost scenario as follows: $390.13 to conduct a heightened compliance review of public-facing representations to ensure compliance with § 463.3 (150 estimated documents per year × 5 estimated minutes of review per document × $31.21 per hour of compliance officer review); and $300 estimated for expanded storage to retain records required under § 463.6. These figures total $690.13 per dealer per year.

The Commission estimates annual ongoing costs that scale with dealer size based on number of employees as follows. The Commission estimates that annual costs that scale with dealer size are $76.86 per employee per year. Annual ongoing costs that scale with dealer size include: $26.53 per employee to provide the total of payments disclosures required by § 463.4(d) and (e) (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + (19,228,256 total covered transactions involving monthly payments or financing × (2/60 estimated disclosure hours per transaction × $28.41 per hour + $0.15 printing costs per disclosure)))/ 1,257,877 total employees); $36.40 per employee for training and the delivery of a disclosure under a regime in which dealers choose to deliver an itemized disclosure to comply with § 463.5 (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + ((10,343,319 new vehicle sales + 21,219,640 used vehicle sales) × (2/60 estimated disclosure hours per sale transaction × $28.41 per hour + $0.11 physical costs per disclosure)))/ 1,257,877 total employees); and $13.93 per employee to generate and store calculations required to be retained under § 463.6 ((31,562,959 vehicle sales × 1/60 estimated hours per transaction × $28.41 per hour/1,257,877 total employees) + (5,444,502 vehicle sales with GAP agreement × 1/60 estimated hours per transaction × $28.41 per hour/ 1,257,877 total employees)).

Next, the Commission uses census data on the average number of employees at dealerships within different dealer size cohorts to determine the per-dealer cost for each dealer cohort.[501] Multiplying the estimated cost per employee ($76.86) by the average number of employees within different dealer size cohorts yields annual ongoing scaled costs per dealer of: $124.59 per dealer with fewer than 5 employees ($76.86 × 1.62 employees); $499.59 per dealer with between 5 and 9 employees ($76.86 × 6.50 employees); $1,058.73 per dealer with between 10 and 19 employees ($76.86 × 13.77 employees); $2,584.18 per dealer with between 20 and 49 employees ($76.86 × 33.62 employees); $5,343.19 per dealer with between 50 and 99 employees ($76.86 × 69.52 employees); $10,784.88 per dealer with between 100 and 249 employees ($76.86 × 140.31 employees); $24,384.79 per dealer with between 250 and 499 employees ($76.86 × 317.25 employees); $44,623.26 per dealer with between 500 and 999 employees ($76.86 × 580.56 employees); and $147,085.08 per dealer with 1,000 or more employees ($76.86 × 1,913.60 employees).

Thus, the total first-year compliance costs based on dealer size are $4,345.51 ($3,530.80 + $690.13 + $124.59) per dealer with fewer than 5 employees; $4,720.51 ($3,530.80 + $690.13 + $499.59) per dealer with between 5 and 9 employees; $5,279.66 ($3,530.80 + $690.13 + $1,058.73) per dealer with between 10 and 19 employees; $6,805.11 ($3,530.80 + $690.13 + $2,584.18) per dealer with between 20 and 49 employees; $9,564.12 ($3,530.80 + $690.13 + $5,343.19) per dealer with between 50 and 99 employees; $15,005.80 ($3,530.80 + $690.13 + $10,784.88) per dealer with between 100 and 249 employees; $28,605.72 ($3,530.80 + $690.13 + $24,384.79) per dealer with between 250 and 499 employees; $48,844.18 ($3,530.80 + $690.13 + $44,623.26) per dealer with between 500 and 999 employees; and $151,306.01 ($3,530.80 + $690.13 + $147,085.08) per dealer with 1,000 or more employees.

To analyze the economic effect of the costs of the Rule by dealer size, the Commission compares per-dealer costs to per-dealer sales, gross margin, and gross margin minus operating expenses. The Commission does not have data on how sales, gross margin, and operating expenses are apportioned to dealerships based on the number of employees. Accordingly, the Commission assumes that sales, gross margin, and operating expenses are apportioned to dealerships *pro rata* with the number of employees. Dividing the 2021 industry-wide figures for annual sales ($1.265 trillion), gross margin ($226.118 billion), and gross margin minus operating expenses ($81.850 billion) by the total number of

[499] As used here, ''pricing hours'' means time spent by a sales and marketing manager reviewing dealership policies and procedures for determining the public-facing prices of vehicles in inventory.

[500] Applicable wage rates throughout this section are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.*

[501] Based on 2021 census data, dealers with fewer than five employees have an average of 1.62 employees (34,616 employees at all dealerships with fewer than five employees/21,356 dealers with fewer than five employees); dealers with 5–9 employees have an average of 6.50 employees (35,794 employees/5,507 dealers); dealers with 10–19 employees have an average of 13.77 employees (52,852 employees/3,837 dealers); dealers with 20–49 employees have an average of 33.62 employees (253,365 employees/7,536 dealers); dealers with 50–99 employees have an average of 69.52 employees (423,351 employees/6,090 dealers); dealers with 100–249 employees have an average of 140.31 employees (386,001 employees/2,751 dealers); dealers with 250–499 employees have an average of 317.25 employees (57,105 employees/180 dealers); dealers with 500–999 employees have an average of 580.56 employees (5,225 employees/9 dealers); and dealers with 1,000 or more employees have an average of 1,913.60 employees (9,568 employees/5 dealers). *See* U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=LFO~001.*

employees (1,257,877),[502] each employee represents an additional $1,005,372.54 in sales ($1.265 trillion/1,257,877 employees), $179,761.61 in gross margin ($226.118 billion/1,257,877 employees), and $65,069.96 in gross margin minus operating expenses ($81.850 billion/1,257,877 employees). Multiplying these per-employee figures by the average number of employees of dealers within different size cohorts provides per-dealer sales, gross margin, and gross margin minus operating expenses for each cohort. For instance, dealers with fewer than 5 employees have estimated annual sales of $1,629,611.16 (1.62 employees × $1,005,372.54 sales per employee), annual gross margin of $291,376.10 (1.62 employees × $179,761.61 gross margin per employee), and annual per-dealer gross margin minus operating expenses of $105,472.17 (1.62 employees × $65,069.96 gross margin minus operating expenses per employee).

The Commission then divides first-year compliance costs by these figures to yield cost as a percentage of sales, gross margin, and gross margin minus operating costs. Applying this method to each of the dealer size cohorts, first-year compliance costs are equivalent to: 0.27% of annual sales ($4,345.51/$1,629,611.16), 1.49% of gross margin ($4,345.51/$291,376.10), and 4.12% of gross margin minus operating expenses ($4,345.51/$105,472.07) for dealers with fewer than 5 employees; 0.07% of annual sales ($4,720.51/$6,534,647.69), 0.40% of gross margin ($4,720.51/$1,168,401.53), and 1.12% of gross margin minus operating expenses ($4,720.51/$422,936.98) for dealers with 5–9 employees; 0.04% of annual sales ($5,279.66/$13,848,305.89), 0.21% of gross margin ($5,279.66/$2,476,090.91), and 0.59% of gross margin minus operating expenses ($5,279.66/$896,293.27) for dealers with 10–19 employees; and less than one-half of one percent of the annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

(2) Costs in subsequent years. The estimated cost of compliance with the Rule drops after the first year, given the absence of upfront costs, which are not incurred after the first year. Compliance costs in subsequent years—which are limited to annual ongoing costs (both fixed and those that scale with dealer size)—are therefore a smaller percentage of annual sales, gross margin, and gross margin minus operating expenses, equal to less than two percent of these metrics for dealers of all sizes.[503]

The Commission does not find that these compliance costs represent a significant economic burden. The Commission therefore certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

B. Initial and Final Regulatory Flexibility Analysis

The NPRM noted the Commission's belief that the proposed rule would not have a significant economic impact on small entities, but nevertheless examined the six IRFA factors, and invited comment on the proposed rule's burdens on small businesses. In the following paragraphs, the Commission discusses comments and then sets forth a FRFA.

1. Comments on the Initial Regulatory Flexibility Analysis

(a) Description of the Reasons Why Action by the Agency Is Being Considered

The IRFA explained that the Commission proposed the Rule to address misleading practices and unauthorized charges to consumers during the vehicle buying or leasing process, and to deter dealer misconduct and remedy consumer harm. The Commission further noted that its law enforcement, outreach and other engagement in this area, and the hundreds of thousands of consumer complaints received by the FTC, indicated that dealership misconduct and deceptive tactics persisted despite Federal and State law enforcement efforts. In response, the comments from SBA Advocacy and one industry group argued that the number of complaints received by the Commission is insufficient to support a rulemaking given the total number of vehicle transactions in the United States.[504] Similarly, the industry group argued that the Commission has not filed enough law enforcement actions against motor vehicle dealers to justify the proposal, and that, where it has brought enforcement actions, the Commission has managed to obtain redress for harmed consumers without the need for an additional monetary remedy. As explained in SBP II.B and in the section-by-section analysis of the recordkeeping requirements in § 463.6 in SBP III.F,

[502] Data on the number of employees comes from the 2021 census. *See* U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.*

[503] Average ongoing compliance costs after the first year equal: 0.05% of annual sales, 0.28% of gross margin, and 0.77% of gross margin minus operating expenses for dealers with fewer than 5 employees, and less than one-half of one percent of annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

[504] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 6. SBA Advocacy also raised concerns that the proposal could make the buying process more cumbersome and confusing, noting that the proposal requires additional disclosures, and the proposal prohibited dealers from relying on a signed or initialed document, by itself, or prechecked boxes to establish express, informed consent. These arguments are addressed in the discussion of disclosures in §§ 463.4, 463.5 and the definition of ''Express, Informed Consent'' in § 463.2.

The industry group also argued that the number of complaints is overstated because it includes: (1) complaints that are not applicable to motor vehicle dealers or conduct addressed by the Rule, and (2) consumers who did not report a loss. This industry group also argued that the Commission failed to take notice of survey data indicating that the majority of consumers are satisfied with their vehicle purchases. *See, e.g.,* Cox Auto., ''2021 Cox Automotive Car Buyer Journey Study'' (2022) [hereinafter 2021 Cox Automotive Car Buyer Journey Study], *https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf.* First, in the Commission's experience, complaints *understate* harm caused by unlawful conduct in a given category, notwithstanding any inclusion of complaints that may pertain to ancillary or related issues. *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm and citing case where prior to FTC action, there were 391 complaints about add-ons *and other issues* but survey results during the same period indicted that at least 16,848 customers were subject to unlawful practices related to add-ons alone). Moreover, the Commission's reported complaint numbers may be underinclusive of relevant complaints filed by consumers (*e.g.,* complaints about vehicle financing issues may be filed under the ''Banks and Lenders'' category; vehicle repossession issues may be filed under the ''Debt Collection'' category; and complaints about deceptive online vehicle shopping may be filed under the ''Online Shopping and Negative Reviews'' category). With regard to consumers who did not report a loss, the Commission disagrees that such consumers were not harmed or that their experience is not relevant to the Rule. For example, many consumers experience a law violation or other harmful conduct, but choose not to consummate the transaction, including consumers who waste time pursuing misleading offers. Further, survey data indicating that a majority of customers are ''satisfied'' do not indicate whether those customers had hidden charges in their contracts and whether they ever became aware of such charges. Surveys cited by the Commission have identified situations where customers are unaware of add-on charges in their contracts; indeed, in one case, 79% of consumers were unaware of such charges. *See* SBP II.B (discussing hidden charges in auto contracts). Consumers might be satisfied with a purchase until they later learn they are paying for items they did not authorize, if they learn this at all. Further, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense . . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

consumer complaints represent the ''tip of the iceberg'' of actual misconduct, as many unlawful practices go undetected or unreported by consumers. Further, the Commission has taken significant action aimed at addressing law violations in the motor vehicle dealer marketplace, despite limited resources and a broad mandate to address unlawful practices across much of the nation's commercial activity,[505] and, particularly given the Supreme Court's 2021 ruling limiting the FTC's ability to obtain redress for consumers, it is difficult to get full redress for consumers.[506] Despite these Commission actions, as well as the hundreds of additional actions brought by other Federal and State regulators, the deceptive or unfair acts or practices addressed by the proposed rule persist.

(b) Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objectives of the Rule and its legal basis, including the specific grant of rulemaking authority under section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519, were set forth in the IRFA.[507] The objectives and legal basis, and comments on these topics, additionally have been discussed throughout this SBP.

(c) Description of and, Where Feasible, Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

In its IRFA, the Commission estimated that there were approximately 46,525 franchise, new motor vehicle, and independent/used motor vehicle dealers.[508] As discussed in the Paperwork Reduction Act analysis in SBP III.V, the Commission received comments from SBA Advocacy and others on this estimate, and the Commission has responded to those comments by making certain changes to the proposal in light of the comments received. The Commission has revised its estimate of covered dealers to 47,271 franchise, new motor vehicle, and independent/used motor vehicle dealers based on newly available NAICS data assembled by the U.S. Census Bureau.[509]

Regarding the estimate of the number of small entities affected by the Final Rule, as noted in the Certification of the Final Rule,[510] while the Commission cannot determine the precise number of small entities, the data the Commission does have reinforce the Commission's initial view that most covered entities are small entities.

(d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

An industry association commenter argued that the Commission did not ''accurately'' lay out the proposed rule's projected requirements. The commenter did not provide an explanation of what it alleged to be inaccurate in the Commission's description. This comment notwithstanding, the NPRM described the proposed rule's projected requirements, including by elaborating on the proposed recordkeeping requirements and providing estimates regarding the anticipated recordkeeping time and resource obligations for programmers, clerical staff, sales managers, and compliance officers.[511] The NPRM also provided a detailed description of the recordkeeping requirements for entities to be covered by the Rule.[512]

(e) Duplicative, Overlapping, or Conflicting Federal Rules

An industry association commenter argued that the Commission failed to identify relevant Federal rules that may duplicate, overlap, or conflict with the proposal. This commenter's arguments that the proposed rule conflicts with Federal statutes are addressed in the section-by-section analysis in SBP III. Commenters provided no examples of actual conflicts between the proposals and Federal law. Further, there is no evidence that duplicative laws prohibiting misrepresentations or unfair acts or practices have harmed consumers or competition. Moreover, the additional remedies provided by the Final Rule will benefit consumers who encounter conduct that is already illegal and will assist law-abiding dealers that presently lose business to competitors that act unlawfully.

(f) Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Statutory examples of ''significant alternatives'' include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the Rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the Rule, or any part thereof, for small entities.[513] Comments from SBA Advocacy and from a national industry association argued that the Commission did not set forth alternatives to the proposed rule.[514]

In its Regulatory Flexibility Act compliance guidance to Federal agencies, the SBA Office of Advocacy provides that, ''[i]f an agency is unable to analyze small business alternatives separately, then alternatives that reduce the impact for businesses of all sizes must be considered.'' [515] As the

[505] One industry group argued that the majority of the FTC's enforcement actions have pertained to deceptive advertising, and few have alleged unlawful conduct involving add-ons. The Commission agrees that many of its actions have alleged deceptive pricing. In focusing on certain actions that involved allegations that dealers placed unauthorized charges for add-ons, however, the commenter leaves out other unlawful conduct related to add-ons. Such conduct includes, for example, misrepresentations regarding the pricing of add-ons (Complaint ¶¶ 6–12, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015)), or failing to disclose that mandatory add-ons were included in the cost of credit (Consent Order ¶¶ 73–75, *Y King S Corp.,* CFPB No. 2016–CFPB–0001 (Jan. 21, 2016)). In addition, unauthorized charges are likely to go unnoticed by consumers, which can hamper enforcement efforts. *See, e.g.,* Auto Buyer Study, *supra* note 25, at 14 (describing several study participants who thought they had not purchased add-ons, or that add-ons were free, and only learned during the study that they were charged for add-ons).

[506] *See AMG Cap. Mgmt., LLC* v. *Fed. Trade Comm'n,* 141 S. Ct. 1341 (2021).

[507] NPRM at 42035.

[508] *Id.* at 42035. The Commission explained that, because of the relative size of the automobile market compared to other types of motor vehicle dealers, and the greater availability of relevant information for this market, its NPRM analysis exclusively considered automobile dealers. The Commission invited submissions of market information for other types of motor vehicles such as boats, RVs, and motorcycles that would allow expansion of the scope of its analysis. *See* NPRM at 42035–36.

[509] U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001* (listing 21,622 establishments for ''[n]ew car dealers,'' NAICS code 44111, and 25,649 establishments for ''[u]sed car dealers,'' NAICS code 44112).

[510] *See* SBP VI.A.2.

[511] NPRM at 42035; *see also id.* at 42033–34 (describing recordkeeping requirements and analyzing cost burden). To avoid duplicative or unnecessary analysis, the information required by the IRFA can be provided with or as part of any other analysis required by any other law. 5 U.S.C. 605(a).

[512] *See* NPRM at 42027, 42035 (enumerating records to be retained and time period for retention).

[513] *See* 5 U.S.C. 603(c)(1)–(4).

[514] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664.

[515] Off. of Advoc., U.S. Small Bus. Admin., ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' 39 (2017), *https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf.*

Commission explained in its NPRM, it ''envisioned and drafted this Rule mindful that most motor vehicle dealers are small entities,'' and drafted its proposal in the first instance to minimize economic impact on all motor vehicle dealers.[516] For example, the Rule prohibits conduct that already violates the FTC Act, but still takes steps to minimize burdens for dealers of all sizes, by, for example, allowing records to be kept in any legible form already kept in the ordinary course of business, and by limiting recordkeeping requirements to twenty-four months from the date the record is created despite the fact that motor vehicle financing terms are generally years longer than this period. Commenters generally appear to understand the relevant market in a similar manner. For instance, the possible alternatives raised by the comment from SBA Advocacy would apply uniformly to both large and small businesses. These alternatives included excluding vehicle dealers that do not sell automobiles, regardless of the size of the dealer, and creating a carve-out for banks and other financing companies that would cover multi-billion dollar institutions.[517] Comments from SBA Advocacy and a national industry association also discussed the proposed rule's disclosure requirements in an industry-wide manner, not limiting their comments to businesses under any particular size threshold.[518] Nevertheless, the Commission has reviewed these comments carefully, has responded to comments on alternatives in the corresponding sections of its section-by-section analysis, and has determined to modify the definition of ''Covered Motor Vehicle'' at § 463.2(e) and not to finalize the requirements proposed in §§ 463.4(b) and 463.5(b).[519]

2. Final Regulatory Flexibility Analysis

Although the Commission is certifying that the Rule will not have a significant economic impact on a substantial number of small entities, the Commission has prepared the following FRFA with this Final Rule. In the following paragraphs, the Commission provides the information required for a FRFA: (1) a statement of the need for, and objectives of, the Rule; (2) a statement of the significant issues raised by public comments in response to the IRFA, including any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, the Commission's assessment and response, and any resulting changes; (3) a description of and an estimate of the number of small entities to which the Rule will apply or an explanation of why no such estimate is available; (4) a description of the projected reporting, recordkeeping, and other compliance requirements; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a discussion of any significant alternatives for small entities.[520]

(a) Statement of the Need for, and Objectives of, the Rule

The FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. As detailed in SBP II.B.1, these deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership, and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law enforcement, outreach and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

(b) Issues Raised by Comments, Including Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The comments regarding the IRFA are addressed in SBP VI.B, and the comments regarding the other provisions of the NPRM are discussed in the SBP's section-by-section analysis in SBP III. As noted, the Commission has made certain changes to the Rule after carefully reviewing the comments. These changes include modification of the definition of ''Covered Motor Vehicle'' at § 463.2(e), removal of the add-on list disclosure requirement in proposed § 463.4(b) and the requirements in proposed § 463.5(b), and removal of the corresponding recordkeeping requirements in proposed § 463.6(a)(2) and (a)(4).

(c) Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply or an Explanation of Why No Such Estimate Is Available

The Final Rule applies to covered motor vehicle dealers, as defined in § 463.2(f), of covered motor vehicles at § 463.2(e): ''any self-propelled vehicle designed for transporting persons or property on a public street, highway, or

[516] NPRM at 42036–37; *see also id.* at 42029–30 (indicating, in Questions for Comment 26.b, 28.a, & 30 that the Commission was considering alternative approaches).

[517] *See* Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 4–6. As addressed in SBP III.C.2(a) and SBP III.E.2(c), in responding to a similar comment by financial institutions, the Final Rule does not change the status quo regarding the responsibilities of contract assignees or other subsequent holders of motor vehicle financing under the Holder Rule, and the Commission declines to create a safe harbor for contract assignees where it did not previously exist.

Similarly, one comment recommended that the Commission add a rule provision authorizing an alternative compliance mechanism, stating that such a provision would aid not just smaller entities but larger entities as well. Under this alternative mechanism, independent accountability organizations could apply to the Commission for authorization to review and assess auto dealers' adherence to a set of rule compliance guidelines that would be created. *See* Comment of BBB Nat'l Programs, Doc. No. FTC–2022–0046–8452 at 1–3. This comment suggested that such an alternative compliance mechanism would have several benefits, including educating industry participants and allowing for industry oversight beyond the capacity of the FTC. The Commission agrees with the goals of educating stakeholders and maximizing resources used to ensure compliance with the Rule but notes that these goals can be furthered without adding alternate mechanisms with as-yet unknown guidelines, that may or may not be sufficient to protect consumers, to the Rule that the Commission is finalizing. The Commission notes that the Rule finalizes certain baseline protections that should already be in place under the law. The Commission encourages stakeholders, such as auto dealer trade associations, BBB, and others, to educate their members and the public about the Rule and encourage compliance, as such groups have done when issuing guidance on other aspects of the law.

[518] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 5–6; *see generally* Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368. The National Automobile Dealers Association also argues that the Commission should have considered whether to do a rule in the first instance. The NPRM provides a detailed explanation of why, more than a decade after Congress granted the FTC APA rulemaking authority with respect to motor vehicle dealers, and continued enforcement, outreach, and other initiatives, a rule is needed to address ongoing problems related to bait-and-switch tactics and hidden charges.

[519] Separately, the Commission notes that the NPRM identified and solicited comments on alternatives to every substantive requirement, including the areas specifically addressed by the commenters. *See, e.g.,* NPRM at 42028–30 (Q4–7, Q10, Q16, Q28, Q33, Q36–38); *id.* at 42040–41.

[520] 5 U.S.C. 604(a)(1)-(6).

road,'' and, in light of comments received, excludes specific categories as detailed in § 463.2(e).[521] As explained in the Certification,[522] the Commission cannot determine the precise number of small entities to which the Final Rule applies, but census data indicate that the vast majority of the estimated 47,271 dealers covered by the Rule are small entities according to the applicable U.S. Small Business Administrator's relevant size standards.

(d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Final Rule prohibits certain unfair or deceptive acts or practices and contains recordkeeping requirements. The Final Rule contains no reporting requirements.

The Final Rule requires covered motor vehicle dealers to clearly and conspicuously disclose the offering price of a vehicle in certain advertisements and in response to consumer communications. It also requires dealers to make certain other disclosures during the sale, financing, or leasing process. To enforce the Rule and prevent the unfair or deceptive practices prohibited by the Rule, the Rule further requires dealers to retain records necessary to demonstrate compliance with the Rule. Such records include advertising materials and copies of purchase orders and financing and lease documents. The Rule requires such records to be retained for a period of twenty-four months from the date they are created and provides that they may be kept in any legible form, and in the same manner, format, or place as they may already be kept in the ordinary course of business. Further details on these provisions are discussed throughout this SBP, including in the section-by-section analysis of the recordkeeping requirements in § 463.6, as well as in the preceding Paperwork Reduction Act analysis.

(e) Description of the Steps the Commission Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The Final Rule addresses certain unfair or deceptive acts or practices in motor vehicle sales, financing, and leasing. In drafting its NPRM, reviewing public comments, and modifying the Rule from its original proposal, the Commission has taken specific steps to avoid unduly burdensome requirements for small entities. The Commission believes that the Final Rule—including the prohibitions against making specific misrepresentations and against charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge—is necessary to protect consumers, including small-business consumers that purchase, finance, or lease motor vehicles. By addressing these practices, the Rule also will benefit competition by preventing law-abiding dealers, many of which are small businesses, from losing business due to unlawful practices by other dealers.

For each provision in the Rule, the Commission has attempted to reduce the burden on businesses, including small entities. For example, the Commission limited the number of disclosures that dealers are required to make under the Final Rule, and in response to comments, further limited such disclosures by determining not to finalize the disclosures in proposed §§ 463.4(b) and 463.5(b). Similarly, the Commission has limited the duration of the Rule's recordkeeping requirements to twenty-four months from the date the relevant record is created, even though this period is far shorter than the length of many financing contracts.

As previously noted, the Commission does not believe the Final Rule imposes a significant economic impact on a substantial number of small entities. Nonetheless, the Commission has taken care to avoid extensive requirements related to form. For example, the Commission does not specify the form in which records required by the Final Rule must be kept. Moreover, the Rule's disclosure requirements do not mandate specific font sizes. In sum, the Commission has worked to minimize any significant economic impact on small businesses.

VII. Final Regulatory Analysis Under Section 22 of the FTC Act

A. Introduction

The Federal Trade Commission (FTC) is finalizing a Rule to address unfair or deceptive acts or practices by covered motor vehicle dealers when engaging with consumers who are shopping for covered motor vehicles. The Rule contains several provisions targeted at addressing price-related deception and unfairness for consumers with respect to purchasing, leasing, and financing new and used motor vehicles. The Final Rule prohibits misrepresentations regarding material information about certain aspects of motor vehicles and motor vehicle financing. The Final Rule also mandates certain disclosures about vehicle price, payments, and add-ons, while prohibiting charges for add-on products and services that would not benefit the consumer or for any item unless the dealer obtains the express, informed consent of the consumer for the charge.

Section 22 of the FTC Act, 15 U.S.C. 57b–3, requires the Commission to issue a final regulatory analysis when publishing a final rule. The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

As discussed previously, the FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. These deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership; and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law enforcement, outreach, and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

In response to public comments, the Commission considered and made a number of revisions from the proposed

[521] The Commission is authorized to prescribe rules with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, as defined in 12 U.S.C. 5519(a).

[522] *See* SBP VI.A.2.

rule, which in turn have necessitated revisions to the regulatory analysis, resulting in this final regulatory analysis.[523] The most significant revisions to the proposed rule impacting the regulatory analysis are the removal of proposed §§ 463.4(b) (requiring the disclosure of add-on lists) and 463.5(b) (requiring various itemized disclosures relating to undisclosed or unselected add-ons). As a result of the Commission's determination not to finalize these sections of the proposed rule, costs and benefits associated with those provisions have been excluded from the final regulatory analysis. The Commission also has made revisions in response to public comments, the availability of newer data, the identification of additional relevant data, and the application of newer scholarly research. The final regulatory analysis thus builds upon the preliminary regulatory analysis, while incorporating several updates:

- The analysis of consumer time savings has been revised in response to public comments and changes following the NPRM.
- A section quantifying the reduction in deadweight loss resulting from the Rule has been added, based upon recent research that allows the Commission to quantify both how dealer markups will respond to price transparency and how new and used vehicle quantities will respond to changes in price.
- Training costs have been added for some provisions in response to public comments.
- Information systems costs have been added to the Recordkeeping section in response to public comments, based on estimates of how much data would be required and the cost of cloud or on-premises data storage.
- Wages used to monetize labor costs have been updated to reflect new data from the Bureau of Labor Statistics.
- The number of dealers has been updated to reflect new data from Census County Business Patterns.
- The number of transactions subject to the Rule has been revised in response to public comments, and the Commission's identification of additional data sources that can be used to exclude private party and fleet transactions.

The Final Rule contains requirements in the following areas:

1. Prohibited misrepresentations;
2. Required disclosure of offering price in certain advertisements and in response to inquiry;
3. Required disclosure of total of payments for financing and leasing transactions;
4. Prohibition on charging for add-ons in certain circumstances;
5. Requirement to obtain express, informed consent before any charges; and
6. Recordkeeping.

In the following analysis, we describe the anticipated impacts of the Final Rule. Where possible, we quantify the benefits and costs and present them separately by provision. If a benefit or cost is quantified, we indicate the sources of the data relied upon. If an assumption is needed, the text makes clear which quantities are being assumed.

A period of 10 years is used in the baseline scenario because FTC rules are generally subject to review every 10 years.[524] Quantifiable aggregate benefits and costs across three different sets of assumptions are summarized as the net present value over this 10-year time frame in Table 1.1. Quantifiable benefits include time savings from a more efficient shopping and sales process and a reduction in deadweight loss, both of which ultimately result from greater transparency under the Rule. Quantifiable costs primarily reflect the resources expended by automobile dealers in developing the systems necessary to comply with the provisions of the Rule. In addition, we expect additional benefits and costs that we are presently unable to quantify. Among the unquantified benefits are time savings that accrue to individuals who abandon vehicle transactions entirely; additional time savings on activities that individuals engage in digitally under the status quo; reductions in deadweight loss resulting from direct price effects in the markets for used vehicles or vehicle add-ons; and the benefit of reduced stress, discomfort, and unpleasantness experienced by motor vehicle consumers under the status quo. Among the unquantified costs would be any potential reductions in consumer information resulting from changes in dealers' policies regarding marketing and advertisements. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor a number of times equal to the number of years in the future the net benefit accrues.[525]

TABLE 1.1—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Benefits:						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	568	468	1,298	1,069	2,307	1,899
Total Benefits	8,031	6,613	16,224	13,359	26,343	21,690
Costs:						
Finance/Lease Total of Payments Disclosure	296	246	296	246	117	98
Offering Price Disclosure	46	46	46	46	0	0
Prohibition re: Certain Add-ons & Express, Informed Consent	475	406	475	406	147	128

[523] These revisions and alternatives the Commission considered are described in detail in the Commission's Statement of Basis and Purpose, as is the Commission's explanation why the Final Rule will attain its objectives in a manner consistent with applicable law.

[524] *See* Fed. Trade Comm'n, Notification of Intent to Request Public Comment, Regulatory Review Schedule, 87 FR 47947 (Aug. 5, 2022), *https://www.govinfo.gov/content/pkg/FR-2022-08-05/pdf/2022-16863.pdf.*

[525] While whole calendar years are used here for ease of reference, this analysis estimates costs and benefits over a ten-year period running from the Rule's effective date. For the purposes of discounting, the Commission assumes that any upfront costs or benefits occur immediately upon the effective date of the Rule and are therefore not discounted. The Commission further assumes that ongoing costs and benefits occur at the end of each period, such that even ongoing costs/benefits that occur in year 1 are discounted.

TABLE 1.1—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033—Continued

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Prohibition on Misrepresentations	157	130	157	130	0	0
Recordkeeping	296	248	296	248	296	248
Total Costs	1,270	1,075	1,270	1,075	559	474
Net Benefits	6,761	5,538	14,954	12,284	25,784	21,216

Note: ''Low Estimate'' reflects all lowest benefit estimates and high cost scenarios and ''High Estimate'' reflects all highest benefit estimates and low cost scenarios. ''Base Case'' reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

B. Estimated Benefits of Final Rule

In this section, we describe the beneficial impacts of the Rule, by (1) providing quantitative estimates where possible, (2) identifying quantitative benefits that cannot be estimated at this time due to a lack of data, and (3) describing benefits that can only be assessed qualitatively. The benefits cut across multiple areas addressed by the Rule and these benefits are impossible to identify separately by area. As a result, we enumerate the benefits of the Rule not by provision, but by category.

1. Consumer Time Savings When Shopping for Motor Vehicles

Several provisions of the Rule would benefit consumers by saving them time as they complete motor vehicle transactions. Required disclosures of relevant prices and prohibitions of misrepresentations, *inter alia,* would save consumers time when shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time spent pursuing misleading offers. The Commission's enforcement record shows that consumer search and shopping is sometimes influenced by unfair or deceptive advertising that draws consumers to a dealership in pursuit of an advertised deal, only to find out at some point later in the process (if at all) that the advertised deal is not actually available to them.[526] This bait-and-switch advertising has the effect of wasting consumers' time traveling to and negotiating with unscrupulous dealerships, time which would otherwise be spent pursuing truthful offers in the absence of deception and unfairness. If consumers are faced with hard constraints on their time or other resources, this wasted time may mean that they are unable to find the deal that best fits their needs and preferences. Additionally, motor vehicle consumers frequently begin the process of shopping for a motor vehicle (*e.g.,* by visiting a dealership in response to an ad or initiating negotiations in response to a quoted price that is incomplete) and then later abandon the nascent transaction entirely when additional information is revealed. In these instances, consumers do not purchase or lease a vehicle at all. The Rule would also save consumers time by avoiding these abandoned transactions. However, because the Commission has been unable to identify data to determine the quantity of such abandoned transactions and the amount of time spent pursuing them, this benefit remains unquantified in the analysis.

Obviously, many consumers end up purchasing and leasing vehicles under the status quo—either because full revelation of prices and terms still results in a mutually beneficial transaction or because full revelation never occurs and consumers are deceived into completing a transaction that is not mutually beneficial. These consumers also spend additional, unnecessary time discovering information that dealers would be required to disclose earlier once the Rule is in effect. The Commission expects the Rule's required disclosures and prohibitions against misrepresentations to improve information flows and consumer search efficiency, including but not limited to, addressing the influence of deception and unfairness on consumer search and shopping behavior.

The Commission's preliminary analysis estimated that the proposed rule would allow consumers to spend 3 fewer hours completing each motor vehicle transaction and result in (quantifiable) overall time savings valued at between $30 billion and $35 billion. In this final regulatory analysis, the Commission takes into account the effects of revisions to the proposed rule and additional data, addresses industry comments, and employs an alternative analytical approach with a sensitivity analysis. This sensitivity analysis reflects a ''high-end'' estimate that consumers will save as many as 3.3 hours per completed transaction; a ''base case'' estimate—representing the most likely scenario—that consumers will save 2.05 hours per transaction; and a possible ''low-end'' savings estimate of 1.02 hours. Using a 7% discount rate, these time savings estimates result in a range of between $6.1 billion and $19.8 billion in total savings, with a base case of $12.3 billion.

In its preliminary analysis, the Commission relied on results from the 2020 Cox Automotive Car Buyer Journey study, which showed that consumers spent roughly 15 hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[527] Based on the proposed rule provisions prohibiting misrepresentations and requiring price transparency, the Commission assumed each consumer who consummated a vehicle transaction would spend 3 fewer hours shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees. The 3 hours corresponded to 20% of an average consumer's time spent on such activities in 2019 (pre-COVID).

The Commission received a number of comments emphasizing the unnecessary time consumers must spend to ascertain the price and terms when attempting to consummate a vehicle transaction. One group of commenters, for example, asserted that ''[t]he most important factor for consumers purchasing a vehicle is its price, yet the price is almost impossible to ascertain without spending hours at the dealership.'' [528] Another group of commenters provided a compilation of numerous consumer complaints, including many that described consumers spending hours at a

[526] *See* SBP II.B–C.

[527] NPRM at 42037 & n.180.

[528] Comment of Am. for Fin. Reform et al., Doc. No. FTC–2022–0046–7607.

dealership trying to ascertain the final price and terms of the transaction.[529] The improved information flow under the Final Rule will provide quantifiable benefits for consumers by reducing or eliminating this unnecessary need to spend time penetrating opaque pricing and terms, and will provide qualitative benefits by reducing frustration and stress in the car buying process.

Some industry commenters questioned the appropriateness of the data and assumptions used to quantify the time savings benefit. A number of industry association commenters argued that the 15-hour figure did not represent a reasonable base from which time savings attributable to the Rule could be derived. One such commenter criticism asserted that the publication from which it was sourced only surveyed consumers who used the internet during research and shopping and therefore could not be representative of the time spent by consumers who do not use the internet. Still other commenters noted that additional data from the same organization were available. The Commission disagrees that the 15-hour estimate is an unreasonable base from which to derive time savings from the Rule. While the Cox Automotive Study acknowledges only internet users were surveyed, the study also indicates its ''[r]esults are weighted to be representative of the buyer population.'' [530] Also, while more recent data were available at the time of the analysis for the NPRM, those data were from an extraordinary period (the COVID–19 pandemic). The Commission expects that the data used for the preliminary analysis are more representative of consumer experiences over the analysis window than the more recent data. While not dispositive, the limited data available since the NPRM was published bears this hypothesis out. In the 2021 Cox Automotive Car Buyer Journey Study, consumers spent roughly 12-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[531] In contrast, in the 2022 Car Buyer Journey study, consumers spent roughly 14-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[532] This admittedly short trend suggests that the COVID–19 pandemic had a significant effect on motor vehicle shopping, reducing the amount of time the typical consumer spent on these activities, and that time spent on these activities has already rebounded to previous levels.[533]

Another industry association commenter suggested that the figure included categories of time use that could not conceivably be affected by the proposed rule, such as online research into vehicle features, and that attention should be restricted to time spent shopping. The Commission finds that several provisions in the Rule clearly have the potential to reduce time spent across most categories covered by the 15-hour figure, including the largest category (''Researching and Shopping Online''). This category of time use would include comparing listed vehicle prices across dealerships that, under the Rule, would be transparent and comparable in a way that they were not in the status quo, thus saving consumers time.

Some commenters also noted that the total base of transactions reported in the preliminary analysis appeared to overstate the number of transactions to which the proposed rule would apply. First, commenters asserted that the 62.1 million transactions double-counted new vehicle leases in the data source from which it was obtained (2019 National Transportation Statistics, Table 1–17). Second, commenters asserted that the number included private party transactions that would be entirely unaffected by the proposed rule. Finally, commenters argued that the transactions number contained wholesale and fleet transactions, where the amount of time spent researching, shopping, and visiting dealers is likely to be substantially different relative to a household consumer.

The Commission has verified that the source data were revised to fix the erroneous double-counting of leases between the time they were accessed by the Commission for the drafting of the preliminary analysis and the time that comments were received. The final analysis uses the revised data. In addition, in response to comments that private party transactions should be excluded from the analysis, the Commission is revising its analysis. Additional data would be necessary to quantify any time savings benefits for wholesale and fleet transactions. Accordingly, the Commission has excluded all transactions occurring through non-retail channels from the final analysis.[534]

A number of comments raised concerns about the foundations of the 3-hour time-savings assumption. One industry organization noted that the Cox Automotive study cited in the NPRM does not itself address the proposals in the NPRM (which the survey, of course, predated) and does not estimate time savings.[535] Another organization

[529] Comment of Consumer Reps. et al., Doc. No. FTC–2022–0046–7520 at 3, 11, 12, 16, 38 (including story from Illinois consumer describing ''[spending] about 4 hours at the dealership while the salesman kept changing the terms of the deal . . . .''; story from Connecticut consumer describing how, ''[a]fter nearly three hours of paperwork . . . I was finally presented with the official bill to pay the balance. The price was now higher than the original adjusted sticker.''; story from New Jersey consumer describing how, ''[a]fter 4 hours of negotiations . . . I finally got nearly the same price as the verified offer [for the vehicle] but about $1000 less on my trade-in[ ] (that was also part of the verified offer). The [dealer] also added on Accessories 'other products' [of] $474.00 . . . .''; story from Texas consumer describing how ''[t]he [dealership] finance manager kept me there for two hours, and said the deal was done. I went to get my wife, when we got back the price had gone up $3,000.00.'').

[530] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 1.

[531] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16.

[532] *See* 2022 Car Buyer Journey, *supra* note 25, at 6.

[533] Interestingly, consumer satisfaction with the car buying process, as measured by this same survey, was highest during the COVID–19 pandemic when the time spent on research, shopping, and visiting dealerships was lowest, and has since dropped back to pre-pandemic levels. 2022 Car Buyer Journey, *supra* note 25, at 5.

[534] When the transaction volume from the preliminary analysis is applied to the Commission's current methodology and sensitivity analysis, time savings under the Final Rule ranges from a high-end of $35 billion to a low-end of $11 billion, with a base case of $22 billion (assuming a 7% discount rate). In comparison, the preliminary analysis computed savings under the proposed rule as approximately $31 billion (also assuming a 7% discount rate). The residual difference in base case savings is attributable to less time saved per transaction—partially explained by additional provisions in the NPRM that the Commission is not finalizing—as well as updates to the underlying wages used to monetize the consumer time savings.

[535] This same organization commissioned a study that was recently released asserting the proposed rule would lead to an increase in consumer transaction time. This survey, however, had numerous methodological shortcomings rendering its results unreliable. For example, the survey presented each respondent at the outset with a leading statement telling them the rule would impose ''new duties [that] are expected to create additional monitoring, training, forms, and compliance review responsibilities as well as a modification of record keeping systems and coordination with outside IT and other vendors'' and ''increase the time of a motor vehicle transaction, inhibit online sales, limit price disclosures, and increase customer confusion and frustration.'' Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022–14214), CFR part 463'' 34–36 (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf* (introductory instructions on the survey instrument sent to respondents). Moreover, the survey started with a sample size of 60 dealers (*id.* at 7) in an industry with an estimated 46,525 dealers, NPRM at 42,031 & n.154, but only 40 dealers actually completed responses to many key questions (*id.* at 29). The survey does not describe how these 40–60 dealers were chosen. Although the survey estimates that the proposed rule would require consumers to spend additional time on motor vehicle transactions, this conclusion is based on the responses of just 40 dealers and included no consumers. *Id.* at 29–32. Moreover, the survey report attributed much of this estimated increase to

Continued

expressed confusion as to whether the assumption was intended as a flat 3-hour time savings or a 20% time savings, asserting that dynamism in automotive retailing will likely lead to evolution in the total amount of time spent shopping.

While the Commission believes its 3-hour time-saving assumption in the NPRM remains reasonable, the Commission has conducted additional analyses, the results of which demonstrate the positive net benefits of the Rule even when applying more conservative assumptions around time savings and adjusting for the removal of certain proposed provisions from the NPRM.[536] Using recent figures from Cox Automotive's Car Buyer Journey 2019 study, the Commission notes that consumers who do various activities in the vehicle buying process digitally (''digital consumers'') save time at the dealership relative to those who do not (''non-digital consumers'').[537] The Commission's revised base case time savings calculation assumes that only the fraction of consumers who are not currently shopping digitally will experience time savings, and that these savings will be proportional to the time savings found in the Car Buyer Journey 2019 study for digital consumers.[538] Because the Commission expects the provisions of the Rule to emulate some of the time-saving features of completing these activities digitally, the time savings benefits of the Rule are assumed to be a proportion of the time saved by status quo digital consumers, with the proportion determined by how closely the status quo digital shopping experience is expected to resemble the shopping experience for all consumers once the Rule is in effect. Additionally, because these numbers only reflect time saved at the dealership of purchase, we assume that these same consumers will also save time on these activities to the extent that they are initiated at dealerships visited prior to the dealership at which they purchase (''non-purchase dealerships''). Based on 2020 data from Cox Automotive, the average consumer visits 1 non-purchase dealership for each transaction.[539] Table 2.1 documents both the fraction of consumers performing activities digitally under the status quo and the time saved at the dealership by these consumers on each activity.

TABLE 2.1—COMPLETING ACTIVITIES DIGITALLY

Activity	% of Consumers digital (2020 digitization)	Time saved at dealership (2019 journey) (minutes)
Negotiating the Purchase Price	20	43
Select F&I Add-Ons	18	33
Discussing and Signing Paperwork	13	45
Get a Trade-In Offer	31	26

Source: Car Buyer Journey 2019 and Digitization of End-to-End Retail.

Based on the description of these activities and the anticipated effects of the Rule, our base case estimates assume that non-digital consumers will save an amount of time negotiating a vehicle purchase price equal to the amount of time saved by those negotiating purchase price digitally under the status quo (43 minutes). For non-digital consumers, it is currently time-consuming to obtain comparable price quotes from dealerships. Many dealerships will not initiate price negotiations in earnest without a competing price quote in writing, which can only be obtained by visiting a dealership for the non-digital consumer. Mandating offering price disclosures—which are comparable across dealerships by definition—early in the shopping process will emulate the price discovery function of negotiating prices online, in which comparable price quotes can be obtained (with effort) via email.[540]

The Commission anticipates that the impact of the Rule on time spent selecting F&I add-ons and discussing and signing paperwork will be moderate. In our base case estimates, non-digital consumers will save an amount of time doing these activities equal to the half the amount of time saved by those doing these activities digitally under the status quo ($33 \times 0.5 = 16.5$ minutes and $45 \times 0.5 = 22.5$ minutes, respectively). Time saved selecting add-ons flows primarily from the prohibitions on various misrepresentations, the mandatory disclosures regarding whether add-ons are required, and the prohibition on charging for add-ons under certain circumstances.[541] Time saved discussing and signing paperwork also flows from the prohibitions on various misrepresentations, several disclosures mandated by the Rule, and the

proposed rule provisions that are not in the Final Rule. *Id.* at 25.

[536] In fact, the sensitivity analysis in Table 2.3 of this final regulatory analysis presents a range of reasonable estimates for time savings that includes the 3-hour time-saving assumption from the preliminary analysis in the NPRM.

[537] Cox Auto. et al., ''Car Buyer Journey 2019'' (2019) [hereinafter Car Buyer Journey 2019], *https://www.coxautoinc.com/wp-content/uploads/2019/06/2019-Car-Buyer-Journey-Study-FINAL-6-11-19.pdf.* While Cox Automotive has released subsequent Car Buyer Journey studies, none of these subsequent studies quantify time savings from shopping digitally. In addition, to the extent that shoppers compensate by spending more time at home on these activities, these time savings should be reduced to reflect *net* time savings from performing these activities digitally. We believe that the nature of performing these activities digitally vs. at the dealership suggests these offsets should be small.

[538] The 2020 Cox Automotive Digitization of End-to-End Retail study reports the fraction of consumers who are already engaging in various activities online under the status quo. Cox Auto., ''Digitization of End-to-End Retail'' (2021) [hereinafter Digitization of End-to-End Retail], *https://www.coxautoinc.com/wp-content/uploads/2021/01/2020-Digitization-of-End-to-End-Retail-Study-FINAL.pdf.* While the activities listed across studies do not match perfectly, we map the activity categories to the closest corresponding activity in the other study and, in our final analysis, exclude from the time savings calculation the percentage of transactions corresponding to the fraction of consumers already engaging in that activity online. While it is likely that consumers shopping digitally under the status quo will also experience some additional time savings under the Rule, there is insufficient data to estimate this marginal savings and so we leave this benefit unquantified in the analysis.

[539] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 15 (noting an average of 2.2 dealerships visited among new car buyers).

[540] Shoppers who negotiate purchase price digitally under the status quo will likely also obtain time savings from mandatory offering price disclosures, corresponding to the time and effort they put into contacting and exchanging email with dealerships. We lack sufficient data on the time spent on these activities to quantify these benefits, however.

[541] *See* §§ 463.3(a), (b), and (f); 463.4(c); and 463.5(a) and (c). The Commission notes that time savings would likely be higher in this category had it determined to finalize proposed § 463.4(b), which would have required disclosure of an add-on list.

prohibition on charging for items without express, informed consent.[542] For non-digital consumers, considerable time must be spent at the dealership both closely reviewing paperwork (*e.g.,* to ensure that unwanted optional add-ons are not being added to the transaction; to ensure that the financing terms, including monthly payments, total payments, and term length, are as expected; and to confirm that terms in the contract generally conform to what was discussed) and waiting for sales and F&I staff at the dealership to consult with managers and revise paperwork as needed. Digital consumers, however, may have access outside the dealership to add-on menus where they can select their desired F&I products affirmatively without worry that dealership staff will misrepresent the products or pressure them into selecting something unwanted. In addition, digital consumers may receive and review paperwork before arriving at the dealership. This way, any necessary revisions can be performed by the dealership asynchronously so that the consumer is free to spend that time as they wish instead of being stuck in an F&I office. The noted Rule provisions will give consumers confidence that the add-on options presented to them are non-deceptive and the contract paperwork they are asked to review will not yield any unpleasant surprises. As a result, on average they will neither need to engage in such close scrutiny of their contract documents, nor spend as much time waiting for dealership staff to speak to managers or make changes as the first draft will be more likely to conform to their expectations.[543]

The Commission assumes that the Rule will likely not assist consumers much (if at all) in reducing time spent obtaining a trade-in offer. In our base case estimates, we assume non-digital consumers will not save additional time on obtaining a trade-in offer under the Rule. There are various provisions in the Rule that touch trade-in offers made by dealerships[544] and may increase consumer confidence in dealer contracts as discussed previously. In addition, trade-in values are an important piece of transaction pricing, so greater price transparency may save consumers time on the trade-in aspect of transactions that involve them. There is a concern, however, that dealers may spend more time trying to extract maximum value out of any given trade-in opportunity once the Rule is in effect. Because the Commission believes that greater transparency in vehicle pricing and add-ons will lead to reduced markups on these products (*see* ''Reductions in Deadweight Loss''), it is possible that dealers will attempt to make up these lost profits by maximizing trade-in margins, which may lead to increased time spent on negotiations. Since we do not have sufficient data to determine the balance of these two effects, we assume in the base case that they offset. In sensitivity analyses where we explore alternative assumptions, note that time savings from this activity only apply to the roughly 50% (by one estimate) of vehicle purchase transactions at dealerships where consumers trade in a vehicle.[545]

Finally, data from the 2021 Cox Automotive Car Buyer Journey Study reveal that consumer time spent at non-purchase dealerships is roughly 82% of the time spent at the dealership of purchase.[546] Additionally, the average consumer visits 1 non-purchase dealership for each transaction, so under the dual assumptions that (1) the proportions of time spent at dealerships across these activities is consistent across purchase and non-purchase dealerships and (2) the noted time savings are constant as a fraction of time spent, we multiply the time savings numbers by this ratio to obtain the additional time saved at non-purchase dealerships.

Proceeding as in the preliminary analysis, we assume that motor vehicle purchase, financing, and lease transactions will be stable at the 2019 level of 57.9 million transactions per year.[547] As discussed previously, the final analysis excludes private party, fleet, and wholesale transactions. According to Edmunds Automotive Industry Trends 2020, 19.3% of new vehicle sales in 2019 were fleet sales.[548] This fraction of the 17.1 million new vehicle sales and leases in the data are excluded from the analysis. An Automotive News article from January 2023 (citing data from Cox Automotive) states that 48% of all used vehicle sales occurred outside of the retail channel.[549] As with new vehicle sales, this fraction of the 40.8 million used vehicle transactions in the data are excluded from the analysis. Adding up the covered transactions (35 million)[550] and applying the time savings calculated from the base case assumptions, we anticipate that the Rule will generate a total time savings of more than 72 million hours per year. According to the Bureau of Labor Statistics Occupational Employment Statistics, the average hourly wage of U.S. workers in 2021 was $29.76, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings.[551] Thus, the value of non-work time for the average U.S. worker would be $24.4 per hour. As a result, our final analysis refines the estimate to a present value of between $12.3 billion and $14.9 billion as described in Table 2.2, which translates to savings of roughly $1.75 billion per year.[552]

[542] *See* §§ 463.3; 463.4(c), (d), and (e); and § 463.5(c).

[543] Again, status quo digital shoppers will likely obtain time savings on these activities as well, to the extent that their paperwork will also be less likely to require close scrutiny and revisions. We lack sufficient data on the time spent on these activities to quantify these benefits, however.

[544] *See* §§ 463.3(i) and (j); 463.4(d).

[545] *See* Progressive, ''Consumers embrace online car buying,'' *http://www.progressive.com/resources/insights/online-car-buying-trends/* (last visited Dec. 5, 2023).

[546] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16 (noting total time of 2:09 spent ''Visiting Other Dealerships/Sellers'' and total time of 2:37 spent ''With the Dealership/Seller Where Purchased'').

[547] *See* U.S. Dep't. of Transp., Off. of the Sec'y of Transp., Bureau of Transp. Stat., ''National Transportation Statistics 2021, 50th Anniversary Edition'' 21 (2021), *https://www.bts.dot.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf* (Table 1–17).

[548] *See* Edmunds, ''Automotive Industry Trends 2020'' 7 (2020), *https://static.ed.edmunds-media.com/unversioned/img/industry-center/insights/2020-automotive-trends.pdf.*

[549] *See* Auto. News, ''Used-vehicle volume hits lowest mark in nearly a decade'' (Jan. 13, 2023), *https://www.autonews.com/used-cars/used-car-volume-hits-lowest-mark-nearly-decade* (estimating 19,100,000 of used vehicle sales in the year 2022 occurred within the retail channel). The same Automotive News source reports a total used vehicle sales number of approximately 40 million for 2019. *Id.* The conclusions of the analysis are robust to using this total figure instead.

[550] A recent report by the Center for Automotive Research estimates that there approximately 43 million non-fleet, non-private party sales in 2019 based on privately sourced data. Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022–14214), CFR part 463'' 5 (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf.* While this would result in a savings estimate approximately 22% higher, the Commission relies on its analysis of the publicly available data described herein.

[551] Daniel S. Hamermesh, ''What's to Know About Time Use?'' 30 J. Econ. Survs. 198, 201 (2016), *https://onlinelibrary.wiley.com/doi/epdf/10.1111/joes.12107.*

[552] Note that we assume only one consumer is involved in each transaction; to the extent that multiple members of a household may visit dealerships for each transaction, these calculations are likely to underestimate the total time savings.

TABLE 2.2—ESTIMATED BENEFITS OF TIME SAVINGS FOR COMPLETED TRANSACTIONS

		2024–2033
Completed Transactions		
Avg. minutes saved at dealership of purchase/other dealers (by activity): [a]		
Negotiating the Purchase Price		34/28
Select F&I Add-Ons		14/11
Discussing and Signing Paperwork		20/16
Get a Trade-In Offer		0/0
Hours saved per transaction		2.05
Number of covered vehicle transactions per year [b]		34,986,253
Value of time for vehicle-shopping consumers [c]		$24.40
Abandoned Transactions		*Unquantified*
Total Quantified Benefits (in millions)	3% discount rate	$14,926
Total Quantified Benefits	7% discount rate	$12,290

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] For total volume, National Transportation Statistics Table 1–17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicles), *supra* note 548548, and Cox Automotive via Automotive News (for used vehicles), *supra* note 549549.
[c] BLS Occupational Employment Statistics (May 2022) and Hamermesh (2016).

Due to the uncertainty surrounding how the Rule will translate into time savings for consumers and to which activities it will most strongly apply, we explore a range of alternative assumptions regarding what fraction of the documented time savings digital consumers experience will be received by non-digital consumers under the Rule. In our low-end scenario, we assume that the Rule will result in half the consumer time savings of the base case. In our high-end scenario, we assume that all the time savings experienced by digital consumers under the status quo—including time saved getting a trade-in offer—will be received by non-digital consumers under the Rule. The low-end assumptions correspond to a total time savings of more than 35.85 million hours per year while the upper bound assumptions correspond to a total time savings of more than 115.47 million hours per year. The results of this analysis are presented in Table 2.3. Importantly, over the whole range of these alternative assumptions we find that benefits exceed costs. In fact, holding other benefit and cost estimates constant, the time savings generated by the Rule could be *de minimis* and the implied benefits would still exceed the costs. While there are some activities in the car buying process that the Rule may not affect (*e.g.,* test driving vehicles, etc.), the data discussed suggest that there is ample room for the Rule to eliminate unnecessary time across various activities. And even though digital consumers spend less time on these activities, results across several studies suggest that this reduction in time leads to a better experience for consumers.[553]

TABLE 2.3—SENSITIVITY ANALYSIS OF TIME SAVINGS

		Low end	Base case	High end
Avg. minutes saved at dealership of purchase/other dealers (by activity): [a]				
Negotiating the Purchase Price		17/14	34/28	34/28
Selecting F&I Add-Ons		7/6	14/11	27/22
Discussing and Signing Paperwork		10/8	20/16	39/32
Get a Trade-In Offer		0/0	0/0	18/15
Hours saved per transaction [b]		1.02	2.05	3.3
Total Quantified Benefits (in millions)	3% discount rate	$7,463	$14,926	$24,036
Total Quantified Benefits	7% discount rate	$6,145	$12,290	$19,790

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] Time savings for "Get a Trade-In Offer" assumed to be zero for lease transactions or sales without trade-ins (estimated at 50%).

2. Reductions in Deadweight Loss

The status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation. As a result, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. Recent research suggests that when

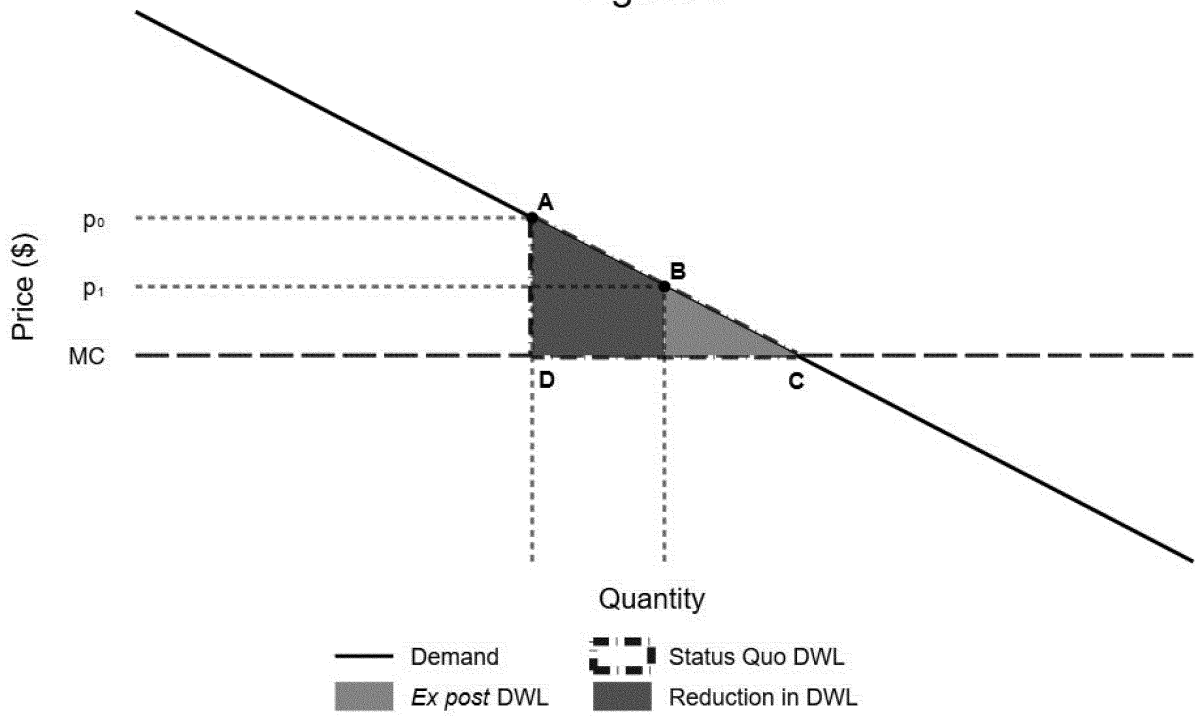
[553] *See* Car Buyer Journey 2019, *supra* note 537, at 9 (Consumers who negotiate (88% vs. 64%) and complete paperwork online (74% vs. 65%) are more satisfied with their dealership experience.); 2022 Car Buyer Journey, *supra* note 25, at 22 ("More [financing] steps completed online = higher satisfaction & less time at the dealership"); Cox Auto., "Cox Automotive Car Buyer Journey Study: Pandemic Edition" 22 (2021), *https://www.coxautoinc.com/wp-content/uploads/2021/02/Cox-Automotive-Car-Buyer-Journey-Study-Pandemic-Edition-Summary.pdf* ("Heavy Digital Buyers were the Most Satisfied").

consumers are able to observe prices for vehicles before visiting dealerships—as is intended by the Rule—prices and dealer profits are likely to fall.[554] When not accompanied by changes in quantity (due to a fixed supply of the good), price adjustments serve to transfer welfare from one side of the market (*e.g.,* dealers) to the other (*e.g.,* consumers), which typically have no net effect on the outcome in a regulatory analysis.[555] A decrease in vehicle prices, however, will likely also lead to an increase in the number sold as the supply is not fixed. As a result, this quantity expansion effect unambiguously increases welfare by reducing the deadweight loss that occurs when firms can charge prices that are marked up over marginal costs.

3. Framework

When a policy reduces the price of a good—either through a reduction in firm costs or, as in this case, a reduction in firm market power—the quantity of the good sold will typically increase. If a distortion exists in the market causing the product in question to be sold at a price above the marginal (social) cost of production (*e.g.,* a tax, an externality, or a markup enabled by market power), this quantity expansion has the effect of reducing deadweight loss in that market. In the simple case where there is one good subject to the policy and that good has no close substitutes or complements, this welfare effect can be easily illustrated as in Figure 1.

Figure 1



The solid line reflects the demand for the good, where some quantity is purchased at a market price of p_0 (point A), which is higher than marginal costs (MC). Because of this wedge between price and marginal costs, there is a reduction in welfare relative to the outcome where prices equal marginal costs; this deadweight loss is illustrated on the graph by the bordered triangle (ACD). Holding everything else constant, when prices fall from p_0 to p_1, this deadweight loss is reduced to some extent. Part of this increase in welfare will go to consumers, and part will go to producers.

Imagine that this graph depicts the market for new automobiles. The Final Rule will increase price competition, thus reducing market power and shifting prices closer to marginal costs in the new automobile market. If this market satisfied the criteria for the simple case described herein (*i.e.,* no close substitutes or complements), the only data we would need to estimate this change in total welfare would be the predicted change in price, the predicted change in quantity (which can be calculated from an estimate of the slope or elasticity of the demand curve for new vehicles), and some information or assumption about the shape of the demand curve between points A and B. Of course, the new automobile market is closely linked to the used automobile market, so this simple picture does not capture the entire story.

When a good has a close substitute (like used versus new vehicles), a price decrease for that good will cause demand for the related good to decrease. Also, in the case of automobiles, there is a long-run link between the new and

[554] Marco A. Haan et al., ''A Model of Directed Consumer Search,'' 61 Int'l J. Indus. Org. 223, 223–55 (2018), *https://doi.org/10.1016/j.ijindorg.2018.09.001;* José Luis Moraga-Gonzalez et al., ''Consumer Search and Prices in the Automobile Market.'' 90 Rev. Econ. Stud. 1394–1440 (2023), *https://doi.org/10.1093/restud/rdac047.*

[555] *See* Off. of Mgmt. & Budget, Exec. Off. of the President, ''Circular A–4'' 38 (2003), *https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4_0.pdf:* ''A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers.'' To the extent any price changes caused by the Rule result in transfers to consumers from dealers who were in violation of existing laws, such transfers would be consistent with the agency's mission of providing redress to injured consumers and its history of doing so in enforcement actions.

used vehicle markets as a new vehicle purchased today becomes a potentially available used vehicle tomorrow. These linkages between the markets will dampen the demand response to any given price change in the primary market. In practice, this means that our estimates of the responsiveness of new vehicle purchases to price changes (*i.e.,* the price elasticity of demand for new vehicles) will overstate the change in quantity resulting from a change in prices, because such estimates typically assume that all other prices remain constant. In addition, if there are distortions present in the market for related goods (*i.e.,* used vehicles are also sold at a markup over marginal costs) only examining the welfare effect in the primary market will understate the total welfare effect, as there will be an analogous reduction in deadweight loss in the market for the related good. These linkages between markets for related goods become difficult to explain graphically. However, we have included in the technical appendix an algebraic derivation of the total welfare effect in new and used vehicle markets resulting from the finalization of the Rule. The resulting formula requires estimates of seven parameters in order to compute the welfare effect: two ''policy elasticities'' that reflect the responsiveness of quantities of new and used vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new and used vehicles, two quantities that reflect the aggregate costs of all new and used vehicles sold under the status quo, and the predicted change in prices due to the Rule.

4. Estimation

To obtain ''policy elasticities'' we reference a U.S. Environmental Protection Agency report titled ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage'' (''EPA Report'').[556] In this report, the authors ''developed a theoretical model of the relationships between new- and used-vehicle markets, scrappage, and total vehicle inventory'' that allows for simulation of prices and quantities in these markets. The model is calibrated using a range of demand elasticity estimates from a review of the relevant literature on auto markets. The resulting simulations examine the long-run ''steady state'' of vehicle inventories and demand, accounting for cross-market demand effects as well as the endogenous supply of used vehicles resulting from changes in demand for new vehicles in previous periods. Importantly, among the outputs of their simulations are the ''policy price elasticities'' required by our welfare change formula. Our base case estimates of deadweight loss reduction use the long-run policy price elasticities that result from calibrating the model with the EPA Report's intermediate values for the aggregate new vehicle and outside option demand elasticities, but we explore sensitivity to other calibration scenarios.

To obtain baseline estimates of new-vehicle markups, we refer to a recent paper entitled ''The Evolution of Market Power in the US Automobile Industry'' by Paul Grieco, Charles Murry, and Ali Yurukoglu.[557] The authors specify a model of the U.S. new car industry to explore trends in concentration and markups. The authors find that markups in the industry have been falling over time generally, but have been fairly stable since the early 2000s.[558] As our baseline, we use their most recent estimate of industry markups, which was 15% in 2018.[559] While this estimate reflects markups over production costs by manufacturers and not markups over wholesale prices paid by dealers, it is the wedge between retail price and production cost that matters for welfare. As we are unaware of any publicly available data measuring used-vehicle markups, we explore two alternatives that we believe reflect the limiting cases: (1) used vehicles have no markup and (2) used-vehicle markups are the same as new-vehicle markups.

We obtain both quantities of new- and used-vehicles sold as well as average prices from National Transportation Statistics, Table 1–17. As before, we exclude private party, fleet, and wholesale transactions. This exclusion is likely to bias our estimate of the total welfare effect downward because, unlike the time savings benefits of the Rule which may be restricted to dealer-consumer transactions, the price effects of the Rule are likely to carry over to private party and fleet transactions. Using these aggregate figures along with an estimate of baseline markups, we estimate the aggregate cost of new- and used-vehicles sold in 2019.[560]

Finally, based on the academic literature on search costs in the automobile market, the Rule is expected to reduce prices of new vehicles by reducing the markup that dealers are able to charge over marginal costs. We have identified two papers that empirically estimate the effect of price transparency or reduced search frictions on auto markups by specifying a structural model of the new-vehicle market, estimating the structural parameters, and then conducting counterfactual simulations where search frictions are reduced. Murry and Zhou (2020) simulate a full information counterfactual in the Ohio automobile market where search frictions are eliminated entirely and find that markups are reduced by $333.[561] Moraga-Gonzalez et al. (2022) simulate a counterfactual in the Dutch automobile market where prices are observed prior to costly consumer search (*i.e.,* visiting dealerships) and find that markups are reduced from 40.52% to 32.59%.[562] For our base case estimates, we use the smaller Murry and Zhou (2020) estimate, primarily because their model is estimated using U.S. data consistent with our setting. However, we note that Moraga-Gonzalez et al. offers evidence to suggest that significantly larger changes in markups may result from the Rule.

Using these parameters obtained from the literature in combination, we implement the formula for the change in total welfare given in the technical appendix. For each market—new and used—the formula multiplies the policy price elasticity by the percent change in price to get the percent change in quantity, and then multiplies this by the aggregate markup (as given by the price-cost markup [563] at baseline times the aggregate cost of baseline transactions) to get the approximate change in total welfare per year. As an example, our base case estimate assumes a policy

[556] Assmt. & Standards Div., Ofc. of Transp. & Air Quality, U.S. Env't Prot. Agency, ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage'' (2021), *https://cfpub.epa.gov/si/si_public_file_download.cfm?p_download_id=543273&Lab=OTAQ.*

[557] *See* Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' (2022), mimeo.

[558] Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' 19 (2022), mimeo.

[559] Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' 19 (2022), mimeo.

[560] Aggregate cost of good i is equal to $(1-\mu_i) \times p_i \times Q_i$, where μ_i, p_i, and Q_i are the markup, price, and quantity sold of good i, respectively.

[561] Charles Murry & Yiyi Zhou, ''Consumer Search and Automobile Dealer Colocation,'' 66 Mgmt. Sci. 1909–1934 (2020), *https://doi.org/10.1287/mnsc.2019.3307.*

[562] José Luis Moraga-Gonzalez et al., ''Consumer Search and Prices in the Automobile Market,'' 90 Rev. Econ. Stud. 1394–1440 (2022), *https://doi.org/10.1093/restud/rdac047.*

[563] The baseline new vehicle markup estimate of 15% is defined as the ratio of the price-cost margin to unit price, *i.e.* $(p_i - MC_i)/p_i$, and is sometimes referred to as the Lerner index. With knowledge of either price or marginal cost, this can be rearranged to express the price-cost markup, *i.e.* $(p_i - MC_i)/MC_i$, which is used in the formula referenced here.

price elasticity of new-vehicle demand of −0.25, a policy price elasticity of used-vehicle demand (with respect to new-vehicle price) of −0.04, and used car markups equal to new car markups (15%), resulting in the following calculation:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

$$= 18\% \times \$334{,}115{,}569{,}664 \times -0.25 \times -1\% + 18\% \times \$371{,}555{,}893{,}248 \times -0.04 \times -1\%$$

$$= \$152{,}143{,}550 \text{ per year}$$

This annual reduction in deadweight loss is then applied to each year of the 10-year analysis period and discounted to the present to yield the total benefit. We highlight this base case (bolded in Table 2.4) but explore several scenarios that vary along two dimensions: (1) the ''policy elasticity'' of new- and used-vehicle demand with respect to the change in price and (2) the existence of baseline markups in the used-vehicle market. In Table 2.4, baseline markups for used vehicles vary across columns while the relevant policy price elasticities vary across rows: Scenario A corresponds to new-/used-vehicle elasticities of −0.14 and 0.01, Scenario B corresponds to new-/used-vehicle elasticities of −0.17 and −0.04, Scenario C corresponds to new-/used-vehicle elasticities of −0.23 and −0.10, and Scenario E corresponds to new-/used-vehicle elasticities of −0.39 and −0.12.

TABLE 2.4—REDUCTION IN DEADWEIGHT LOSS (IN MILLIONS), 2024–2033

Scenario	No used-vehicle markups		Symmetric markups	
	Total @ 3% discount	Total @ 7% discount	Total @ 3% discount	Total @ 7% discount
A	$617	$508	$568	$468
B	749	617	945	778
C	1,014	835	1,504	1,238
D	1,102	907	1,298	1,069
E	1,719	1,415	2,307	1,899

Note: Benefits have been discounted to the present at both 3% and 7% rates. Scenarios correspond to those in Table 7–2 of ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage.'' New-vehicle demand elasticities range from −0.4 (Scenarios A, B, and C) to −0.8 (Scenario D) to −1.27 (Scenario E). Outside option elasticities vary from 0 (Scenario A) to −0.05 (Scenarios B and D) to −0.14 (Scenarios C and E). New/Used cross-price elasticities are set such that substitution away from new vehicles flows almost entirely to used-vehicles, with only small effects on the total number of vehicles. All scenarios hold scrappage elasticity fixed at −0.7.

5. Benefits Related to More Transparent Negotiation

An additional, albeit difficult to quantify, benefit is the reduction in discomfort and unpleasantness that consumers associate with negotiating motor vehicle transactions under the status quo. According to the 2020 Cox Automotive Car Buyer Journey study, filling out paperwork, negotiating vehicle price, and dealing with salespeople are three of the top four frustrations for consumers at car dealerships.[564] Once the Rule is in effect, all three of these issues will be mitigated somewhat by the transparency facilitated by the Rule's required disclosures and the time that consumers spend shopping and negotiating motor vehicle transactions will be less stressful. While we expect an increase in social welfare through this channel, due to a lack of data allowing this more qualitative benefit to be translated into a quantitative gain, these benefits are left unquantified in the analysis.

C. Estimated Costs of Final Rule

In this section, we describe the costs of the Rule provisions as enumerated in SBP VII.A, provide quantitative estimates where possible, and describe costs that we can only assess qualitatively. Some industry commenters questioned the appropriateness of the data and assumptions used in the NPRM, including the discussion of costs in the preliminary regulatory analysis. The Commission used a variety of data sources in its calculations for the NPRM and in the Rule, including wage data from the Bureau of Labor Statistics Occupational Employment Statistics, establishment counts from U.S. Census County Business Patterns, transaction counts from National Transportation Statistics, and breakdowns of motor vehicle transactions (*e.g.,* by financing, GAP agreement, F&I add-ons) from numerous industry sources. Where such data was not available (*e.g.,* regarding time devoted to compliance tasks), the Commission made assumptions based on a review of previous regulatory analyses that featured similar requirements, with adjustments made based on our understanding of the particulars of motor vehicle dealer operations.[565]

Throughout this section, the cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for Automobile Dealers.[566]

[564] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 37.

[565] *See, e.g.,* Off. of the Sec'y, Dep't of Transp., Dkt. No. DOT–OST–2010–0140, ''Enhancing Airline Passenger Protections II—Final Regulatory Analysis'' (Apr. 20, 2011), *https://www.regulations.gov/document/DOT-OST-2010-0140-2046.*

[566] Applicable wage rates for the Commission's preliminary regulatory analysis, which was published in its NPRM, were based on data from the Bureau of Labor Statistics' May 2020 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at

Continued

This is valid under the assumption that the opportunity cost of hours spent in compliance activities is hours spent in other productive activities, the social value of which is summarized by the employee's wage.[567] To the extent that these activities can be accomplished using time during which employees would otherwise be idle under the status quo, our estimates will overstate the welfare costs of the Rule.

1. Prohibited Misrepresentations

In its preliminary analysis, the Commission presented two scenarios that estimated the costs associated with the Rule provisions prohibiting misrepresentations. First, as all the misrepresentations prohibited by the Rule are material and therefore deceptive under section 5 of the FTC Act, one scenario assumed that all motor vehicle dealers are compliant with section 5 under the status quo and will therefore conduct no additional review.

The second scenario allowed for costs incurred by firms because of the enhanced penalty associated with violating the Rule (relative to a *de novo* violation of section 5 of the FTC Act) under the assumption that dealers may expend additional resources to ensure compliance. This ''heightened compliance review'' scenario assumed that each of the 46,525 dealers would have a professional spend 5 additional minutes reviewing each public-facing representation (assumed to be 150 per year on average). At a labor rate of $26.83 per hour for compliance officers employed at auto dealers, this cost was estimated to be $15.6 million per year.

The Commission received comments about the appropriateness of the data and assumptions used to estimate the cost of complying with this provision of the Rule. The most specific criticism contended that the number of documents dealers would need to review would be ''several times'' the 150 assumed and that review would require at least 15 minutes per document because ''dealers typically do not fully control the advertising platforms they use given the direct involvement of the vehicle OEMs . . . and that of other third parties. Also, many dealers, and especially small business dealers do not employ internal compliance officers or attorneys who could conduct marketing reviews.'' [568]

As there is scant empirical evidence provided for these assertions, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). However, we have conducted a sensitivity analysis in which all labor hours in the base case analysis are increased by an order of magnitude, in keeping with the spirit of the comments discussed; *see* SBP VII.G. As can be seen in the results from that analysis, the Rule clearly still generates net benefits for society.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS FOR PROHIBITED MISREPRESENTATIONS

		2024–2033
Scenario 1—No Review:		
No Cost		$0
Total Cost		$0
Scenario 2—Heightened Compliance Review:		
Number of dealers [a]		47,271
Number of documents per dealer per year		150
Minutes of review per document		5
Cost per hour of review		$31.21
Total Cost	3% discount rate	$157,310,579
Total Cost	7% discount rate	$129,526,073

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new).

2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry

The Rule requires all dealers to disclose an offering price in any advertisement that references an individual vehicle or in response to any consumer inquiry about an individual vehicle. For this provision, the Commission's preliminary analysis presented two cost scenarios for dealers when complying with the Rule. First, because dealers already price all vehicles in inventory under the status quo, one scenario assumed that there would be no additional cost of complying with this provision. This scenario assumes that the initial pricing and any subsequent re-pricing of vehicles in inventory would take no (or minimal) additional time under the Rule.

As with the prohibition on misrepresentations, the second scenario considers the enhanced penalty associated with violating the Rule and allows for costs given that dealers may expend additional resources to ensure that the prices they disclose conform to the Rule's definition of offering price, thus minimizing the risk of penalties should they fail to conform to that definition. The latter scenario assumed that, in the first year under the Rule, each of the 46,525 dealers would have a sales and marketing manager spend 8 hours reviewing their policies and procedures for determining the public-facing prices of vehicles in inventory. In addition, each dealer would employ a programmer for 8 hours to update any automated systems that need to be updated in accordance with these new policies and procedures. At labor rates of $63.93 per hour and $28.90, respectively, this cost was estimated at $34.5 million. Both scenarios assume that, once calculated, the time required to train employees to include prices in response to consumer inquiries about specific vehicles will either be negligible or be subsumed by training costs included under other provisions. Finally, the time required to deliver the disclosures is also negligible, as prices are already typically disclosed in

https://www.bls.gov/oes/2020/may/oes_nat.htm. Labor rates in the present analysis have been updated based on data from the Bureau of Labor Statistics' May 2022 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at *https://www.bls.gov/oes/current/naics4_441100.htm.*

[567] This assumption would hold, for example, if both the product and labor markets in this industry were competitive.

[568] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 299–300.

advertisements and in interactions with consumers under the status quo; the Rule just requires the price to conform to a specific definition.

Some commenters raised issues with the assumptions regarding the time and resources necessary to determine compliant prices as well as deliver the required disclosures. The comments asserted that vehicle prices change frequently in response to market conditions, which would make it difficult to ensure that offering prices are accurate. Additionally, comments disputed the notion that delivery of the information to consumers in accordance with the Rule's provisions would not be costly, in terms of employee time and consumer time. One comment suggested that ''there would be an average of three Offering Price disclosures based there [sic] being an average of three dealer-customer discussions regarding three specific motor vehicles, per transaction,'' [569] asserting that the frequency of these disclosures would have implications for the cost estimates that had not been considered in the preliminary analysis.

If indeed the Rule required significant additional employee time spent per transaction, that would have implications for the cost estimates. However, as previously discussed, it is the understanding of the Commission that virtually all dealer-customer discussions regarding specific motor vehicles that occur under the status quo already include time devoted to a discussion of the vehicle's price. The only change under the Rule is that, within that price discussion an offering price (as defined by the Rule) must be provided. The cost of determining this price is included under the second scenario in our preliminary analysis, and sensitivity to the specific assumptions of that scenario have been explored in the Appendix. The results from our analysis indicate that the Rule generates net benefits for society under a wide range of plausible assumptions about the inputs to our cost calculations.

Commenters also raised concerns about the potential for behavioral adjustment by dealerships, choosing to refrain from advertising individual vehicles or responding to consumer inquiries about specific vehicles and thus increasing consumers' costs of search. The Commission, however, has not been presented with compelling evidence that dealers will forego competition with other dealers on price, choosing instead to default to advertising a focal price (such as MSRP). Indeed, the Commission's offering price disclosure requirement is similar to existing requirements in a number of States, and the Commission is not aware of any such behavioral adjustments (*e.g.,* eliminating prices from advertisements, refusing to respond to consumer inquiries, etc.) having occurred in those States. As a result, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available).

TABLE 3.2—ESTIMATED COMPLIANCE COSTS FOR OFFERING PRICE DISCLOSURES

	2024
Scenario 1—No Review:	
No Cost	$0
Total Cost	$0
Scenario 2—Calculation of Offering Price:	
Number of dealers [a]	47,271
Pricing hours per dealer	8
Cost per hour of pricing	$80.19
Programming hours per dealer	8
Cost per hour of programming	$40.24
Total Cost	$45,542,772

[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new).

3. Disclosure of Add-On List and Associated Prices

In the NPRM, the proposed rule would have required all dealers to disclose an itemized menu of all optional add-on products and services along with prices, or price ranges, on all dealer-operated websites, online services, and mobile applications as well as at all dealership locations. Various commenters expressed concern that the add-on list requirement would have been too complex and potentially confusing, as discussed in the paragraph-by-paragraph analysis in SBP III.D.2(b). As a result, the Commission has determined not to finalize § 463.4(b) of the proposed rule. While the preliminary analysis estimated compliance costs between approximately $42 million and $43 million for the disclosure of add-on lists and associated prices, those costs are not included in the final analysis.

4. Required Disclosure of Total of Payments for Financing/Leasing Transactions

The Rule requires all dealers to disclose, when representing a monthly payment, the total of payments for the financing or leasing contract. In addition, in any comparison of two payment options with different monthly payments, the dealer is required to disclose that the option with the lower monthly payment features a higher total of payments (if true).

The Commission's preliminary analysis presented two cost scenarios, corresponding to different methods by which dealers may choose to comply with the Rule. In the first scenario, we assumed that dealers would incur a one-time, upfront cost of both designing the required disclosures and informing associates of their obligations to provide the disclosures. Importantly, ongoing costs on a per transaction basis were assumed to be negligible, reflecting a compliance regime where dealers already generate the required information during the normal course of business and must only convey it to consumers at an appropriate point in the transaction. In the second scenario, we assumed that dealers incur an additional ongoing cost per financed or leased transaction in order to communicate the required disclosures

[569] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 300.

to consumers in writing, reflecting a compliance regime where dealers find it necessary to maintain a documentary record of compliance with the Rule.[570]

The upfront costs (and total costs under Scenario 1) of complying with this provision as estimated by the preliminary analysis were limited to 8 hours spent by a compliance manager (at a rate of $26.83) on the creation of a template disclosure script that contains the required information and informing sales staff of their obligations to deliver the disclosure at an appropriate time during the transaction. This cost was estimated at $10 million.

The preliminary estimates of additional ongoing costs—as in Scenario 2—included 2 minutes of sales associate time per financed/leased transaction (at a rate of $21.84) spent on the process of populating and delivering a printed version of the disclosure, with $0.15 per disclosure spent on printing costs. The total additional cost under this scenario is estimated at $213.4 to $249.5 million.

Comments from industry groups asserted that the preliminary analysis underestimated training costs and that it would be difficult to determine the total of payments for financing prior to knowing the details of the transaction. One comment contended that ''these mandates . . . necessarily would involve significant annual training requirements for new employees given that . . . the average dealer experiences an annual sales consultant turnover rate of 67%.'' [571] The comment further asserted that dealers cannot determine the total cost of a financing or leasing agreement without knowing the terms for which consumers qualify and what terms they want. The comment argued that as a result, only the scenario with costs incurred on a per transaction basis should be considered. Finally, the comment argued that the per-transaction costs in Scenario 2 are too low, both because the Commission underestimates the time required to deliver, discuss, and review disclosures and because multiple disclosures would have to be made per transaction (as terms are changed).

These comments misunderstand the Commission's analysis with respect to the costs of complying with this provision. Scenario 1 does not anticipate that the dealer presents a consumer with the total of payments for a financing or leasing contract at the outset of the transaction. It requires only that, at the point where the dealer engages in discussions regarding different monthly payments for financing or leasing arrangements, the information that must be disclosed (*i.e.,* the total of payments and a comparison of these totals across differing monthly payments) is already available to the dealer under the status quo. The only additional cost incurred per transaction would be the delivery of this information to the consumer (the determination of which is contemplated in the costs estimated under Scenario 1).

With respect to the comment regarding insufficient allowance for training costs in light of employee churn in the industry, the Commission has determined this to be a valid critique of the preliminary analysis. As a result, the final regulatory analysis includes an additional ongoing cost for both Scenarios. This ongoing cost includes training for sales staff and budgets 1 hour of training for each of the 417,110 sales and related employees across the industry, at an (average) cost of $29.43 per hour. The resulting additional ongoing costs in both scenarios amounts to $12.3 million per year. Further, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.[572] The remainder of the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). Concerns about underestimates of the time required to review disclosures on a per-transaction basis are addressed by the Commission's sensitivity analyses conducted in the Appendix.

TABLE 3.4—ESTIMATED COMPLIANCE COSTS FOR FINANCING COSTS

		2024 only	2024–2033
Scenario 1—Creation of disclosure and training only:			
Upfront costs:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of disclosure creation		$31.21	
Subtotal		$11,802,623	
Ongoing costs:			
Number of sales and related employees[a]			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Subtotal	3% discount rate		$104,712,908
	7% discount rate		$86,218,307
Scenario 1—Total Cost	3% discount rate		$116,515,532
	7% discount rate		$98,020,931
Scenario 2—Disclosures per transaction:			
Covered new vehicle sales per year[b]			10,343,319
% New vehicle sales involving financing[c]			81%
Covered used vehicle sales per year			21,219,640
% Used vehicle sales involving financing			35%
Covered new vehicle leases per year			3,423,294

[570] While disclosures of this nature are already required to be present in the financing contract by the Truth in Lending Act (TILA), the Rule would change the timing of a subset of those disclosures. As a result, the dealer may have to develop and deliver a separate document in the event that the standard TILA disclosure has not yet been generated at the point where disclosure is required under the Rule.

[571] Comment of Nat'l Auto Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 301.

[572] Without cross-tabulations of fleet sales and sales involving financing, we assume that these are independent such that the fraction of covered transactions involving financing is equal to the fraction of covered transaction times the fraction of financed transactions.

TABLE 3.4—ESTIMATED COMPLIANCE COSTS FOR FINANCING COSTS—Continued

		2024 only	2024–2033
Total transactions involving monthly payments/financing.			19,228,256
Disclosure minutes per transaction			2
Cost per hour of disclosure			$28.41
Printing cost per disclosure			$0.15
Subtotal	3% discount rate		$179,930,957
	7% discount rate		$148,151,196
Total Cost	3% discount rate		$296,446,489
	7% discount rate		$246,172,126

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

[a] Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for NAICS Code 441100—Automobile Dealers, May 2021.

[b] For total volume, National Transportation Statistics Table 1–17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicle) and Cox Automotive via Automotive News (for used vehicles).

[c] Melinda Zabritski, Experian Info. Sols. Inc., ''State of the Automotive Finance Market Q4 2020''.

5. Prohibition on Charging for Add-Ons That Provide No Benefit

The Rule prohibits dealers from charging for add-on products or services from which the targeted consumer would not benefit. Compliance with this provision will require dealers to develop policies and transaction-level rules about when consumers can be charged for add-on products and services. The Rule as proposed in the NPRM also would have included additional provisions relating to add-ons that have not been finalized. These included a prohibition on charging for optional add-on products or services unless dealership employees made a number of disclosures at various points before finalizing a transaction. This provision would have required each dealer to design form disclosures, create a system for populating these forms, train their sales staff on the disclosure requirements, and provide the disclosures in writing, with the appropriate information filled in, to each consumer prior to completing the transaction.

The Commission's preliminary analysis relating to the cost of complying with these disclosure requirements budgeted for 8 hours of compliance manager time (at a cost of $26.83 per hour) and 4 hours of sales manager time (at a cost of $63.93 per hour) to design disclosure forms, and an additional 8 hours of programmer time (at a cost of $28.90) to create a system to populate these forms. The preliminary analysis also budgeted for 2 minutes of sales associate time (at a rate of $21.84 per hour) and $0.11 in printing/electronic delivery costs per disclosure, with the number of disclosures determined by the fraction of transactions involving optional add-ons and/or financing.

In response to numerous comments, the Commission has determined not to finalize the proposal in § 463.5(b), which would have required the delivery of written disclosures and acknowledgement via signature of those disclosures by consumers. Various commenters were concerned that the add-on disclosures would add documents and time to the transaction. In response to these comments, the Commission has determined to omit what would have been the only provision affirmatively requiring the dealer and consumer to review additional documentation during a transaction. As a result, while the preliminary analysis estimated compliance costs between approximately $883 million and $1 billion for the disclosure of total costs for cash and financed transactions with optional add-on products, the cost estimate in the final analysis is on the order of one-tenth to one-half of the preliminary estimate (depending on the scenario).

As a result, the Commission has substantially revised the cost analysis in this section. First, the Commission assumes that each dealer will employ 8 hours of compliance manager time (at a rate of $31.21) and 8 hours of sales manager time (at a rate of $80.19) in the first year under the Rule, to cull add-ons with no value from their offerings and develop policies regarding when certain add-ons may or may not be sold. Second, the Commission budgets for 1 hour of training per year for each of the 417,110 sales and related employees across the industry, to apprise them of these policies and their obligations under the Rule. Finally, the Commission includes a second cost scenario in which dealers will choose to deliver one itemized disclosure to each customer before the finalization of each transaction. Although this is not required under the Final Rule, dealers may wish to have documentation of compliance with the provisions of the Rule. As in the preliminary analysis, the Commission assumes that each dealer will employ 8 hours of compliance manager time and 4 hours of sales manager time creating this disclosure and 8 hours of programmer time creating a system to populate these forms when provided inputs by sales staff. The same occupational wage data have been used, but the rates have been updated to match the most recent data available. We further assume, as in the preliminary analysis, that sales staff will spend 2 minutes per disclosure (at a rate of $28.41 per hour) updating, printing, and delivering these forms to consumers and that the physical costs of delivering the disclosure are roughly $.11 per disclosure.[573] Finally, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.

[573] The physical costs are $.15 per paper disclosure and $.02 per electronic disclosure, assuming that 27% are made electronically. This assumption is informed by a consumer survey that indicates 73% of consumers with motor vehicles prefer to receive registration renewal notices by mail as opposed to electronically. *See* Consumer Action, ''Your opinion wanted: Paper vs. electronic bills, statements and other communications'' 4 (2018–2019), *https://www.consumer-action.org/downloads/Consumer_Action_Paper_v_electronic_survey.pdf* (showing that 1800 of 2456 respondents who owned and needed to periodically register a motor vehicle preferred mail notices).

TABLE 3.5—ESTIMATED COMPLIANCE COSTS FOR PROHIBITION ON CERTAIN ADD-ONS

		2024 only	2024–2033
Scenario 1—Policies and Training Only:			
Upfront costs:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of compliance manager		$31.21	
Sales manager hours per dealer		8	
Cost per hour of sales manager		$80.19	
Subtotal		$42,127,915	
Ongoing costs:			
Number of sales and related employees			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Scenario 1—Subtotal	3% discount rate		$146,840,824
	7% discount rate		$128,346,223
Scenario 2—Disclosure creation and delivery:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of compliance manager		$31.21	
Sales manager hours per dealer		4	
Cost per hour of sales manager		$80.19	
Programmer hours per dealer		8	
Cost per hour of programmer		$40.24	
Subtotal		$42,182,750	
Disclosure delivery (per transaction):			
New vehicle sales per year			10,343,319
Used vehicle sales per year			21,219,640
Minutes per disclosure			2
Cost per hour of disclosure			$28.41
Physical costs per disclosure			$0.11
Subtotal	3% discount rate		$285,904,302
	7% discount rate		$235,407,319
Scenario 2—Total Cost	3% discount rate		$474,927,875
	7% discount rate		$405,936,291

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

6. Requirement To Obtain Express, Informed Consent Before Any Charges

The Rule requires dealers to obtain express, informed consent before charging any consumer for any product or service in association with the sale, financing, or lease of a vehicle. Because we presume that all dealers who are complying with the law currently have policies in place to prevent charges without consent, we assume that there will be no additional costs imposed by this provision.

7. Recordkeeping

The Final Rule requires dealers to retain records of all documents pertaining to Rule compliance. These recordkeeping requirements include:

- Copies of all materially different marketing materials, sales scripts, and training materials that discuss sales prices and financing or lease terms.
- Records demonstrating that all add-ons charged for meet the requirements stated in the Rule, including calculations of loan-to-value ratios in contracts including GAP agreements.
- Copies of all purchase orders, financing and lease contracts signed by the consumer (whether or not final approval is received), and all written communications with any consumer who signs a purchase order or financing or lease contract.
- Copies of all written consumer complaints, inquiries related to add-ons, and inquiries and responses about individual vehicles.

Most of these documents are already produced in the normal course of business under the status quo, or the costs of creating them have already been accounted for in previous sections. In its preliminary analysis, the Commission assumed that each dealer would incur an upfront cost, employing 8 hours of programmer time, 5 hours of clerical time, 1 hour of sales manager time, and 1 hour of compliance officer time, at hourly rates of $28.90, $18.37, $63.93, and $26.83, respectively, in order to upgrade their systems and create the templates necessary to accommodate retention of all relevant materials. The Commission also assumed that each dealer would employ 1 additional minute of sales staff time per transaction to populate forms and store relevant materials.

One industry commenter contended that the proposed rule would impose substantial and costly recordkeeping mandates, citing primarily the various channels through which dealers would be required to capture and retain communications. The Commission believes the recordkeeping requirements strike an appropriate balance, requiring the retention of materials needed to allow effective enforcement while being mindful of dealer burden. In addition, the recordkeeping requirements are similar to analogous requirements in other Commission disclosure rules, as

tailored to individual industries and markets.[574]

As such, the Commission's final analysis retains its preliminary estimates—appropriately updated where more recent data were available—with a few changes. First, we made adjustments to the cost estimates associated with the required loan-to-value calculations for all transactions with GAP agreements. Based on a comment from one industry group, we revised down the share of covered new and used vehicle sales with a GAP agreement to 17%.[575] As in the preliminary analysis, for these transactions sales staff will spend an additional minute to generate and store the relevant calculations. As discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions. In addition, the expansion of the volume of records that dealers are required to retain and manage will likely require investment in additional IT systems and hardware, which was left unquantified in the preliminary analysis. After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to house the records that the Rule requires them to maintain. Based on a review of the transaction records we have received from dealers through investigations, this amount is likely to be more than sufficient for compliance.[576]

TABLE 3.6—ESTIMATED COMPLIANCE COSTS FOR RECORDKEEPING

		2024 only	2024–2033
Updating systems:			
Number of dealers		47,271	
Programming hours per dealer		8	
Cost per hour of programming		$40.24	
Clerical hours per dealer		5	
Cost per hour of clerical work		$20.16	
Sales manager hours per dealer		1	
Cost per hour of sales manager review		$80.19	
Compliance manager hours per dealer		1	
Cost per hour of compliance review		$31.21	
Subtotal		$25,248,387	
Hardware and Storage (per year):			
Number of dealers			47,271
Cost of hardware/storage			$300
Recordkeeping (per transaction):			
Number of covered motor vehicle sales			31,562,959
% of sales with GAP agreement [a]			17%
Number of motor vehicle sales with GAP agreement.			5,444,502
Sales staff minutes per transaction			1
Cost per hour of recordkeeping			$28.41
Subtotal	3% discount rate		$270,444,391
Subtotal	7% discount rate		$222,677,967
Total Cost	3% discount rate		$295,692,777
Total Cost	7% discount rate		$247,926,354

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12 n.43.

D. Other Impacts of Final Rule

As the status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. SBP VII.B discussed the Commission's expectation that prices are likely to adjust in response to the transparency facilitated by the Rule, and quantified the benefits that result when vehicle quantities increase in response to a more transparent and less deceptive equilibrium. The price changes in the new vehicle market discussed in SBP VII.B will also have the effect of transferring $3.4 billion per year from dealers whose conduct under the status quo would not have complied with the Rule to consumers. In addition, other prices may be impacted by the Rule, such as used vehicle prices and add-on prices. As we have insufficient data to predict these price effects, neither the transfers associated with these potential price changes nor the resulting quantity adjustments and deadweight loss reductions are quantified in the current

[574] 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling).

[575] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12 n.43 (indicating 15.3% (18.2%) for new (used) vehicles). These rates were weighted by transactions counts to calculate an overall rate of 17%.

[576] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

analysis. Finally, it may be the case that enhanced transparency of the Rule leads to *fewer* of certain types of transactions relative to the status quo. Recent evidence suggests that price shrouding of the kind that is prevalent in the motor vehicle market results in consumers spending more than they would otherwise.[577] We expect that this phenomenon may extend especially to the motor vehicle add-on market, where the Commission has compiled substantial evidence that individuals frequently inadvertently purchase add-ons that they did not want and ultimately will not use.[578] While much of this effect may ultimately be transfers, we reiterate that to the extent they represent transfers from dishonest dealers to consumers, this may be considered a benefit of the Rule.

In addition, deceptive practices by dishonest dealers lead consumers to engage with those dealers instead of honest dealerships. Once the Rule is in effect, some business that would otherwise have gone to dealers using bait-and-switch tactics or deceptive door opening advertisements will now go to honest dealerships. Again, assuming that the costs of the firms are similar, any one-for-one diversion of sales from one set of businesses to another is generally characterized as a transfer under OMB guidelines. However, in this case, it would represent a transfer from the set of dishonest dealers to honest dealers, which may weigh differently if profits from law violations are not counted towards social welfare in the regulatory analysis.

E. Conclusion

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the Final Rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the Rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our base case estimates, the present value of quantified benefits for consumers from the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $13.4 billion. The present value of quantified costs for covered motor vehicle dealers of complying with the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $1.1 billion. This generates an estimate of the present value of quantified net benefits equal to $12.3 billion using a discount rate of 7%. Using the best (or worst) case assumptions discussed in the preceding analysis results in net benefits of $21.2 billion (or $5.5 billion) using a discount rate of 7%.

Given that we expect unquantified benefits to outweigh unquantified costs for this Rule, this regulatory analysis indicates that adoption of the Rule would result in benefits to the public that outweigh the costs.

PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Benefits:						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	568	468	1,298	1,069	2,307	1,899
Total Benefits	8,031	6,613	16,224	13,359	26,343	21,690
Costs:						
Finance/Lease Total of Payments Disclosure	296	246	296	246	117	98
Offering Price Disclosure	46	46	46	46	0	0
Prohibition Re Certain Add-ons & Express, Informed Consent	475	406	475	406	147	128
Prohibition on Misrepresentations	157	130	157	130	0	0
Recordkeeping	296	248	296	248	296	248
Total Costs	1,270	1,075	1,270	1,075	559	474
Net Benefits	6,761	5,538	14,954	12,284	25,784	21,216

Note: ''Low Estimate'' reflects all lowest benefit estimates and high cost scenarios and ''High Estimate'' reflects all highest benefit estimates and low cost scenarios. ''Base Case'' reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

[577] *See* Tom Blake et al., ''Price Salience and Product Choice,'' 40 Mktg. Sci. 619–36 (2021), *https://doi.org/10.1287/mksc.2020.1261.*

[578] *See* Nat'l Consumer Law Ctr., ''Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing'' (Oct. 1, 2017), *https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf;* Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2–3 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (citing a U.S. Department of Defense data call summary that found that the vast majority of military counselors have clients with auto financing problems and cited ''loan packing'' and yo-yo financing as the most frequent auto lending abuses affecting servicemembers); Adam J. Levitin, ''The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses,'' 108 Geo. L.J. 1257, 1265–66 (2020), *https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf* (discussing ''loan packing'' as the sale of add-on products that are falsely represented as being required in order to obtain financing.); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade. Comm'n* v. *Universal City Nissan,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14 (''Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers' experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.'').

F. Appendix: Derivation of Deadweight Loss Reduction

The derivation of the formula for the reduction in deadweight loss from the Rule follows from ''Sufficient Statistics Revisited'' by Henrik Kleven.[579] In the source article, the wedge between costs and prices is tax rates, but here we consider producer markups; the fundamental principles are unchanged.

We have a mass of consumers i with utility function $u^i(x^i_O, x^i_N, x^i_U)$ over new cars, used cars, and the numeraire (good 0) who face the following budget constraint:

$$\sum_j (1+\tau_j^i)x_j^i = Y^i$$

given markups T^i_j for good j and consumer i and income Y^i for consumer i. Pre-markup prices are normalized to one so xi_j is the cost of consumer i's purchase of good j. Total profits from the consumption of consumer i are $T^i = \Sigma_j T^i_j x^i_j$.

Define a policy to be evaluated as θ. Total welfare is defined as:

$$W(\theta) = \int_i v^i(\theta)\, di + \mu \int_i T^i(\theta)\, di$$

Here, $v^i(\theta)$ is the indirect utility function for consumer i, so the first term is consumer surplus and the second term is producer surplus, while μ is the value of a dollar of profit. The change in welfare from policy θ, translated into dollars by dividing by μ, is:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \frac{dT^i}{d\theta} - \frac{\partial T^i}{\partial \theta}\, di$$

The first term is the total effect on profit from the reform and the second term is the ''mechanical'' effect; assuming quantities stay constant, how much profits will fall if the policy goes into effect. We can rewrite this as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \left[\sum_{j=0}^{J} \tau_j^i x_j^i \frac{d\log x_j^i}{d\theta}\right] di$$

Where

$$\frac{d\log x_j^i}{d\theta}$$

is labelled the ''policy elasticity'' for good and consumer with respect to policy . We make the following additional assumptions/simplifications:

1. The outside good is priced at cost.
2. All consumers face the same markups so $T^i_k = T_k$.
3. For simplicity, all elasticities are assumed to be cost share-weighted averages of individual effects, so

$$X_j = \int_i x_j^i \text{ and } \epsilon_{jk} = \int_i \epsilon^i_{jk} \frac{x^i_j}{X_j}.$$

As a result, the welfare change from the Auto Rule (θ) is:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \frac{d\log X_N}{d\theta} + X_U \tau_U \frac{d\log X_U}{d\theta}$$

Assuming that the Rule affects only markups for new vehicles, we can rewrite the ''policy elasticities'' as a product of a price elasticity and the elasticity of price with respect to the Rule, as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

where

$$\hat{\varepsilon}_{jk} = \frac{d\log X_j}{d\log(1+\tau_k)}$$

is the long-run ''policy price elasticity'' of demand for good w.r.t. the price of good , including the effects that a price change has on the prices of related goods. The formula accounts for demand feedback effects between the new and used car markets but assumes no dynamics in the path from the policy to the long-run steady-state. Computing this formula requires estimates of seven parameters: two ''policy price elasticities'' that reflect the responsiveness of quantities of new and used vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new/used vehicles, two quantities that reflect the aggregate cost of all new/used vehicles sold under the status quo, and the predicted change in prices due to the Rule. Calibration of these parameters is discussed in the main text.

G. Appendix: Uncertainty Analysis

While the main text uses alternative assumptions to explore sensitivity to a

[579] *See* Henrik J. Kleven, ''Sufficient Statistics Revisited.'' 13 *Annual Rev. Econ.* 515–38. (2021), *https://doi.org/10.1146/annurev-economics-060220-023547.*

number of discrete scenarios, in this appendix we allow variation in most of the assumptions that underlie our model. This Monte Carlo analysis procedure allows us to more fully characterize the uncertainty around our central estimate of net benefits, under the assumption that our basic model is specified correctly. Most of the assumptions in our analysis refer to amounts of time, either amounts of time dealerships employees must spend on a compliance task or amounts of time that consumers save on various activities related to the automobile shopping process. Deviations for these assumptions are centered on the parameters used in the main text. Elsewhere, as with assumptions regarding fractions or proportions, our base case is often an extreme case (*i.e.,* 0 or 1). In these cases, deviations are typically not centered on the base case and are allowed to vary across the whole range as dictated by the parameter. Still, we can expect the average results from this sensitivity analysis to be similar to the result in the main text. The object of interest here is the distribution of estimates, which indicates the expected variation in net benefits if the true parameters deviate from our predictions (with errors of the form modeled).

For most assumptions, we draw from a symmetric, triangular distribution around the base case assumption with a specified upper and lower bound. In this distribution, the probability of drawing particular parameter value increases linearly from the lower bound to the base case assumption before decreasing linearly to the upper bound, such that the area inscribed by the triangle is equal to 1. We emphasize this distribution because it is a parsimonious way to incorporate variation in parameter values over a finite range and incorporates our preferred estimates as the most likely outcome. For a few parameters where we think it is appropriate to de-emphasize the main estimate parameter, we draw from a uniform distribution. Importantly, all draws are independent; there is no correlation between the deviations drawn in any given Monte Carlo trial. An additional sensitivity analysis considers a situation where our errors across all labor time parameters are correlated; specifically, that all of our estimates of the time required for compliance tasks are 1/10th of the true time required.

To incorporate uncertainty in time savings benefits to consumers, we allow the time saved by digital consumers to vary by up to ten minutes more or less than the main analysis parameters. The share of these time savings received by non-digital consumers under the Rule is modeled as uniformly distributed between zero (no savings) and one (savings equivalent to what digital consumers receive in the status quo).

TABLE A.1—ALTERNATIVE PARAMETERS: BENEFITS OF TIME SAVINGS FOR COMPLETED TRANSACTIONS

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Price Negotiation Time Savings	43	Triangular	33	53
Add-on Negotiation Time Savings	33	Triangular	23	43
Paperwork Time Savings	45	Triangular	35	55
Trade-In Negotiation Time Savings	26	Triangular	16	36
Fraction of Price Time Savings Under Rule	1.0	Uniform	0	1
Fraction of Add-on Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Paperwork Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Trade-In Time Savings Under Rule	0.0	Uniform	0	1

For the deadweight loss reduction component of benefits, we explore sensitivity only to baseline used-vehicle markups, allowing them to vary from 0 to the baseline new-vehicle markup of 15%. In the main text, we explore a number of scenarios for deadweight loss reduction corresponding to greater and lesser demand elasticities as well.

The following tables describe the distributions we model for cost parameters in the simulation exercise. All cost parameters are assumed to be drawn from triangular distributions. The tables follow the same order as the discussion in the main text.

TABLE A.2—ALTERNATIVE PARAMETERS: COSTS OF MISREPRESENTATION PROHIBITION COMPLIANCE

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Document Review Minutes	5	Triangular	0	10
Documents Reviewed	150	Triangular	100	200

TABLE A.3—ALTERNATIVE PARAMETERS: COSTS OF OFFERING PRICE DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Template Creation Sales Manager Hours	8	Triangular	4	12
Template Creation Web Developer Hours	8	Triangular	4	12

TABLE A.5—ALTERNATIVE PARAMETERS: COSTS OF FINANCING DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Disclosure Creation Compliance Manager Hours	8	Triangular	4	12
Disclosure Training Hours	1	Triangular	0	2
Disclosure Delivery Time Minutes	2	Triangular	0	4
Printing Costs	0.15	Triangular	0.10	0.20

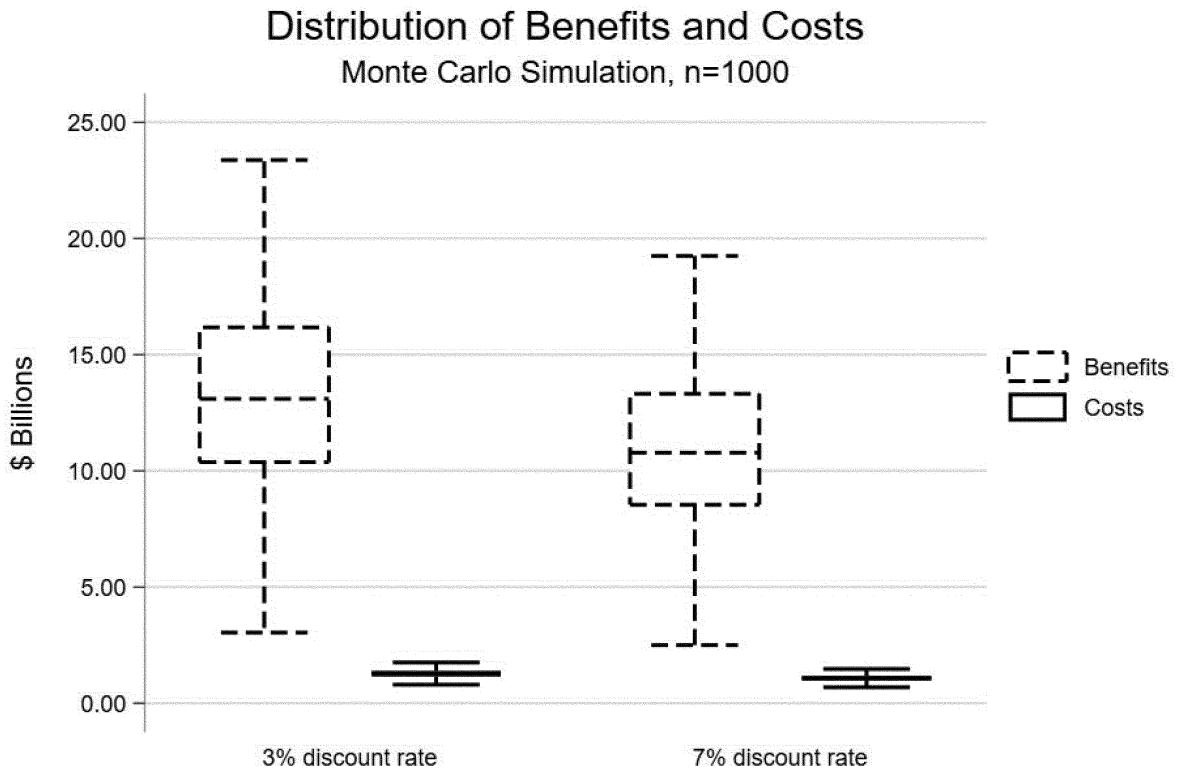
TABLE A.6—ALTERNATIVE PARAMETERS: COSTS OF ITEMIZED DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Electronic Disclosure Share (Scenario 2 only)	0.27	Triangular	0.04	0.50
Upfront Sales Manager Hours (Scenario 1)	8	Triangular	4	12
Upfront Compliance Manager Hours (Scenario 1)	8	Triangular	4	12
Disclosure Training Hours (Scenario 1)	1	Triangular	0	2
Disclosure Creation Sales Manager Hours (Scenario 2 only).	4	Triangular	2	6
Disclosure Creation Compliance Manager Hours (Scenario 2 only).	8	Triangular	4	12
Disclosure Creation Web Developer Hours (Scenario 2 only).	8	Triangular	4	12
Disclosure Delivery Minutes (Scenario 2 only)	2	Triangular	0	4
Printing Costs (Scenario 2 only)	0.15	Triangular	0.10	0.20
Electronic Disclosure Costs (Scenario 2 only)	0.02	Triangular	0	0.04

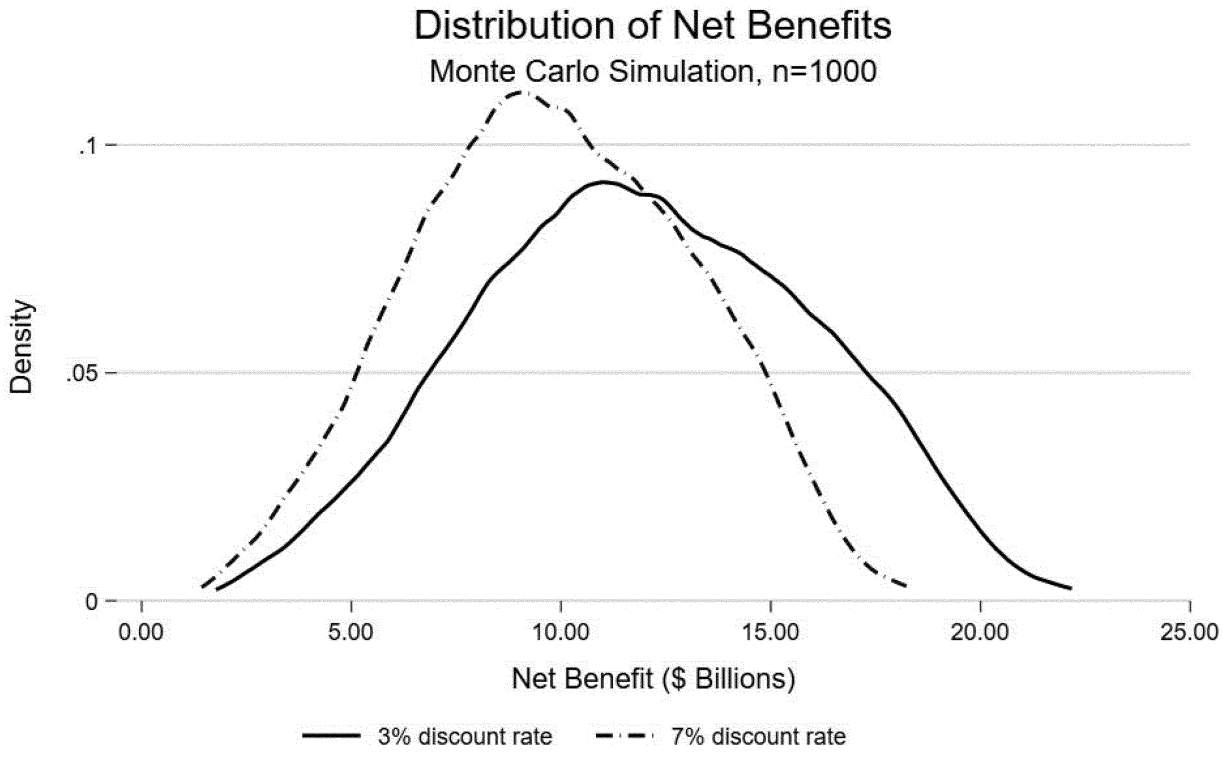
TABLE A.7—ALTERNATIVE PARAMETERS: RECORDKEEPING COSTS

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
GAP Sales Share	0.17	Triangular	0.07	0.27
GAP Sale Minutes	1	Triangular	0	2
Upfront Web Developer Hours	8	Triangular	4	12
Upfront Clerical Hours	5	Triangular	2	8
Upfront Sales Manager Hours	1	Triangular	0	2
Upfront Compliance Manager Hours	1	Triangular	0	2
IT Hardware Costs	300	Triangular	100	500

We simulate 1,000 scenarios drawing from these parameter distributions, recording the costs and benefits of each potential outcome. The distribution of costs and benefits is plotted in the following table for discount rates of 3% and 7%.



Differencing the costs and benefits from each simulation iteration yields a distribution of net benefits under the various parameter draws. We again plot this distribution under 3% and 7% discount rates.



This exercise finds heterogeneity in net benefits under the alternative parameter distributions, but the Rule still yields positive net benefits in all simulated outcomes.

Finally, to examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of labor costs, we calculate costs and benefits in a scenario where all labor costs turn out to be ten

times larger than the parameter values in the main text. All non-labor hours costs (including benefits hours, wage rates, and prevalence counts) are unchanged in this analysis.

TABLE A.8—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), LABOR COSTS × 10, 2024–2033

	Base case	
	3% Discount rate	7% Discount rate
Benefits:		
Time savings	$14,926	$12,290
Deadweight Loss Reduction	1,298	1,069
Total Benefits	16,224	13,359
Costs:		
Prohibition on Misrepresentations	1,573	1,295
Offering Price Disclosure	455	455
Finance/Lease Total of Payments Disclosure	2,743	2,279
Prohibition re: Certain Add-ons & Express, Informed Consent	4,471	3,830
Recordkeeping	1,868	1,583
Total Costs	11,111	9,443
Net Benefits	5,114	3,916

Note: ''Base Case'' reflects base case benefit estimates and high cost scenarios with ten times the labor costs as in the main analysis. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

VIII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this Rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 463

Consumer protection, Motor vehicles, Reporting and recordkeeping requirements, Trade practices.

■ For the reasons stated in the preamble, the Federal Trade Commission adds part 463 to subchapter D of Title 16 of the Code of Federal Regulations to read as follows:

PART 463—COMBATING AUTO RETAIL SCAMS TRADE REGULATION RULE

Sec.
463.1 Authority.
463.2 Definitions.
463.3 Prohibited misrepresentations.
463.4 Disclosure requirements.
463.5 Dealer charges for Add-ons and other items.
463.6 Recordkeeping.
463.7 Waiver not permitted.
463.8 Severability.
463.9 Relation to State laws.

Authority: 15 U.S.C. 41 *et seq.;* 12 U.S.C. 5519.

§ 463.1 Authority.

This part is promulgated pursuant to section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5519(d). It is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly, including the recordkeeping requirements which are necessary to prevent such unfair or deceptive acts or practices and to enforce this part.

§ 463.2 Definitions.

(a) ''Add-on'' or ''Add-on product(s) or Service(s)'' means any product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer in connection with a Vehicle sale, lease, or financing transaction.

(b)–(c) [Reserved]

(d) ''Clear(ly) and Conspicuous(ly)'' means in a manner that is difficult to miss (*i.e.,* easily noticeable) and easily understandable, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the internet or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(e) ''Covered Motor Vehicle'' or ''Vehicle'' means any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road. For purposes of this part, the term Covered Motor Vehicle does not include the following:

(1) Recreational boats and marine equipment;

(2) Motorcycles, scooters, and electric bicycles;

(3) Motor homes, recreational vehicle trailers, and slide-in campers; or

(4) Golf carts.

(f) ''Covered Motor Vehicle Dealer'' or ''Dealer'' means any person, including any individual or entity, or resident in the United States, or any territory of the United States, that:

(1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of Covered Motor Vehicles;

(2) Takes title to, holds an ownership interest in, or takes physical custody of Covered Motor Vehicles; and

(3) Is predominantly engaged in the sale and servicing of Covered Motor Vehicles, the leasing and servicing of Covered Motor Vehicles, or both.

(g) ''Express, Informed Consent'' means an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following:

(1) What the charge is for; and

(2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. The following are examples of what does not constitute Express, Informed Consent:

(i) A signed or initialed document, by itself;

(ii) Prechecked boxes; or

(iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

(h) ''GAP Agreement'' means an agreement to indemnify a Vehicle purchaser or lessee for any of the difference between the actual cash value of the Vehicle in the event of an unrecovered theft or total loss and the amount owed on the Vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the Vehicle, or to waive the unpaid difference between money received from the purchaser's or lessee's Vehicle insurer and some or all of the amount owed on the Vehicle at the time of the unrecovered theft or total loss, including products or services otherwise titled ''Guaranteed Automobile Protection Agreement,'' ''Guaranteed Asset Protection Agreement,'' ''GAP insurance,'' or ''GAP Waiver.''

(i) ''Government Charges'' means all fees or charges imposed by a Federal, State, or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.

(j) ''Material'' or ''Materially'' means likely to affect a person's choice of, or conduct regarding, goods or services.

(k) ''Offering Price'' means the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.

§ 463.3 Prohibited misrepresentations.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to make any misrepresentation, expressly or by implication, regarding Material information about the following:

(a) The costs or terms of purchasing, financing, or leasing a Vehicle.

(b) Any costs, limitation, benefit, or any other aspect of an Add-on Product or Service.

(c) Whether the terms are, or transaction is, for financing or a lease.

(d) The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.

(e) The availability of Vehicles at an advertised price.

(f) Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term.

(g) Any information on or about a consumer's application for financing.

(h) When the transaction is final or binding on all parties.

(i) Keeping cash down payments or trade-in Vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction.

(j) Whether or when a Dealer will pay off some or all of the financing or lease on a consumer's trade-in Vehicle.

(k) Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or the Dealer's products or services.

(l) Whether the Dealer or any of the Dealer's personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.

(m) Whether consumers have won a prize or sweepstakes.

(n) Whether, or under what circumstances, a Vehicle may be moved, including across State lines or out of the country.

(o) Whether, or under what circumstances, a Vehicle may be repossessed.

(p) Any of the required disclosures identified in this part.

(q) The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5.

§ 463.4 Disclosure requirements.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.

(a) *Offering Price.* In connection with the sale or financing of Vehicles, a Vehicle's Offering Price must be disclosed:

(1) In any advertisement that references, expressly or by implication, a specific Vehicle;

(2) In any advertisement that represents, expressly or by implication, any monetary amount or financing term for any Vehicle; and

(3) In any communication with a consumer that includes a reference, expressly or by implication, regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle. With respect to such communications:

(i) The Offering Price for the Vehicle must be disclosed in the Dealer's first response regarding that specific Vehicle to the consumer; and

(ii) If the communication or response is in writing, the Offering Price must be disclosed in writing. The requirements in this paragraph (a) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).

(b) [Reserved]

(c) *Add-ons not required.* When making any representation, expressly or by implication, directly or indirectly, about an Add-on Product or Service, the Dealer must disclose that the Add-on is not required and the consumer can purchase or lease the Vehicle without the Add-on, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (c) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).

(d) *Total of payments and consideration for a financed or lease transaction.* (1) When making any representation, expressly or by implication, directly or indirectly, about a monthly payment for any Vehicle, the Dealer must disclose the total amount the consumer will pay to purchase or lease the Vehicle at that monthly payment after making all payments as scheduled. If the representation is in

writing, the disclosure must be in writing.

(2) If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer. If the representation is in writing, the disclosure must be in writing.

(3) The requirements in this paragraph (d) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).

(e) *Monthly payments comparison.* When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the Dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (e) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).

§ 463.5 Dealer charges for Add-ons and other items.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer, in connection with the sale or financing of Vehicles, to charge for any of the following.

(a) *Add-ons that provide no benefit.* A Dealer may not charge for an Add-on Product or Service if the consumer would not benefit from such an Add-on Product or Service, including:

(1) Nitrogen-filled tire-related products or services that contain no more nitrogen than naturally exists in the air; or

(2) Products or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that are duplicative of warranty coverage for the Vehicle, including a GAP Agreement if the consumer's Vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

(3) The requirements in this paragraph (a) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.

(b) [Reserved]

(c) *Any item without Express, Informed Consent.* A Dealer may not charge a consumer for any item unless the Dealer obtains the Express, Informed Consent of the consumer for the charge. The requirements in this paragraph (c) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.

§ 463.6 Recordkeeping.

(a) Any Covered Motor Vehicle Dealer subject to this part must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with this part, including the following records:

(1) Copies of all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a Vehicle, that the Dealer disseminated during the relevant time period; *Provided that* a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different;

(2) [Reserved]

(3) Copies of all purchase orders; financing and lease documents with the Dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the Dealer and any consumer who signs a purchase order or financing or lease contract with the Dealer;

(4) Records demonstrating that Add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and

(5) Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about Vehicles referenced in § 463.4.

(b) Any Dealer subject to this part may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section will be a violation of this part.

§ 463.7 Waiver not permitted.

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

§ 463.8 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.

§ 463.9 Relation to State laws.

(a) *In general.* This part will not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to Covered Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2023–27997 Filed 12–28–23; 8:45 am]

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